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# REVISED CODES OF MONTANA

## VOLUME 4

### Part 2

### 1969 Cumulative Pocket Supplement

#### *Containing*

AMENDMENTS TO ACTS AND NEW LAWS ENACTED BY THE  
LEGISLATIVE ASSEMBLY SINCE PUBLICATION OF  
REPLACEMENT VOLUME 4 (PART 2) OF  
THE 1947 REVISED CODES

#### AND

ANNOTATIONS SUPPLEMENTING REPLACEMENT VOLUME 4  
(PART 2) THROUGH VOLUME 447, PACIFIC  
REPORTER (2ND SERIES)

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# REVISED CODES OF MONTANA

VOLUME 4

Part 2

1968 Cumulative Pocket Supplement

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## NEW LAWS IN VOLUME 4 (Part 2)

For index see pocket supplement to Replacement Volume 9

### ENACTED IN 1963

School foundation program, anticipatory increase, 75-3612.1 to 75-3612.3.  
University of Montana, revenue-producing facilities at, 75-216 to 75-223.  
Validation of defective conveyances, 73-208.

### ENACTED IN 1965

Child care institutions, school districts for, 75-5501 to 75-5508.  
Community college districts, 75-4413 to 75-4430.  
Consolidated intercounty school districts, 75-1813.1.  
County poor funds, additional levy for, 71-106 note.  
Economic opportunity and poverty relief, 71-1601 to 71-1604.  
Equalization aid to schools attended by children residing on state institution property, 75-3624.  
Joint high school districts, 75-4612 to 75-4614.  
Joint interstate school facilities, 75-3109 to 75-3113.  
Residence determination for university tuition purposes, 75-506.2 to 75-506.6.  
School safety patrols, 75-5401 to 75-5405.  
Transportation of pupils living near school, 75-1641 to 75-1644.  
Unification of county high schools, 75-4120.1, 75-4120.2.  
Validation of defective conveyances, 73-209.

### ENACTED IN 1967

Financing of schools, 75-3806.  
Insurance for school districts, 75-1645.  
Medical assistance, 71-1511 to 71-1526.  
Residence determination for university tuition purposes, 75-506.7.  
School district's leasing of buildings, 75-3114 to 75-3125.  
State educational institutions, research, 75-313, 75-314.  
Teachers' retirement system, funding, 75-2709.1, 75-2709.2.  
Validation of defective conveyance, 73-210.  
Vocational training centers, 75-4308.

### ENACTED IN 1969

Interlocal co-operative agreements, financial administration of, 75-3738 to 75-3742.  
Public employees' retirement reserve fund, 75-1646, 75-1647.  
School prayer, 75-2405.1.  
Schools, driver education, 75-5310 to 75-5317.  
Validation of defective conveyances, 73-211.  
Vocational education, post-secondary, 75-4309 to 75-4323.

## AMENDMENTS IN VOLUME 4 (Part 2)

Agricultural experiment station, 75-706, 75-723.  
Board of railroad commissioners, 72-102.  
Community colleges, 75-4423, 75-4425, 75-4426.  
Exchange of property, 74-505.  
Grain inspection laboratory, 75-807, 75-811.  
Holidays, 75-2212.  
Montana university system, 75-216, 75-401, 75-402, 75-506.1, 75-506.3, 75-506.4, 75-506.7.  
Public utility, reports and examinations, 70-110, 70-111.  
Public welfare,  
    County welfare programs, 71-106, 71-216, 71-217, 71-222.  
    Dependent children, aid to, 71-501, 71-509.  
    Federal funds, 71-901.  
    General relief, 71-302, 71-307 to 71-309.

## AMENDMENTS IN VOLUME 4 (Part 2) (Continued)

### Public welfare,

- Lien on property of recipient, 71-241.
- Medical assistance, 71-1524.
- Old-age assistance, 71-402, 71-405, 71-406.
- Public assistance, grants of, 71-230, 71-242.
- Silicosis payments, 71-1003, 71-1004, 71-1008.
- State administrator, 71-209.
- State board and department, 71-202, 71-203, 71-206, 71-209, 71-211, 71-222, 71-241.

### Railroad companies, 72-211, 72-224, 72-627.

### Recording conveyance, notice, 73-201.

### Residence determination, tuition, 75-506.3, 75-506.4.

### Retail installment sales, 74-608.

### Sale of goods, 74-325.

### School census, 75-1904.

### School districts, 75-1802, 75-1804, 75-1805, 75-1810, 75-1813.

### Schools in general,

- Budget system, 75-1706, 75-1713.1, 75-1716, 75-1719, 75-1720, 75-1723, 75-1816, 75-4516.1, 75-4518.1, 75-4521, 75-4524, 75-4525.

### Crippled children, education of, 75-1405.

### Federal aid, acceptance, 75-5101.

### Financing of schools, 75-3701, 75-3706, 75-3722, 75-3801, 75-3806, 75-3904, 75-3908, 75-3914.

### Foundation program and state equalization aid, 75-3611 to 75-3621.

### Health instruction, 75-2009.

### High schools, 75-4601, 75-4607.

### Indians, free tuition, 75-506.1.

### Junior high schools, 75-4202.

### Law enforcement academy, 75-5203, 75-5205, 75-5206, 75-5208.

### Lunch program, 75-4802, 75-4803, 75-4805, 75-4806.

### Special education for retarded and handicapped children, 75-5001, 75-5003, 75-5005.

### State board of education, 75-106, 75-107.

### Teachers' rights and duties, 75-2401.

### Certification of teachers, 75-2501, 75-2516, 75-2518, 75-2521.

### Retirement system, 75-2701, 75-2703, 75-2707 to 75-2709.

### Textbooks, 75-3503, 75-3505.

### Transfer of students outside district, 75-1630, 75-4146, 75-4230.

### Transportation of pupils, 75-3308, 75-3403, 75-3413, 75-3414.

### Trustees' duties, 75-1632.

### Vocational education, 75-4241, 75-4246.

### State educational institutions, control, 75-301 to 75-303.

### State geologist, 75-606, 75-607.

### Superintendent of public instruction, 75-1301, 75-1303, 75-1315.

### Teachers' rights and duties, retirement system, 75-2701, 75-2703 to 75-2705, 75-2707 to 75-2709.

### Television districts, 70-426.

### Trustees,

### Duties, 75-1637.

### Elections, 75-1604, 75-1614, 75-1618.

### Meetings, 75-1621, 75-1622.

### University of Montana, revenue-producing facilities, 75-216.

### Veterans' burial, 71-120 to 71-122, 71-123, 71-125.



# MONTANA REVISED CODES

## TITLE 70—PUBLIC UTILITIES

- Chapter 1. Public service commission—regulation of public utilities, 70-110, 70-111.  
4. Television, 70-426.

### CHAPTER 1—PUBLIC SERVICE COMMISSION—REGULATION OF PUBLIC UTILITIES

- Section 70-110. Failure of public utility to make reports or permit examinations—penalty for violation of safety regulations.  
70-111. Records and reports of commission.

#### 70-104. (3882) Power to prescribe rules of procedure—judicial power.

##### Informal Hearing

Fundamentals of a fair hearing, required by section 27, article III of the Montana constitution were denied parties opposing rate increase when a hearing was held by the public service commission without the presence of the opponents, and when the testimony of that hearing was not spread on the record. *Cascade County Consumers Assn. v. Public Service Commission*, 144 M 169, 394 P 2d 856, 864. (Dissenting opinion, 144 M 169, 394 P 2d 856, 875.)

##### Posthearing Audit

Where audit had been requested in utility rate increase case by opponents of increase, both sides were given ample time to present evidence and cross-examine witnesses, opponents were permitted to go into utility books with expert witnesses, and the public service commission hired independent rate experts, opponents were not denied a full and fair hearing because of posthearing audit made by the employees of the commission. *Cascade County Consumers Assn. v. Public Service Commission*, 144 M 169, 394 P 2d 856, 869. (Dissenting opinion, 144 M 169, 394 P 2d 856, 875.)

#### 70-106. (3884) Power of commission to ascertain property values.

##### Leaseholds

Value of gas leases was properly included in rate base for power company seeking increased natural gas rate where there was ample testimony as to the leaseholds being used and useful to support

the public service commission. *Cascade County Consumers Assn. v. Public Service Commission*, 144 M 169, 394 P 2d 856, 870. (Dissenting opinion, 144 M 169, 394 P 2d 856, 875.)

70-110. (3888) Failure of public utility to make reports or permit examinations—penalty for violation of safety regulations. Any officer, agent, or person in charge of the books, accounts, records, and papers, or any of them, of any public utility, who shall refuse or fail for a period of thirty days, to furnish the commission with any report required by the provisions of this act, and any officer, agent, or person in charge of any particular books, accounts, records, or papers relating to the business of such public utility, who shall refuse to permit any commissioner or other person duly authorized by the commission, to inspect such books, accounts, records, or papers on behalf of the commission, and every firm, person, corporation or association violating any safety regulation of the commission, shall be subject to a fine of

not less than one hundred dollars nor more than one thousand dollars (\$1,000), such fine to be recovered in a civil action upon the complaint of the commission in any court of competent jurisdiction; and each day's refusal or failure on the part of such officer, agent, or person in charge, and each day in which a violation of a safety regulation persists, shall be deemed a separate offense, and be subject to the penalty herein prescribed.

**History:** En. Sec. 8, Ch. 52, L. 1913; re-en. Sec. 3888, R. C. M. 1921; amd. Sec. 1, Ch. 248, L. 1969.

#### Amendments

The 1969 amendment inserted "every firm, person, corporation or association violating any safety regulation of the commission" before "shall be subject to a fine"; raised the fine from \$500 to \$1,000;

and inserted "each day in which a violation of a safety regulation persists" before "shall be deemed a separate offense."

#### Effective Date

Section 2 of Ch. 248, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 6, 1969.

**70-111. (3889) Records and reports of commission.** The commission shall make reports as provided in section 2 [82-4002] of this act, which reports shall, as nearly as may be, conform in a general way to those of the railroad commission of the state, and be made at the same time. All the reports, records, accounts, files, papers, and memoranda of every nature in the possession of the commission shall be open to the public at all reasonable times, subject to the exception that when the commission deems it necessary, in the interest of the public, it may withhold from the public any facts or information in its possession for a period of not more than ninety days after the acquisition of such facts or information.

**History:** En. Sec. 9, Ch. 52, L. 1913; re-en. Sec. 3889, R. C. M. 1921; amd. Sec. 29, Ch. 93, L. 1969.

#### Amendments

The 1969 amendment substituted the reporting requirements of section 82-4002 for former provision requiring annual reports for each calendar year.

**70-128. (3906) Action to set aside rates or charges fixed by commission.**

#### Jurisdiction

Where neither the parties nor the facts are the same in two cases to set aside orders of public service commission, and no effort to consolidate the two cases was ever made, court in one case was not deprived of jurisdiction to enter judgment on theory that other court had first obtained jurisdiction of the appeal. Cascade County Consumers Assn. v. Public Service Commission, 144 M 169, 394 P 2d 856, 863. (Dissenting opinion, 144 M 169, 394 P 2d 856, 875.)

### CHAPTER 3—TELEGRAPH, TELEPHONE AND ELECTRIC LIGHT AND POWER LINES

**70-301. (6645) Rights of way for pole lines, etc.**

#### Electric Lines

Electric co-operative could not enjoin competing power company from extending power lines to residents previously served by co-operative on basis that it acquired certain rights to serve customers

after having set out on expensive program of erection and operation of distribution lines to customers in question. Yellowstone Valley Elec. Co-op., Inc. v. Montana Power Co., 150 M 519, 437 P 2d 5.

## CHAPTER 4—TELEVISION

Section 70-426. Annexation of contiguous areas—petition—hearing—resolution

**70-426. Annexation of contiguous areas—petition—hearing—resolution.** The boundaries of a television district created by authority of Chapter 4 of Title 70 of the Revised Codes of Montana, 1947; may be altered and outlying areas be annexed from territory contiguous thereto in the following manner;

(a) A petition shall be signed by owners of television sets within the proposed area, equal in number to not less than fifty-one per cent (51%) of the registered electors who are owners of television sets within the area to be annexed;

(b) The petition shall designate the boundaries of the contiguous area to be annexed and ask that it be annexed to the existing television district;

(c) The petition shall be transmitted to the clerk and recorder and the hearing and notice thereof shall be the same as provided by sections 70-412 through 70-414, R.C.M. 1947;

(d) After the hearing the board of county commissioners shall adopt a resolution either annexing the area to the existing television district or denying the petition.

**History: En. Sec. 1, Ch. 48, L. 1963.**

**Title of Act**

An act providing that boundaries of a television district created by authority of Chapter 4 of Title 70 of the Revised

Codes of Montana, 1947; may be altered and outlying areas may be annexed from territory contiguous to an existing television district; and providing the procedure for such annexation.



## TITLE 71—PUBLIC WELFARE AND RELIEF

- Chapter 1. County poor—care of, by county commissioners, 71-106, 71-120 to 71-123, 71-125.
2. Public Welfare Act part 1—to establish a state department of public welfare and county departments of public welfare, 71-202, 71-203, 71-206, 71-209, 71-211, 71-216, 71-217, 71-222, 71-230, 71-241, 71-242.
  3. Public Welfare Act part 2—general relief—to provide aid to the unemployed, destitute and those made destitute through lack of employment and all those in need of public assistance not eligible or otherwise cared for under other parts of this act, 71-302, 71-307 to 71-309.
  4. Public Welfare Act part 3—to provide for old-age assistance to aged persons in need in conformity with Title 2 of the Federal Social Security Act of 1935 or as amended, 71-402, 71-405, 71-406.
  5. Public Welfare Act part 4—to provide for aid to needy dependent children in conformity with part 4 of the Federal Social Security Act of 1935 or as amended, 71-501, 71-509.
  9. Public Welfare Act part 8—appropriations, disposition of funds and disbursements, 71-901.
  10. Public Welfare Act part 9—to provide for payments to persons having silicosis, 71-1003, 71-1004, 71-1008.
  15. Medical assistance, 71-1511 to 71-1526.
  16. Economic opportunity and poverty relief, 71-1601 to 71-1604.

### CHAPTER 1—COUNTY POOR—CARE OF, BY COUNTY COMMISSIONERS

- Section 71-106. Support of poor and indigent persons—tax levy.
- 71-120. Burial of deceased military service men and women.
  - 71-121. County of residence to bear expense.
  - 71-122. Person conducting burial to report expense.
  - 71-123. Duty of county clerk.
  - 71-125. Act not to apply to nonresidents.

71-106. (4465.4) Support of poor and indigent persons—tax levy. The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law:

To provide for the care and maintenance of the indigent sick, except as otherwise provided in other parts of this act, or the otherwise dependent poor of the county; erect and maintain hospitals therefor, or otherwise provide for the same, and for said purposes to levy and collect annually a tax on property not exceeding seventeen (17) mills, which levy shall be made at the time other tax levies are made on property, as provided by law.

History: En. Subd. 5, Sec. 1, Ch. 100, L. 1931; amd. Sec. 1, Ch. 165, L. 1941; amd. Sec. 1, Ch. 23, L. 1943; amd. Sec. 11, Ch. 212, L. 1965; amd. Sec. 1, Ch. 69, L. 1967. See history of Sec. 16-1001.

#### Amendments

The 1965 amendment inserted "except as otherwise provided in other parts of this act" after "indigent sick" near the beginning of the second paragraph.

The 1967 amendment deleted "from each resident of the county, between the

ages of twenty-one (21) and sixty (60) years a poll tax of two dollars (\$2.00) at a meeting of the board of county commissioners held in December of any year, to become effective as of January first of the following calendar year, and" after "annually"; substituted "seventeen (17) mills" for "three-fifths (3/5) of one per cent (1%)" after "not exceeding"; deleted "last mentioned" before "levy shall be made"; and deleted "or either of such levies when both are not required, and to expend not to exceed five per cent (5%)

of any such levy for the collection of said tax, or of any part thereof. Whenever a resolution is adopted levying a per capita tax the clerk of the board shall immediately prepare and deliver copies thereof to the county assessor and county treasurer. The county assessor after receiving such copy of resolution, when making an assessment of any property belonging to any person liable for the payment of such per capita tax must enter on the assessment list, and also on any statement given the taxpayer, showing the value of the property assessed, the amount of such per capita tax, and the county treasurer when collecting the tax on such property shall at the same time collect the amount of such per capita tax as showing on said statement" at the end of the section.

#### **Temporary Additional Tax Levy (Laws 1965, Ch. 221)**

An act to authorize, in certain instances, the boards of county commissioners to levy an additional tax of not to exceed ten and one-half (10.5) mills for the county poor funds; providing for an effective date and repealing all acts and parts of acts in conflict herewith.

Section 1. Whenever the boards of county commissioners of counties coming within the provisions of this act find that the total amount that may be derived from all other sources will be inadequate to provide the revenue necessary to meet the appropriations for expenditures to be set forth in the poor fund section of the county budget, such county commissioners shall have the power and the authority to levy, not to exceed ten and one-half (10.5) mills, or so much thereof as may be necessary, to meet such expenditures, as an additional levy for the county poor fund after receiving a certificate authorizing them so to do, issued by the state board of equalization as in this act provided.

Section 2. On or before the second Monday in July, the boards of county commissioners of counties desiring to avail themselves of the provisions of this act

shall submit a certified copy of their county poor fund budget to the state examiner and a like certified copy of such budget to the state department of public welfare. The state examiner shall examine such budget and if it is found by the state examiner that such budget is in compliance with the laws of this state and the rules and regulations of such examiner's office, he shall so certify and transmit such certified copy of the budget, together with his certificate thereon, to the state board of equalization. The state department of public welfare shall examine such budget and if it finds the expenditures and revenues of the previous year are correct and the estimated expenditures and revenues for the current year are approximately correct, then such department shall transmit such copy, together with its certificate, to the state board of equalization.

Section 3. The state board of equalization shall, on receipt of the certified copies of such county poor fund budget containing certificates as provided in section 2 hereof, examine such documents and if such board finds that a levy as authorized in section 1, or any part thereof, in addition to all other poor fund revenues is necessary, the said board shall certify the amount of the levy to be made by the county commissioners of such county and transmit such certificates to such board of county commissioners who shall thereupon be authorized to make such levy as is authorized.

Section 4. This act shall be in full force and effect from the first day of July, 1965 to the thirtieth day of June, 1967.

Section 5. All acts and parts of acts in conflict herewith are hereby repealed.

Prior laws, identical in nature, were Laws 1955, Ch. 73, in force from July 1, 1955 to June 30, 1957; Laws 1957, Ch. 36, in force from July 1, 1957 to June 30, 1959; Laws 1959, Ch. 46, in force from July 1, 1959 to June 30, 1961; Laws 1961, Ch. 10, in force from July 1, 1961 to June 30, 1963; and Laws 1963, Ch. 262, in force from July 1, 1963 to June 30, 1965.

#### **71-107. (4465.5) Poor farm.**

##### **Cross-References**

Power of county commissioners to lease county property for operation of a boarding home or nursing home for aged persons, sec. 16-1036.

Power of county commissioners to operate boarding home or nursing home for the aged, secs. 16-1037, 16-1038.

**71-120. (4536) Burial of deceased military service men and women.** (1) It shall be the duty of the board of commissioners of each county in this state to designate some proper person in the county, who

shall be known as veterans' burial supervisor, preferably an honorably discharged service man or woman, whose duty it shall be to cause to be decently interred the body of any honorably discharged service man or woman, who shall have served in any branch of the armed services of the United States and who may hereafter die or any service man or woman who died while in service during any declared or undeclared war, or female resident of the Montana veterans' home, who may hereafter die. Such burial shall not be made in any burial grounds or cemetery, or in any portion of any burial grounds or cemetery, used exclusively for the burial of pauper dead.

(2) The expense of burial shall be two hundred fifty dollars (\$250), to be paid by the county commissioners of the county in which the deceased was an actual bona fide resident at the time of death.

(3) The benefits hereof shall not be available in the case of any decedent whose executor, administrator or heirs waive the benefits.

(4) That the expense of each burial of a female resident of the Montana veterans' home, shall not exceed the sum of two hundred fifty dollars (\$250), to be paid by the county commissioners of the county in which the deceased person resided prior to her admittance to the Montana veterans' home.

(5) In the event any such honorably discharged person, male or female, who shall have served in the armed services of the United States, and who is a resident of the state of Montana, shall die while temporarily absent from the state or county of his residence, then the provisions of this act shall apply, and the burial expenses not exceeding the amount herein specified shall be paid in the same manner as above provided.

(6) Whenever any such honorably discharged person, male or female hereinbefore described shall die at any public institution of the state of Montana, other than the state veterans' home, and burial for any cause shall not be made in the county of the former residence of the deceased, the officers of said state institution, as aforesaid, shall provide the proper burial herein prescribed except that the expense of each burial shall not exceed the sum herein allowed, which expense shall be paid by the county in which the decedent resided at the time of entry into such institution, but no such burial shall be covered by any special or standing contract whereby the cost of burial is reduced below the maximum hereinbefore fixed, to the disparagement of proper interment.

**History:** En. Sec. 1, Ch. 39, L. 1903; re-en. Sec. 2065, Rev. C. 1907; amd. Sec. 1, Ch. 89, L. 1909; amd. Sec. 1, Ch. 109, L. 1911; amd. Sec. 1, Ch. 178, L. 1919; amd. Sec. 1, Ch. 194, L. 1921; re-en. Sec. 4536, R. C. M. 1921; amd. Sec. 1, Ch. 181, L. 1931; amd. Sec. 1, Ch. 163, L. 1937; amd. Sec. 1, Ch. 52, L. 1939; amd. Sec. 1, Ch. 25, L. 1945; amd. Sec. 1, Ch. 310, L. 1967; amd. Sec. 1, Ch. 96, L. 1969.

#### **Amendments**

The 1967 amendment substituted "service man or woman" for "soldier, sailor or

marine" before "whose duty it shall be" in the first sentence, substituted "service man or woman" for "person, whether male or female, and including nurses" before "who shall have served" and inserted "or any service man or woman who died while in service during any declared or undeclared war, or female resident of the Montana veterans' home, who may hereafter die" after "who may hereafter die" at the end of the first sentence; added "and provided" at the end of subparagraph (2); added subparagraph (3); and, in the last paragraph, substituted



"veterans'" for "soldiers'" before "home."

The 1969 amendment designated the first paragraph as subsection (1); redesignated former subparagraphs (1) through (3) as present subsections (2) through (4); in subsection (2), increased the bene-

fit payable from \$150 to \$250; in subsection (4), increased the benefit payable from \$100 to \$250; designated the last two paragraphs as subsections (5) and (6); and made minor changes in phraseology and punctuation.

**71-121. (4537) County of residence to bear expense.** The expenses of such burial shall be paid by the county in which such service man or woman dies or if death occurs while in service, the county of his last residency, but if such deceased person has a residence in another county in this state than the one paying the expenses, the county of his residence shall refund the money advanced by the county where he died. The claimant shall be a relative or guardian unless otherwise directed. Expenses of such funeral shall be audited and paid as other expenses are audited and paid by the county.

**History:** En. Sec. 2, Ch. 39, L. 1903; re-en. Sec. 2066, Rev. C. 1907; re-en. Sec. 4537, R. C. M. 1921; amd. Sec. 2, Ch. 310, L. 1967.

#### Amendments

The 1967 amendment substituted "service man or woman dies or if death occurs while in service, the county of his last residency" for "soldier, sailor, or marine dies" near the beginning of the section and inserted the present second sentence.

**71-122. (4538) Person conducting burial to report expense.** It shall be the duty of the person appointed as provided in section 71-120 to cause such deceased person to be buried as provided in this act, and he shall immediately report his action to the clerk of the board of county commissioners, setting forth all the facts, together with the name, rank, or command, so far as is known, to which the deceased belonged, as such service man or woman, the date of death, place of burial, and his occupation while living, and also an itemized statement of the expenses incurred by reason of such burial.

**History:** En. Sec. 3, Ch. 39, L. 1903; re-en. Sec. 2067, Rev. C. 1907; amd. Sec. 1, Ch. 109, L. 1911; re-en. Sec. 4538, R. C. M. 1921; amd. Sec. 3, Ch. 310, L. 1967.

#### Amendments

The 1967 amendment substituted "service man or woman" for "soldier, sailor, or marine."

**71-123. (4539) Duty of county clerk.** It shall be the duty of the clerk of the board of county commissioners, upon receiving the report and statement of expenses provided for in this act, to transcribe, in a book to be kept for that purpose, all the facts contained in such report concerning such service man or woman. It shall also be the duty of said clerk, upon receiving the report of the burial of such deceased person, to make application to the proper authorities under the government of the United States for a suitable headstone, as provided by act of Congress, and to cause the same to be placed at the head of the grave of such service man or woman, the expense of which shall not exceed the sum of twenty dollars (\$20) for cartage of and properly setting up each stone. The expense thus incurred shall be audited and paid as provided in section 71-121 for the burial expenses.

History: En. Sec. 4, Ch. 39, L. 1903; re-en. Sec. 2068, Rev. C. 1907; re-en. Sec. 4539, R. C. M. 1921; amd. Sec. 1, Ch. 146, L. 1963; amd. Sec. 4, Ch. 310, L. 1967.

#### Amendments

The 1963 amendment increased the al-

lowance specified near the end of the second sentence from \$10 to \$20.

The 1967 amendment substituted "service man or woman" for "soldier, sailor, or marine" in the first and again in the second sentence and made minor changes in style.

**71-125. (4541) Act not to apply to nonresidents.** This act shall not apply to service men and women who, at the time of their death, shall not have a legal residence within this state.

History: En. Sec. 6, Ch. 39, L. 1903; re-en. Sec. 2070, Rev. C. 1907; re-en. Sec. 4541, R. C. M. 1921; amd. Sec. 1, Ch. 125, L. 1931; amd. Sec. 5, Ch. 310, L. 1967.

#### Amendments

The 1967 amendment deleted from the

beginning of the section a clause reading "This act shall not apply to such soldiers, sailors or marines as may hereafter die in the state soldiers' home in this state"; and substituted "service men and women" for "such soldiers, sailors or marines."

### CHAPTER 2—PUBLIC WELFARE ACT PART 1—TO ESTABLISH A STATE DEPARTMENT OF PUBLIC WELFARE AND COUNTY DEPARTMENTS OF PUBLIC WELFARE

- Section 71-202. Appointment of state board—creation—salary.  
 71-203. Powers and duties of the state board.  
 71-206. Records to be maintained and reports rendered.  
 71-209. Powers and duties of the state administrator.  
 71-211. State department to act as agency of federal government—assistance to ward Indians.  
 71-216. Powers and duties of the county board.  
 71-217. Staff personnel—how selected, paid and controlled—dismissal.  
 71-222. Millage taxes to be levied—expenditures—budgets.  
 71-230. Method of issuing assistance grants—reimbursement.  
 71-241. Agreement for lien on real property of some recipients of public assistance.  
 71-242. Award of public assistance—ineligibility upon transfer of property, when.

#### **71-202. Appointment of state board—creation—salary. (a) and (b).**

\* \* \* [Same as parent volume.]

(c) The members of the state board shall take and subscribe to the constitutional oath of office.

(d). \* \* \* [Same as parent volume.]

(e) Each member of the state board of public welfare shall receive twenty dollars (\$20) per diem for each day actually spent in the performance of his duties and his actual necessary traveling and other expenses in going to, attending and returning from meetings of the board, and his actual and necessary traveling and other expenses incurred in the discharge of such duties as may be requested of him by a majority vote of the board, but in no event shall a member's per diem payments exceed twelve hundred fifty dollars (\$1,250) in any one (1) year. No member of the state board shall have any direct financial interest in or profit by any of the operations of the state department of public welfare or any of its agencies.

Per diem and expenses of state board members shall, upon claims being presented according to state law, be paid out of funds appropriated to the state department of public welfare.

**History:** En. Sec. 2, Part 1, Ch. 82, L. 1937; amd. Sec. 1, Ch. 26, L. 1953; amd. Sec. 1, Ch. 117, L. 1957; amd. Sec. 29, Ch. 177, L. 1965; amd. Sec. 1, Ch. 101, L. 1967.

#### Amendments

The 1965 amendment deleted from the end of subsection (c) a clause reading, "and shall furnish a surety company bond conditioned upon the faithful and proper discharge of their duties in the amount of five thousand dollars (\$5,000.00) each, running to the state of Montana, the premium of which shall be paid by the state."

The 1967 amendment increased from \$15 to \$20 the daily per diem for members of the state board of public welfare, and increased from \$1,000 to \$1,250 the annual limitation in the first paragraph of subsection (e).

#### Repealing Clause

Section 2 of Ch. 101, Laws 1967 repealed all acts and parts of acts in conflict therewith.

#### Cross-References

Bonds of state officers and employees, sec. 6-105 et seq.

**71-203. Powers and duties of the state board.** (1) In co-operation with the governor the state board shall select and appoint an administrative officer for the state department of public welfare who shall be known as the state administrator and who shall have such tenure of office, salary and administrative per diem and travel expense as the state board may establish, with the exception that the salary of said state administrator shall be in such amount as may be specified by the legislative assembly in the appropriation to the department of public welfare. If the legislative assembly does not specify the maximum salary of the administrator it shall be fixed by the state board of public welfare after approval by the board of examiners. Before approving any salary increase the board of examiners shall review the salaries of comparable positions in Montana state government, other states, and private industry. The state administrator shall be selected and appointed with due regard to the education, training and ability necessary in public welfare administration and organization and shall have been a resident of the state of Montana at least five (5) years prior to his appointment.

(2) Within six (6) months after the adoption and approval of this act it shall be the duty of the state board to establish and maintain minimum standards of service and personnel and to formulate salary schedules for the classified personnel, based upon training, experience and ability, for employees selected for positions in the state office of the state department and in county departments.

A merit system when practical but not later than one (1) year from and after the effective date of this act shall be established and maintained pertaining to qualifications for appointments, tenure of office, annual merit ratings, releases, promotions and salary schedules and the state board shall cause examinations to be held from time to time throughout the state for the purpose of establishing an available qualified list in order of merit of persons eligible for appointment. Personnel standards shall conform in so far as possible with general standards as established or required by the federal social security board.

**History:** En. Subd. (a) and (b), Sec. 3, Part 1, Ch. 82, L. 1937; amd. Sec. 30, Ch. 177, L. 1965; amd. Sec. 4, Ch. 237, L. 1967.

#### Amendments

The 1965 amendment deleted from subsection (1) a final sentence reading, "The

state administrator shall be bonded in the sum of twenty-five thousand (\$25,000.00) dollars, the premium of which will be paid by the state."

The 1967 amendment substituted "be in such amount \* \* \* department of public welfare" for "not exceed five thousand (\$5,000.00) dollars per year" at the end



of the first sentence of subsection (1); inserted the second and third sentences in subsection (1); and made minor style changes.

#### Cross-References

Bonds of state officers and employees, sec. 6-105 et seq.

### 71-204. Authority of board—disclosure of certain information forbidden.

#### References

Cited in State ex rel. Lewis and Clark

County v. State Board of Public Welfare, 141 M 209, 376 P 2d 1002, 1003.

**71-206. Records to be maintained and reports rendered.** The state department of public welfare shall maintain such records and render such reports as may be required by the federal board and such additional records and reports as shall be found necessary for state purposes or required by the state controller. County departments shall likewise be required to maintain such records and render such reports as the state board may require.

The fiscal rules and regulations of the United States government, as enjoined upon the states in respect to the Federal Social Security Act, shall be used by the state and county departments as a method of accounting for all joint federal state funds.

**History:** En. Subd. (e), Sec. 3, Part 1, Ch. 82, L. 1937; amd. Sec. 19, Ch. 249, L. 1967.

#### Amendments

The 1967 amendment substituted "controller" for "examiner" at the end of the

first sentence of the first paragraph and deleted the second paragraph in the old section, which read, "All receipts of moneys, goods or property and all disbursements therefrom shall be subject to examination and audit by the state examiner."

**71-209. Powers and duties of the state administrator.** (1) The administrator shall be the executive and administrative officer of the state department of public welfare and shall act as secretary of the state board. Before each regular biennial meeting of the legislative assembly he shall prepare and submit to the state board of public welfare for its consideration budget estimates of all funds required to be appropriated by the legislative assembly for the operation of the department during the two next ensuing fiscal years as fiscal years are defined by section 59-701. These budget estimates shall contain all information necessary for their consideration. After these budget estimates have been considered by the state board of public welfare, the administrator shall submit these budget estimates to the state budget director with requests for appropriations.

(2) The state administrator shall report as provided in section 2 [82-4002] of this act.

(3) In conformity with the merit system governing the selection and entire status of officers and employees in the state department of public welfare and in all county departments of public welfare in the state of Montana, adopted by the state board of public welfare and approved by the social security board, the state administrator shall appoint such other state department and supervisory field personnel as may be necessary for the efficient performances of the activities of the state department. The administrator shall also supervise the appointment, dismissal and entire status of the public assistance staff attached to the county boards of public welfare in accordance with the merit system.



All state department and county department personnel shall be legal residents of the state of Montana, unless it is impossible to find residents of the state possessing qualifications required by the merit system.

**History:** En. Sec. 6, Part 1, Ch. 82, L. 1937; amd. Sec. 2, Ch. 129, L. 1939; subd. (b) amd. Sec. 2, Ch. 117, L. 1941; amd. Sec. 1, Ch. 255, L. 1965; amd. Sec. 30, Ch. 93, L. 1969.

#### Amendments

The 1965 amendment deleted "but not later than November 1" after "considered by the state board of public welfare" in the last sentence of the first paragraph of subsection (a); substituted "state budget director" for "state board of examiners" near the end of the first paragraph of subsection (a); and deleted from the second paragraph of subsection (a) a former

fourth sentence pertaining to the report for the period ending June 30, 1940.

The 1969 amendment redesignated former subsection (a) as subsection (1); substituted the reporting requirements of section 82-4002 in subsection (2) for the second paragraph of former subsection (a), which required the state administrator to prepare a report to the governor in each even-numbered year, showing operations of the department, furnishing information about all its principal activities, and containing recommendations for legislation; and redesignated former subsection (b) as subsection (3).

**71-211. State department to act as agency of federal government—assistance to ward Indians.** The state department shall act as the agent of the federal government in public welfare matters of mutual concern in conformity with this act and the Federal Social Security Act, and in the administration of any federal funds granted to the state to aid in the purposes and functions of the state department.

The counties shall not be required to reimburse the state department for any portion of old-age assistance, medical assistance, aid to needy dependent children or aid to needy blind or aid to the totally disabled paid to ward Indians, further provided that the federal government may reimburse the state of Montana in behalf of counties, providing general relief to ward Indians, a sum in lieu of taxes which the counties would collect if the lands of such ward Indians were not in trust status. A ward Indian is hereby defined as an Indian who is living on an Indian reservation set aside for tribal use, or is a member of a tribe or nation accorded certain rights and privileges by treaty or by federal statutes. If and when the Federal Social Security Act is amended to define a "ward Indian," such definition shall supersede the foregoing definition.

**History:** En. Subd. (h), Sec. 7, Part 1, Ch. 82, L. 1937; amd. Sec. 3, Ch. 129, L. 1939; amd. Sec. 1, Ch. 219, L. 1947; amd. Sec. 3, Ch. 199, L. 1951; amd. Sec. 1, Ch. 141, L. 1953; amd. Sec. 12, Ch. 212, L. 1965; amd. Sec. 17, Ch. 325, L. 1967.

#### Amendments

The 1965 amendment inserted "medical assistance for the aged" after "old-age assistance" near the beginning of the second paragraph; and inserted the words "The state department shall" in brackets at the beginning of the section.

The 1967 amendment corrected this section by adopting the phrase "The state department shall" at the beginning of this section; and, in the second paragraph, inserted "for" after "state department" and deleted "for the aged" after "medical assistance."

#### Separability Clause

Section 19 of Ch. 325, Laws 1967 read "Legislative intent. It is the intent of the legislative assembly that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If part of this act is invalid in one or more of its applications the part remains in effect in all valid applications that are severable from the invalid applications."

#### Repealing Clauses

Section 18 of Ch. 325, Laws 1967 repealed all acts and parts of acts in conflict therewith.

Section 20 of Ch. 325, Laws 1967 read "Sections 71-1501 through 71-1510, R. C. M. 1947, are repealed."

**71-216. Powers and duties of the county board.** The county board of public welfare shall be responsible for establishing local policies and such rules and regulations as are necessary to govern the county department and local administration of public welfare activities except that all such policies and rules and regulations must be in conformity with general policies and rules and regulations established by the state board. The county board of public welfare shall review the determinations of eligibility and amount of payment to or on behalf of individuals made by the staff of the county department for conformity with the aforesaid rules and regulations. Determinations not in conformity will be referred to the staff by the county welfare board for appropriate action as authorized by said board.

**History:** En. Subd. (a), Sec. 10, Part 1, Ch. 82, L. 1937; amd. Sec. 4, Ch. 199, L. 1951; amd. Sec. 13, Ch. 212, L. 1965.

**Amendment**

The 1965 amendment inserted "or on behalf of" after "amount of payment to" in the second sentence.

**71-217. Staff personnel—how selected, paid and controlled—dismissal.** Each county board shall select and appoint from a list of qualified persons furnished by the state department such staff personnel as are necessary. The staff personnel in each county shall consist of at least one qualified staff worker (or investigator) and such clerks and stenographers as may be decided necessary. If conditions warrant, the county board, with the approval of the state department, may appoint some fully qualified person listed by the state department as supervisor of its staff personnel. The staff personnel of each county department are directly responsible to the county board, but the state department shall have the authority to supervise such county employees in respect to the efficient and proper performance of their duties. The county board of public welfare shall not dismiss any member of the staff personnel without the approval of the state department; but the state department shall have the authority to request the county board to dismiss any member of the staff personnel for inefficiency, incompetence or similar cause.

Public assistance staff personnel attached to the county board shall be paid from state public welfare funds, both their salaries and their actual and necessary traveling expenses, and their necessary subsistence expenses when away from the county seat in the performance of their duties; but the county board of public welfare shall reimburse the state department of public welfare, from county poor funds, one-half of the payments so made to its public assistance staff personnel, except that, under circumstances prescribed by the state department of public welfare, the reimbursement by the county board of public welfare may be less than one-half. All other administrative costs of the county department shall also be paid from county poor funds.

On or before the 20th day of the month following the month for which the payments to the public assistance staff personnel of the county were made, the state department of public welfare shall present to the county department of public welfare a claim for the required reimbursements. The county board shall make such reimbursements within twenty (20) days after the presentation of the claim and the state department shall

credit (add) all such reimbursements to its account for administrative costs.

**History:** En. Subd. (b), Sec. 10, Part 1, Ch. 82, L. 1937; amd. Sec. 5, Ch. 129, L. 1939; amd. Sec. 1, Ch. 44, L. 1963.

board to reduce reimbursements by county boards to less than one-half.

**Amendment**

The 1963 amendment added, at the end of the first sentence in the second paragraph, the clause permitting the state

**Repealing Clause**

Section 2 of Ch. 44, Laws 1963 repealed all acts and parts of acts in conflict therewith.

**71-222. Millage taxes to be levied—expenditures—budgets.** It is hereby made the duty of the board of county commissioners in each county to levy seventeen (17) mills for the county poor fund as provided by law, or so much thereof as may be necessary. The board shall budget and expend so much of the funds in the county poor fund for all purposes of this act as will enable the county welfare department to pay the general relief activities of the county and to reimburse the state department of public welfare for the county's proportionate share of the administrative costs of the county welfare department and of all public assistance and its proportionate share of any other welfare activity that may be carried on jointly by the state and the county.

The amounts set up in the budget for the reimbursements to the state department shall be sufficient to make all of these reimbursements in full. The budget shall make separate provision for each one of these public assistance activities, and proper accounts shall be established for the funds for each and all of such activities.

As soon as the preliminary budget provided for in section 16-1903 has been agreed upon, a copy thereof shall without delay be mailed to the state administrator of public welfare, and it shall be his duty, at any time before the final adoption of the budget, to make such recommendations with regard to changes in any part of the budget relating to the county poor fund as is deemed necessary in order to enable the county to discharge its obligations under the Public Welfare Act.

The state administrator shall promptly examine the preliminary budget so submitted to him in order to ascertain if the amounts provided for reimbursements to the state department are likely to be sufficient, and shall notify the county clerk of his findings. It is hereby made the duty of the board to make such changes in the amounts provided for reimbursements, if any are required, that the county will be able to make the reimbursements in full.

The board of county commissioners shall not have the right to make any transfer from the amounts budgeted for reimbursing the state department without having first obtained a statement in writing from the state administrator of public welfare to the effect that the amount to be transferred will not be required during the fiscal year for the purposes for which the amounts were provided in the budget.

No part of the county poor fund, irrespective of the source of any part thereof, shall be used directly or indirectly for the erection or improvement of any county building so long as the fund is needed for general



relief expenditures by the county or is needed for paying the county's proportionate share of public assistance, or its proportionate share of any other welfare activity that may be carried on jointly by the state and the county; provided, however, that expenditures for improvement of any county buildings used directly for care of the poor may be made out of any moneys in the county poor fund, whether such moneys are produced by seventeen (17) mill levy provided for in paragraph one (1) of this section or from any additional levy authorized or to be authorized by law. Such expenditure shall be authorized only when any county building used for the care of the poor must be improved in order to meet legal standards required for such buildings by the state board of health, and, when such expenditure has been approved by the state public welfare department.

**History:** En. Subd. (b), Sec. 11, Part 1, Ch. 82, L. 1937; amd. Sec. 8, Ch. 129, L. 1939; amd. Sec. 3, Ch. 117, L. 1941; amd. Sec. 6, Ch. 199, L. 1951; amd. Sec. 1, Ch. 239, L. 1963; amd. Sec. 2, Ch. 69, L. 1967.

#### Amendments

The 1963 amendment added the proviso to the first sentence of the final paragraph and the entire second sentence of the final paragraph.

The 1967 amendment substituted "seventeen (17)" for "the per capita tax of

two dollars (\$2.00), and the six (6)" after "to levy" in the first paragraph; and substituted "seventeen (17)" for "the per capita tax or the six (6)" before "mill levy" in the last paragraph.

#### Repealing Clauses

Section 2 of Ch. 239, Laws 1963 repealed all acts and parts of acts in conflict therewith.

Section 3 of Ch. 69, Laws 1967 repealed all acts and parts of acts in conflict therewith.

### 71-223. Right of appeal.

#### Legislative Intent

Legislature has imposed upon county welfare department and county commissioners the duty of establishing whether indigency exists in given case and has set

up procedural steps to be followed in carrying out Welfare Act. *Montana Deaconess Hospital v. Lewis and Clark County*, 149 M 206, 425 P 2d 316.

**71-230. Method of issuing assistance grants—reimbursement.** (a) Checks in payment of public assistance, as provided for in each part of this act, with the exception of general relief, shall be issued by the state department upon approved certificates of award and reports of changes of such eligible grantees as are forwarded by the county department to the state department and all such checks will be mailed to the individual recipient or the appropriate vendor. The checks in payment of public assistance shall be issued in the full approved amount for each eligible approved grantee and the original monthly payment shall be from the state public welfare accounts. All public assistance checks shall represent cash on demand at full par value to the recipient and vendor.

(b) Whenever the state department of public welfare, acting pursuant to standards established by said department, shall determine that any otherwise eligible recipient of old age assistance, aid to the needy blind, aid to the permanently and totally disabled, has, by reason of any physical or mental condition, such inability to manage funds that making payments to him would be contrary to his welfare, the department may under standards established under the state plan, make the public assistance payment on behalf of such recipient to another person

found by the department to be interested in or concerned with the welfare of such needy individual. Before such payments may be paid to such other person, such person shall give a bond, with adequate corporate surety and in form to be approved by the state department of public welfare, running in favor of the needy individual and the state of Montana, conditioned upon the faithful use by such other person of the funds for the welfare of the said needy individual. Such bond shall be in an amount equal to six (6) times the amount of the monthly payment involved.

(c) On or before the twentieth of each month the state department will present a claim for reimbursement to each county department for its proportionate share of public assistance granted in the county to recipients during the month and for vendor medical payments made on behalf of recipients in the previous month. The county department must make such reimbursement to the state department within twenty (20) days after such claim is presented.

**History:** En. Sec. 19, Part 1, Ch. 82, L. 1937; amd. Sec. 1, Ch. 71, L. 1957; amd. Sec. 14, Ch. 212, L. 1965; amd. Sec. 1, Ch. 244, L. 1969.

#### Amendments

The 1965 amendment deleted "and with the exception of old-age assistance, aid to dependent children, aid to needy blind, and aid to the permanently and totally disabled payments made in behalf of such recipients for medical care" after "with the exception of general relief" in the first sentence of subsection (a); added "or the appropriate vendor" at the end of the first sentence of subsection (a); added "or vendor" at the end of subsection (a);

inserted "to recipients" after "granted in the county" in the first sentence of subsection (b); added "and for vendor medical payments made on behalf of recipients in the previous month" at the end of the first sentence of subsection (b); and deleted former subsection (c), for text of which see parent volume.

The 1969 amendment inserted present subsection (b) and redesignated former subsection (b) as subsection (c).

#### Repealing Clause

Section 2 of Ch. 244, Laws 1969 repealed all acts and parts of acts in conflict therewith.

**71-241. Agreement for lien on real property of some recipients of public assistance.** No application for a public assistance grant except applications made pursuant to chapter 5, Title 71, Revised Codes of Montana, 1947, (aid to dependent children), chapter 3, Title 71, Revised Codes of Montana, 1947 (general relief), chapter 6, Title 71, Revised Codes of Montana, 1947, (aid to needy blind) and chapter 14, Title 71, Revised Codes of Montana, 1947, (services to the blind), and for vendor medical payments in behalf of individuals, shall be approved unless the applicant shall execute and deliver with such application an agreement, in such form as the state board of public welfare shall prescribe, acknowledging and agreeing that the amount of all assistance thereafter paid to the applicant, from whatever source such assistance may be derived, shall constitute an obligation and indebtedness of the applicant to the state and county which shall be secured by a lien upon all real property of the applicant then owned or acquired while a recipient of such assistance.

**History:** En. Sec. 1, Ch. 228, L. 1953; amd. Sec. 15, Ch. 212, L. 1965; amd. Sec. 1, Ch. 60, L. 1967.

#### Amendments

The 1965 amendment inserted "and for

vendor medical payments in behalf of individuals" after the reference to chapter 3 of Title 71; and made a minor change in punctuation.

The 1967 amendment inserted "chapter 6, Title 71, Revised Codes of Montana,

1947, (aid to needy blind) and chapter 14, relief)" and made a minor change in Title 71, Revised Codes of Montana, 1947, phraseology. (services to the blind)" after "(general

**71-242. Award of public assistance—ineligibility upon transfer of property, when.** Upon completion of the investigation, the county board shall determine whether the applicant is eligible for public assistance under the provisions of this act, the type and amount of public assistance he shall receive, and the date upon which such public assistance shall begin. Public assistance shall not be granted under the Montana State Welfare Act to any person who has deprived himself directly or indirectly of any property for the purpose of qualifying for assistance under this act. Any person who shall have transferred or shall transfer real property or interests in real property within five (5) years of the date of application for public assistance without receiving adequate consideration therefor in money or money's worth shall be presumed to have made such transfer for the purpose of qualifying for assistance under this act.

The state department of public welfare, if necessary to conform with the United States Social Security Act, may issue rules and regulations to the county welfare departments requiring the use of the declaration method, in such form as the state department may prescribe for the purpose of determining eligibility, regardless of any other investigative provisions under this act, and for all types of assistance. These regulations may include any additional investigations the state department may require.

**History:** En. Sec. 1, Ch. 228, L. 1953; amd. Sec. 1, Ch. 327, L. 1969.

#### **Amendments**

The 1969 amendment added the second paragraph.

#### **Repealing Clause**

Section 2 of Ch. 327, Laws 1969 repealed all acts and parts of acts in conflict therewith.

### **CHAPTER 3—PUBLIC WELFARE ACT PART 2—GENERAL RELIEF—TO PROVIDE AID TO THE UNEMPLOYABLE, DESTITUTE AND THOSE MADE DESTITUTE THROUGH LACK OF EMPLOYMENT AND ALL THOSE IN NEED OF PUBLIC ASSISTANCE NOT ELIGIBLE OR OTHERWISE CARED FOR UNDER OTHER PARTS OF THIS ACT**

- Section 71-302. Eligibility requirements for general relief.  
 71-307. Relief by check or disbursing orders.  
 71-308. Medical aid and hospitalization.  
 71-309. Primary obligations of the board of county commissioners.

**71-302. Eligibility requirements for general relief.** An applicant to be eligible for general relief must have resided in the state of Montana for at least one (1) year immediately prior to the date of receipt of this assistance. Any person otherwise qualified who has resided in a county for one (1) year shall thereby acquire residence in that county, which residence shall be retained until residence is acquired in another county by residing there for one (1) year. If a person has resided in the state for one (1) year but does not have county residence, he shall make application for this assistance in the county in which he is residing, which



county shall bear the cost of his assistance until he has acquired a county residence. If a person is absent from the state voluntarily he shall thereby be ineligible for general relief in the state of Montana. Time spent as a patient in a licensed nursing home or hospital, or a private charitable institution, shall not in any case be counted in determining the matter of county residence.

**History:** En. Subd. (a), Sec. 2, Part 2, Ch. 82, L. 1937; amd. Sec. 11, Ch. 129, L. 1939; amd. Sec. 4, Ch. 117, L. 1941; amd. Sec. 1, Ch. 156, L. 1951; amd. Sec. 1, Ch. 99, L. 1963.

#### Amendment

The 1963 amendment added the last sentence.

### 71-306. Right of appeal and hearing.

#### Legislative Intent

Legislature has imposed upon county welfare department and county commissioners the duty of establishing whether indigency exists in given case and has set

up procedural steps to be followed in carrying out Welfare Act. *Montana Deaconess Hospital v. Lewis and Clark County*, 149 M 206, 425 P 2d 316.

**71-307. Relief by check or disbursing orders.** All relief disbursements by county departments of public welfare shall be by warrant or check; provided, however, that if the county welfare department finds that a recipient is in the habit of dissipating relief allowances instead of using them for the purposes intended, or that for any other reason it is better for the recipient and his family to receive the allowance through disbursing orders, then disbursing orders shall be used instead of cash payments; but all such disbursing orders must be written in such form that the goods and merchandise to be provided may be furnished by any regular dealer in such goods and merchandise within the county. It is further provided, however, that if the county has work available which a recipient of general relief is capable of performing, then the county department of public welfare may require the recipient to perform such work at the prevailing rate of wages paid by that county for similar work to be paid from the county poor fund in place of granting him general relief.

The county department of public welfare shall provide coverage under the Workmen's Compensation Act for those recipients of general relief working under the provisions hereof, and is authorized to enter into such agreements with the industrial accident board as may be necessary to carry out the provisions of this section.

Any recipient of general relief who is subject to the provisions of this section and who without cause refuses to perform work assigned to him as herein provided, shall lose his eligibility for general relief for a period of one (1) week for each refusal.

**History:** En. Sec. 5, Part 2, Ch. 82, L. 1937; amd. Sec. 13, Ch. 129, L. 1939; amd. Sec. 1, Ch. 180, L. 1963.

#### Amendment

The 1963 amendment substituted "a recipient of" and "recipient" for "an

applicant for" and "applicant" in the second sentence of the first paragraph; inserted "paid by that county for similar work" after "prevailing rate of wages" near the end of the first paragraph; and added the second and third paragraphs.

**71-308. Medical aid and hospitalization.** Medical aid and hospitalization for persons unable to provide such necessities for themselves are

hereby declared to be the legal and financial duty and responsibility of the board of county commissioners, except as otherwise provided in other parts of this act, payable from the county poor fund. It shall be the duty of the board of county commissioners to make provisions for competent and skilled medical or surgical services as approved by the state board of health or the state medical association, or in the case of osteopathic practitioners by the state osteopathic association or chiropractors by the state chiropractic association, or optometrical services as approved by the Montana optometric association, and dental services as approved by the dental association. "Medical" or "medicine" as used in this act refers to the healing art as practiced by licensed practitioners.

In automobile accident cases wherein transients traveling through the state of Montana are injured, medical aid and hospitalization shall be paid for by the county wherein the accident occurred and the department of public welfare shall reimburse such county in full upon proper claim being made to the department of public welfare; provided, further, that in all other accident cases wherein such transients are injured, medical aid and hospitalization shall be paid for by the county wherein the accident occurred and the department of public welfare shall reimburse such county for one-half of such medical aid and hospitalization paid by such county, upon proper claim being made to the department of public welfare.

The board, in arranging for medical care for those unable to provide it for themselves, may have the care provided by the physicians appointed by such board who shall be known as county physicians or deputy county physicians, and may fix a rate of compensation for the furnishing of such medical attendance.

The board of county commissioners shall have the responsibility of making suitable arrangements to provide respectable burial for those for whom such expenses are not otherwise available.

**History:** En. Sec. 6, Part 2, Ch. 82, L. 1937; amd. Sec. 15, Ch. 129, L. 1939; amd. Sec. 5, Ch. 117, L. 1941; amd. Sec. 1, Ch. 155, L. 1947; amd. Sec. 9, Ch. 199, L. 1951; amd. Sec. 1, Ch. 57, L. 1955; amd. Sec. 1, Ch. 86, L. 1957; amd. Sec. 16, Ch. 212, L. 1965.

#### **Amendment**

The 1965 amendment inserted "except as otherwise provided in other parts of this act" near the end of the first sentence of the first paragraph.

#### **Emergency Hospitalization**

Hospital, located in one county, which performed emergency appendectomy on indigent who was resident of another county, was a real party in interest in suit against county in which patient resided; statute providing that medical aid for indigents is "responsibility of the county" was broad enough to encompass emergency medical aid rendered outside indigent's county of residence. *Montana Deaconess Hospital v. Lewis and Clark County*, 149 M 206, 425 P 2d 316.

#### **Evidence of Indigency**

Fact that alleged indigent had never supported herself and apparently never would was proof of medical indigency in every legal and social sense in spite of fact she was employable and notwithstanding absence of evidence of reasons for her inability to be productive citizen. *Montana Deaconess Hospital v. Lewis and Clark County*, 149 M 206, 425 P 2d 316.

#### **Wandering Child**

County properly brought mandamus action to compel state board of public welfare to reimburse it for medical and hospital expenses for a wandering thirteen-year-old child from another state who roamed from place to place for approximately one month, without means of support, when she threw herself in front of a moving automobile and sustained the injuries for which the county paid the expenses. *State ex rel. Lewis and Clark County v. State Board of Public Welfare*, 141 M 209, 376 P 2d 1002, 1004.

**71-309. Primary obligations of the board of county commissioners.** Except as otherwise provided in other parts of this act, it is hereby declared to be the primary legal duty and financial obligation of the board of county commissioners to make such tax levies and to establish such budgets in the county poor fund as provided by law and as are necessary to provide adequate institutional care for all such indigent residents as are in need of institutional care and to make such tax levies and establish such budgets in the county poor fund as are necessary to make provisions for medical aid and services and hospitalization for all indigent county residents. All such public assistance and services shall be charges against and payable from the county poor fund.

**History:** En. Sec. 7, Part 2, Ch. 82, L. 1937; amd. Sec. 6, Ch. 117, L. 1941; amd. Sec. 10, Ch. 199, L. 1951; amd. Sec. 17, Ch. 212, L. 1965.

**Amendment**

The 1965 amendment inserted "Except as otherwise provided in other parts of this act" at the beginning of the section.

CHAPTER 4—PUBLIC WELFARE ACT PART 3—TO PROVIDE FOR  
OLD-AGE ASSISTANCE TO AGED PERSONS IN NEED IN  
CONFORMITY WITH TITLE 2 OF THE FEDERAL SOCIAL  
SECURITY ACT OF 1935 OR AS AMENDED

**Section 71-402. Eligibility requirements for old-age assistance.**

71-405. County share of participation.

71-406. Investigation of applications.

**71-402. Eligibility requirements for old-age assistance.** Old-age assistance shall be granted any person who:

(a) to (e). \* \* \* [Same as parent volume.]

(f) Has not made an assignment or transfer of property for the purpose of rendering himself eligible for assistance under this act at any time within five (5) years immediately prior to the filing of application for assistance pursuant to the provisions of this act;

(g) Is not receiving aid to dependent children, aid to needy blind or aid to the permanently and totally disabled, or medical aid for the aged, for himself or herself.

**History:** En. Sec. 2, Part 3, Ch. 82, L. 1937; Subd. (g) rep. Sec. 9, Ch. 213, L. 1943; amd. Sec. 15, Ch. 199, L. 1951; amd. Sec. 18, Ch. 212, L. 1965.

**Amendment**

The 1965 amendment increased the period specified in paragraph (f) from two to five years; and inserted "or medical aid for the aged" near the end of paragraph (g).

**71-405. County share of participation.** Each county department shall reimburse the state department in the amount of one-third (1/3) of the approved old-age assistance grants paid by the state department to persons in the county each month, exclusive of the federal share. Each county department shall reimburse the state department in the amount of one-half (1/2) of the approved old-age assistance vendor medical payments on behalf of persons in the county each month, exclusive of the federal share. Such reimbursements shall be credited to the old-age assistance account of the state department.



History: En. Sec. 5, Part 3, Ch. 82, L. 1937; amd. Sec. 1, Ch. 69, L. 1947; amd. Sec. 1, Ch. 155, L. 1949; amd. Sec. 18, Ch. 199, L. 1951; amd. Sec. 3, Ch. 71, L. 1957;

amd. Sec. 1, Ch. 5, L. 1961; amd. Sec. 19, Ch. 212, L. 1965.

#### Amendment

The 1965 amendment inserted the second sentence.

**71-406. Investigation of applications.** Whenever a county public welfare department receives an application for an old-age assistance grant or for medical care on behalf of an old-age assistance recipient, an investigation shall be promptly made. The investigation of each applicant for old-age assistance shall be conducted by the county board through a staff worker of the county department. Each applicant shall be informed of his right to a fair hearing and of the confidential nature of information secured with regard to his circumstances. Upon completion of such investigation the county welfare board shall determine whether the applicant is eligible for and should receive a grant, the amount of the assistance and the date on which assistance shall begin. Aid shall be furnished promptly to all eligible persons. Each applicant shall receive written notice of the decision concerning his application.

History: En. Sec. 6, Part 3, Ch. 82, L. 1937; amd. Sec. 19, Ch. 199, L. 1951; amd. Sec. 20, Ch. 212, L. 1965.

#### Amendment

The 1965 amendment inserted "or for medical care on behalf of an old-age assistance recipient" in the first sentence.

### CHAPTER 5—PUBLIC WELFARE ACT PART 4—TO PROVIDE FOR AID TO NEEDY DEPENDENT CHILDREN IN CONFORMITY WITH PART 4 OF THE FEDERAL SOCIAL SECURITY ACT OF 1935 OR AS AMENDED

Section 71-501. "Dependent child" defined.

71-509. Periodic reconsideration and changes in amount of assistance—appointment of guardian or payment to another person.

**71-501. "Dependent child" defined.** The term "dependent child" means a child (A) under the age of eighteen (18), or (B) under the age of twenty-one (21) who is a student under the regulations prescribed by the state welfare department and such children (A and B above) who have been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, nephew, niece, or first cousin, in a place of residence maintained by one or more of such relatives as his or their own home.

Aid to dependent children shall not be denied to or for the care of children who would otherwise be entitled to such aid under the laws of the state of Montana by the fact that such child is living in the home of his or her father, who is in the opinion of the county board of public welfare of the appropriate county unemployable nor by the fact that such child is living in the home of a head of a household who is, at the time, receiving job training under the laws of the state of Montana; nor shall the benefits which would otherwise accrue to such child for aid to dependent children under the laws of the state of Montana be reduced by reason of either such cause.

**History:** En. Subd. (a) Sec. 1, Part 4, Ch. 82, L. 1937; amd. Sec. 17, Ch. 129, L. 1939; amd. Sec. 7, Ch. 213, L. 1943; amd. Sec. 4, Ch. 71, L. 1957; amd. Sec. 2, Ch. 255, L. 1965.

(B) and the words "and such children (A and B)"; added the second paragraph; and made a minor grammatical change.

#### Amendment

The 1965 amendment inserted the designation for clause (A); inserted clause

#### Effective Date

Section 3 of Ch. 255, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved March 9, 1965.

**71-509. Periodic reconsideration and changes in amount of assistance—appointment of guardian or payment to another person.** All assistance grants made under this chapter shall be reconsidered by the county department as frequently as may be required by the rules of the state department. After such further investigation as the county department may deem necessary or the state department may require, the amount of assistance may be changed or assistance may be entirely withdrawn if the state or county departments find that the child's circumstances have altered sufficiently to warrant such action, provided, however, that if the county department, after investigation, finds that any recipient is not utilizing the grant adequately for the needs of the child or children or is dissipating such grant, or refuses or fails to accept employment or training and payments made to him would not be used in the best interests of the child or children; the county department may request the county attorney to file a petition in the district court for the appointment of such recipient as guardian of the assistance grant in behalf of the child or children. Such petition shall set forth the facts warranting such appointment. Notice of the hearing on such petition shall be served upon the recipient and the county department not less than five (5) days before the date set for such hearing; such petition may be filed with the clerk of the district court and all process issued and served without payment of costs. If upon the hearing of such petition the court is satisfied that it is for the best interests of the child or children, and all parties concerned, that such guardian be appointed, he shall order such appointment, and may require such guardian to render to the court a detailed itemized account of expenditures of such assistance payments at such times as the court may deem advisable.

It is the intention of this act that the guardianship herein provided for shall be a special and limited guardianship solely for the purpose of safeguarding the assistance grants made to dependent children. Such guardianship shall terminate upon the termination of such assistance grant, or sooner on order of the court, upon good cause shown. In lieu of said guardianship proceedings, payments may be made in behalf of the child or children to another person found by the department to be interested in or concerned with the welfare of such needy child or children in accordance with the rules and regulations established by the state department.

Providing however, when federal law or regulations permit that any amount in a sum not exceeding one hundred dollars (\$100.00) in any one (1) calendar year received by an enrolled member of a recognized Indian tribe as per capita payments or a share in the profits and receipts

from tribal lands and interests or tribal enterprises shall not be used to decrease the amount of assistance received under this act. Before such payments may be paid to such other person, such person shall give a bond, with adequate corporate surety and in form to be approved by the state department of public welfare, running in favor of the needy individual and the state of Montana, conditioned upon the faithful use by such other person of the funds for the welfare of the said needy individual. Such bond shall be in an amount equal to six (6) times the amount of the monthly payment involved.

**History:** En. Sec. 8, Part 4, Ch. 82, L. 1937; amd. Sec. 1, Ch. 47, L. 1959; amd. Sec. 1, Ch. 152, L. 1959; amd. Sec. 1, Ch. 351, L. 1969.

such grant" in the second sentence of the first paragraph; added the last sentence of the second paragraph; and added the last two sentences of the third paragraph.

#### Amendments

The 1969 amendment inserted "or refuses or fails to accept \* \* \* best interests of the child or children" after "dissipating

#### Repealing Clause

Section 2 of Ch. 351, Laws 1969 repealed all acts and parts of acts in conflict therewith.

### CHAPTER 9—PUBLIC WELFARE ACT PART 8—APPROPRIATIONS, DISPOSITION OF FUNDS AND DISBURSEMENTS

#### Section 71-901. Receipt of funds.

**71-901. Receipt of funds.** The treasurer of the state of Montana is hereby designated as the appropriate fiscal officer of the state to receive federal funds. All money appropriated by the legislature for public welfare purposes, all money received from the United States government for public welfare purposes, and all money received from any other source for the purposes set forth in the Public Welfare Act shall be paid into the state treasury to the credit of the state department of public welfare.

**History:** En. Sec. 1, Part 8, Ch. 82, L. 1937; amd. Sec. 210, Ch. 147, L. 1963.

the credit of the state department of public welfare" for "and constitute a special fund to be designated as the public welfare fund" at the end of the section.

#### Amendment

The 1963 amendment substituted "to

### CHAPTER 10—PUBLIC WELFARE ACT PART 9—TO PROVIDE FOR PAYMENTS TO PERSONS HAVING SILICOSIS

#### Section 71-1003. Eligibility requirements for aid to persons having silicosis, as herein defined.

71-1004. Amounts of payments.

71-1008. Conformity with acts of federal government.

**71-1003. Eligibility requirements for aid to persons having silicosis, as herein defined.** Payments shall be made under this act to any person who:

(a) Has silicosis, as defined in section 71-1001 of the Revised Codes of Montana, 1947, which results in his total disability so as to prevent him from engaging in a gainful occupation. The term "gainful occupation" as used herein shall not be construed to mean occasional or intermittent light employment where the ability to do manual labor is not essential, but shall mean any person having an income from any other source exceeding one hundred fifty dollars (\$150.00) per month.



(b) and (c). \* \* \* [Same as parent volume.]

(d) Is not receiving, with respect to any month for which he would receive a payment under this act, compensation under the Workmen's Compensation Act of the state of Montana, as provided by chapter 155, Laws of 1959, which will equal the sum of one hundred forty dollars (\$140.00) hereunder. If he is receiving payments under the Workmen's Compensation Act, as provided by chapter 155, Laws of 1959, which is less in the aggregate than one hundred forty dollars (\$140.00), then he is entitled to a payment under this act of the difference between the amount received under the Workmen's Compensation Act, as provided in chapter 155, Laws of 1959, and one hundred forty dollars (\$140.00) per month.

**History:** Sec. 3, Part 9, Ch. 82, L. 1937 as added by Sec. 1, Ch. 5, L. 1941; amd. Sec. 1, Ch. 68, L. 1945; amd. Sec. 1, Ch. 216, L. 1947; amd. Sec. 1, Ch. 192, L. 1949; amd. Sec. 1, Ch. 42, L. 1953; amd. Sec. 1, Ch. 252, L. 1955; amd. Sec. 1, Ch. 3, L. 1961; amd. Sec. 3, Ch. 225, L. 1961; amd. Sec. 1, Ch. 267, L. 1965; amd. Sec. 1, Ch. 125, L. 1967; amd. Sec. 1, Ch. 260, L. 1969.

#### Amendments

The 1965 amendment increased the monthly amounts specified in paragraph (d) from \$75 to \$90.

The 1967 amendment inserted "of the Revised Codes of Montana, 1947" after "section 71-1001" in paragraph (a) and increased the monthly amounts specified in paragraph (d) from \$90 to \$125.

The 1969 amendment increased the monthly amounts specified in paragraph (d) from \$125 to \$140.

**71-1004. Amounts of payments.** Subject to the provisions of this act and the deductions herein provided, any person who has silicosis, as defined in this chapter, and who has, subject to the regulations and standards of the industrial accident board; been determined by the industrial accident board to be entitled to a payment under this chapter for silicosis, shall be granted a payment by the said industrial accident board of one hundred forty dollars (\$140.00) per month subject to such appropriations as may from time to time be made. The legislature shall authorize such additional appropriations as may be necessary to make the increased monthly payments provided herein.

**History:** Sec. 4, Part 9, Ch. 82, L. 1937 as added by Sec. 1, Ch. 5, L. 1941; amd. Sec. 2, Ch. 216, L. 1947; amd. Sec. 2, Ch. 192, L. 1949; amd. Sec. 1, Ch. 204, L. 1953; amd. Sec. 2, Ch. 252, L. 1955; amd. Sec. 1, Ch. 248, L. 1959; amd. Sec. 4, Ch. 225, L. 1961; amd. Sec. 2, Ch. 267, L. 1965; amd. Sec. 2, Ch. 125, L. 1967; amd. Sec. 2, Ch. 260, L. 1969.

#### Amendments

The 1965 amendment increased the monthly payment specified in the first sentence from \$75 to \$90.

The 1967 amendment increased the monthly payment specified in the first sentence from \$90 to \$125.

The 1969 amendment increased the monthly payment specified in the first sentence from \$125 to \$140.

**71-1008. Conformity with acts of federal government.** If and when the government of the United States makes grants to states in aid of and allowing payments to persons having silicosis, as herein defined, the industrial accident board of the state of Montana is hereby authorized to administer in the state of Montana such grants-in-aid and payments in addition to grants made by this act. The total payments to any individual under this act shall not exceed one hundred forty dollars (\$140.00) per month exclusive of any grants made by Congress.

**History:** Sec. 8, Part 9, Ch. 82, L. 1937 as added by Sec. 1, Ch. 5, L. 1941; amd. Sec. 3, Ch. 216, L. 1947; amd. Sec. 3, Ch. 192, L. 1949; amd. Sec. 2, Ch. 204, L. 1953; amd. Sec. 3, Ch. 252, L. 1955; amd. Sec. 2, Ch. 3, L. 1961; amd. Sec. 8, Ch. 225, L. 1961; amd. Sec. 3, Ch. 267, L. 1965; amd. Sec. 3, Ch. 125, L. 1967; amd. Sec. 3, Ch. 260, L. 1969.

#### Amendments

The 1965 amendment increased the maximum monthly payment specified in the final sentence from \$75 to \$90.

The 1967 amendment increased the maximum monthly payment specified in

the final sentence from \$90 to \$125.

The 1969 amendment increased the maximum monthly payment specified in the final sentence from \$125 to \$140.

#### Repealing Clauses

Section 4 of Ch. 267, Laws 1965 repealed all acts and parts of acts in conflict therewith.

Section 4 of Ch. 125, Laws 1967 repealed all acts and parts of acts in conflict therewith.

Section 4 of Ch. 260, Laws 1969 repealed all acts and parts of acts in conflict therewith.

### CHAPTER 15—MEDICAL ASSISTANCE

- Section 71-1511. Provisions for administration.  
 71-1512. Services included in medical assistance.  
 71-1513. State department to consult with council appointed by governor—composition of council.  
 71-1514. Freedom of doctors to treat recipients of medical assistance—freedom of selection of doctor.  
 71-1515. Contracting with other agencies to process claims.  
 71-1516. Eligibility requirements for medical assistance.  
 71-1517. Amount, scope and duration of assistance.  
 71-1518. Application for assistance.  
 71-1519. County share of participation.  
 71-1520. Investigation and determination of eligibility.  
 71-1521. Redetermination of eligibility.  
 71-1522. Change of residence of person receiving medical assistance.  
 71-1523. Confidential records.  
 71-1524. Exclusion of lien.  
 71-1525. Relative's responsibility.  
 71-1526. Discrimination prohibited.

#### 71-1501 to 71-1510. Repealed.

##### Repeal

These sections (Secs. 1 to 10, Ch. 212, L. 1965), relating to medical aid for the

aged, were repealed by Sec. 20, Ch. 325, Laws 1967.

**71-1511. Provisions for administration.** (1) The state department of public welfare (hereinafter called "state department") is hereby authorized and empowered to administer and supervise a vendor payment program of medical assistance, under the powers, duties, and functions provided in sections 71-201 through 71-232, R.C.M. 1947, as amended and as contemplated by the provisions of Title XIX of the Federal Social Security Act.

(2) The county department of public welfare shall be charged with the local administration and supervision of medical assistance, subject to the powers, duties and functions prescribed for the county department in sections 71-201 through 71-232, R.C.M. 1947.

(3) It is hereby mandatory and required that the state plan and operation of medical assistance shall be in effect in each and every county of the state and the administration and supervision of medical assistance shall be uniform throughout the several counties of the state.

(4) The state department of public welfare shall have printed and distribute copies of this act to all county welfare departments and shall prescribe the form of and print and supply to the county welfare departments blanks of applications, reports and such other forms as may be necessary in relation to medical assistance.

(5) All rules and regulations of the state department of public welfare made under this act shall be binding upon the county departments of public welfare.

(6) The state department shall adopt appropriate rules and regulations, not inconsistent with this act, to administer and supervise the said program uniformly throughout the state and shall define by rules and regulations medical assistance. Medical assistance shall be furnished through payments to providers of services and supplies as contemplated in this act.

**History:** En. Sec. 1, Ch. 325, L. 1967.

**Compiler's Notes**

Title XIX of the Social Security Act, referred to in this section, is compiled in the United States Code as Tit. 42, secs. 1396 to 1396d.

**Title of Act**

An act to provide for medical assistance in conformity with Title XIX of the

Federal Social Security Act of 1935 as amended; providing for the administration of the act by the state department of public welfare and the county departments of public welfare; providing eligibility requirements for assistance under the act; and providing for counties' share of participation under the act; amending section 71-211, R. C. M. 1947, to conform herewith; and repealing sections 71-1501 through 71-1510, R. C. M. 1947.

**71-1512. Services included in medical assistance.** The definition of medical assistance shall include:

(a) Inpatient hospital services (other than services in a public institution for tuberculosis or mental diseases);

(b) Outpatient hospital services;

(c) Other laboratory and X-ray services;

(d) Skilled nursing home services (other than services in a public institution for tuberculosis or mental diseases);

(e) Physicians' services, whether furnished in the office, the patient's home, a hospital, a skilled nursing home or elsewhere.

It may also include, although not necessarily limited to the following:

(a) Medical care, or any other type of remedial care recognized under state law, furnished by licensed practitioners within the scope of their practice as defined by state law;

(b) Home health care services;

(c) Private duty nursing services;

(d) Dental services;

(e) Physical therapy and other related services;

(f) Clinic services;

(g) Prescribed drugs, dentures, and prosthetic devices; and eye-glasses prescribed by a physician skilled in diseases of the eye or by an optometrist, whichever the individual may select;

(h) Other diagnostic, screening, preventive, rehabilitative, chiropractic and osteopathic services;



(i) Any additional medical service or aid allowable under or provided by the Federal Social Security Act.

The foregoing services shall be provided to the fullest extent that moneys appropriated, collected, accumulated or matched from any source by the state department will allow. Priorities of the foregoing items and amounts of medical assistance, if funds are inadequate, shall be determined by the state department. The state department shall establish standards of assistance.

**History:** En. Sec. 2, Ch. 325, L. 1967.

**Compiler's Notes**

The Social Security Act, referred to in this section, is compiled in the United States Code as Tit. 42.

**71-1513. State department to consult with council appointed by governor—composition of council.** The state department shall advise and consult at least semiannually with a council composed of not less than nine members, to be appointed by the governor and to serve three year overlapping terms. The first appointed council shall draw lots to determine which members will serve three years, which two years, and which one year. The following associations, to wit: (1) the Montana Medical Association, (2) the Montana State Dental Association, (3) the Montana Hospital Association, (4) the Montana State Pharmaceutical Association, (5) the Montana Nursing Home Association, (6) the Montana Association of County Commissioners, (7) the Montana Nurses Association, and (8) the Montana Optometry Association shall be requested to recommend not less than one member for appointment to such council in order that there be adequate representation of interested professional and official groups. As vacancies occur, the organization recommending the individual whose position is expiring will be requested to submit a recommendation for filling the position. The ninth member of such additional members as the governor may elect to appoint as representative of consumer interests. The following shall serve ex officio as members of the council: (a) executive director of the state board of health, (b) the administrator of the state department of public welfare, as chairman. Members shall be reimbursed for travel and actual expenses while in performance of their duties, not to exceed that allowed to non-elective state officials.

**History:** En. Sec. 3, Ch. 325, L. 1967.

**71-1514. Freedom of doctors to treat recipients of medical assistance—freedom of selection of doctor.** The state department shall provide for professional freedom of those licensed practitioners who provide medical assistance under this act, and provide reasonable freedom of choice to recipients of medical aid to select the vendor or provider of medical care, services or prescribed drugs.

**History:** En. Sec. 4, Ch. 325, L. 1967.

**71-1515. Contracting with other agencies to process claims.** The state department may, by suitable rules and regulations, provide for contracting with any state or private agency for processing and payment of claims under such program of medical assistance, and the state welfare board

shall have the authority to contract with one or more private or state agencies to provide any or all of the enumerated medical services.

History: En. Sec. 5, Ch. 325, L. 1967.

**71-1516. Eligibility requirements for medical assistance.** Medical assistance shall be granted in behalf of all persons who reside in the state of Montana, including residents temporarily absent from the state and who meet any of the following requirements:

(1) Who receive all or part of their income from the federally aided public assistance programs: old-age assistance, aid to the blind, aid to dependent children, and aid to the permanently and totally disabled;

(2) All persons, who upon application, would be eligible for financial assistance under any one of the federally aided programs referred to above;

(3) All persons who would be entitled to financial assistance under one of the federally aided categories except that they do not meet the durational residence requirements or relative responsibility requirements of any of the public assistance programs above enumerated;

(4) Persons in medical institutions (except public institutions for tuberculosis or mental illness) who, if they were no longer in such institution, would be eligible for financial assistance under one of the above programs;

(5) All children under twenty-one who meet the conditions of eligibility in the state's plan for aid to dependent children, other than with respect to school attendance;

(6) All children under twenty-one who are in foster care under the supervision of the state department (except children in public institutions).

History: En. Sec. 6, Ch. 325, L. 1967.

**71-1517. Amount, scope and duration of assistance.** The amount, scope, and duration of medical assistance granted eligible persons shall be determined by the state department.

History: En. Sec. 7, Ch. 325, L. 1967.

**71-1518. Application for assistance.** Application for assistance under this part shall be made to the county office of the county department in the county in which the person is residing. The application shall be presented in the manner on the form prescribed by the state department. All individuals wishing to apply shall have the opportunity to do so.

History: En. Sec. 8, Ch. 325, L. 1967.

**71-1519. County share of participation.** Each county department shall reimburse the state department in the amount of one-half ( $\frac{1}{2}$ ) of the approved medical payments paid by the state department in behalf of persons in the county each month, exclusive of the federal share. Such reimbursements shall be credited to the medical assistance account of the state department.

History: En. Sec. 9, Ch. 325, L. 1967.

**71-1520. Investigation and determination of eligibility.** The county department shall promptly investigate and determine the eligibility of each applicant under this act in accordance with the rules and regulations of the state department. Each applicant shall be informed of his right to a fair hearing and of the confidential nature of the information given. The county department shall determine whether or not the applicant is eligible for assistance under this act, and aid shall be furnished promptly to eligible persons. The county public welfare board shall review the determination of the eligibility or noneligibility made by the county department. Each applicant shall receive written notice of the decision concerning his application and right of appeal shall be secured to the applicant under the procedures of section 71-223, R.C.M. 1947.

**History:** En. Sec. 10, Ch. 325, L. 1967.

**71-1521. Redetermination of eligibility.** All medical assistance cases approved under this part shall be reviewed as often as shall be required under the rules and regulations of the state department.

**History:** En. Sec. 11, Ch. 325, L. 1967.

**71-1522. Change of residence of person receiving medical assistance.** A recipient who moves his residence to another county in this state shall continue to receive assistance under the rules and regulations of the state department. The county from which he has moved shall be charged by the state department for such county share of his assistance for a period of one (1) year after which time the county to which he has moved shall be charged therefor. The state department will determine the date of transfer. The county from which a recipient moves shall notify the state department and the county to which the recipient moves.

**History:** En. Sec. 12, Ch. 325, L. 1967.

**71-1523. Confidential records.** All applications, information and records concerning any applicant or recipient of medical assistance under the provisions of this act shall be confidential and shall not be disclosed nor used for any purpose not directly connected with the administration of medical assistance. The violation of this provision is hereby made a misdemeanor and is punishable as such.

**History:** En. Sec. 13, Ch. 325, L. 1967.

**71-1524. Exclusion of lien.** No applicant hereunder shall be required to execute an agreement for lien on his real property. No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf (except pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual). There shall be no adjustment or recovery (except, in the case of an individual who was sixty-five (65) years of age or older when he received such assistance, from his estate, and then only after the death of his surviving spouse, if any, and only at a time when he has no surviving child who is under age twenty-one (21) or is blind or permanently and totally disabled) of any medical assistance



correctly paid on behalf of such individual. Recoveries shall be prorated to the federal government and the county involved in the proportion to which each contributed to the medical assistance. The provisions of this act are hereby extended to provide for the recovery of all medical assistance paid under sections 71-1511 through 71-1524 and likewise to all medical aid to the aged assistance paid by the state department during the period of time July 1, 1965, through June 30, 1967.

**History:** En. Sec. 14, Ch. 325, L. 1967;  
amd. Sec. 1, Ch. 249, L. 1969.

**Amendments**

The 1969 amendment added the last sentence.

**Repealing Clause**

Section 2 of Ch. 249, Laws 1969 repealed all acts and parts of acts in conflict therewith.

**71-1525. Relative's responsibility.** The provisions of other parts of Title 71, R.C.M. 1947, as amended, notwithstanding, the only relatives that can be held responsible for payment of medical assistance under the program are the husband or wife of the individual, the parents of children under age twenty-one (21), and the parents of blind or disabled persons over age twenty-one (21).

**History:** En. Sec. 15, Ch. 325, L. 1967.

**71-1526. Discrimination prohibited.** No discrimination shall be practiced or asserted against any applicant for or recipient of care and services under this act, on the basis of race, color, or national origin; and the furnishing of care and services under this act to any applicant or recipient thereof shall not be delayed or denied on the basis of race, color, or national origin.

**History:** En. Sec. 16, Ch. 325, L. 1967.

CHAPTER 16—ECONOMIC OPPORTUNITY AND POVERTY RELIEF

- Section 71-1601. Purpose and intent of act.  
71-1602. Agreements with federal agencies authorized.  
71-1603. Expenditure of public funds to carry out agreements.  
71-1604. City-county commission authorized—powers.

**71-1601. Purpose and intent of act.** It is the purpose of this act to enable the state of Montana, and the counties, cities, towns, school districts and other governmental subdivisions of the state, and other organizations or agencies authorized to receive federal assistance under Public Law 88-452, 88th Congress, to secure for the citizens of Montana the benefits offered by the United States government to the several states and their citizens in the law of August 20, 1964 (Public Law 88-452 of the 88th Congress; 78 Stats. 508) for economic betterment and the relief of poverty. It is the intent of this act to grant to the state and its subdivisions the widest possible authority, within the limits set by law, to co-operate and combine their efforts with those of the appropriate federal agencies, and to comply with any federal regulations, not in conflict with the laws of the state of Montana, to carry out the purposes of the congressional act and secure the resulting benefits for Montana and its people.

**History:** En. Sec. 1, Ch. 263, L. 1965.

**Compiler's Note**

Public Law 88-452 of the 88th Congress may be found at 42 U. S. Code 2711 to 2981.

**Title of Act**

An act to authorize and empower counties, cities, towns, school districts or other municipal subdivisions of the state of Montana, and agencies, departments, offices and divisions of the state government,

and other agencies authorized to receive federal assistance under Public Law 88-452, 88th Congress, individually or in combination, to enter into and carry out contracts, agreements and plans with agencies and departments of the United States government and to expend moneys to implement and secure the benefits of Public Law 88-452 of the 88th Congress, enacted August 20, 1964 (78 Statute 508), known as the "Economic Opportunity Act of 1964."

**71-1602. Agreements with federal agencies authorized.** The state of Montana, and all offices, agencies, departments and divisions thereof, and all counties, cities, towns, school districts and other governmental subdivisions of the state, and other organizations or agencies authorized to receive federal assistance under Public Law 88-452, 88th Congress, singly or in combination, are hereby authorized and empowered, within the limits set by the respective laws governing them, to enter into and carry out contracts, agreements and plans with any authorized agency of the United States government for the implementation and operation within the areas of their respective jurisdictions of the act of Congress of August 20, 1964 (Public Law 88-452 of the 88th Congress; 78 Stats. 508).

**History:** En. Sec. 2, Ch. 263, L. 1965.

**71-1603. Expenditure of public funds to carry out agreements.** The agencies of the state and local government enumerated in the preceding section may, within the limits of the laws governing their respective authorities to raise and expend public moneys, budget for, and/or expend public moneys in order to enter into and carry out contracts, agreements and plans under this act and Public Law 88-452. Any such expenditures must be made from the budgets, budget items or appropriations set up for the general purpose to be served by the project.

**History:** En. Sec. 3, Ch. 263, L. 1965.

**71-1604. City-county commission authorized—powers.** The city council or councils of a city or cities within a county and the county commissioners of the county may create a city-county commission to effect the purposes of this act. Such city-county commission is authorized to:

(1) Make contracts and agreements with United States government agencies for the purpose of carrying out the intent of this act;

(2) Accept and expend public and private funds made available to such commission for the purpose of carrying out the intent of this act.

**History:** En. Sec. 4, Ch. 263, L. 1965.

**Effective Date**

Section 5 of Ch. 263, Laws 1965 pro-

vided the act should be in effect from and after its passage and approval. Approved March 9, 1965.

## TITLE 72—RAILROADS

- Chapter 1. Railroads—regulation by board of railroad commissioners, 72-102.  
2. Railroad companies—general powers and duties, 72-211, 72-224.  
6. General regulation of business of railroads, 72-627.

### CHAPTER 1—RAILROADS—REGULATION BY BOARD OF RAILROAD COMMISSIONERS

#### Section 72-102. Oath.

72-102. (3780) **Oath.** Each member of said board, and each person appointed to office by said board, before entering upon the duties of his office, shall take and subscribe the oath specified in section 1, article XIX, of the constitution of the state of Montana, and such oath shall be filed in the office of the secretary of state.

**History:** En. Sec. 2, Ch. 37, L. 1907; re-en. Sec. 4364, Rev. C. 1907; re-en. Sec. 3780, R. C. M. 1921; amd. Sec. 31, Ch. 177, L. 1965.

#### **Amendment**

The 1965 amendment deleted second and third sentences reading, "The members of said board shall each give a bond to the state in the sum of five thousand

dollars, with sureties to be approved by the governor, conditioned for the faithful discharge of the duties of their respective offices. The secretary of the board shall give a like bond in the sum of one thousand dollars."

#### **Cross-References**

Bonds of state officers and employees, sec. 6-105 et seq.

#### 72-106. (3784) **Repealed.**

##### **Repeal**

This section (Sec. 6, Ch. 37, L. 1907), relating to salaries of the commissioners,

the secretary, and the stenographer, was repealed by Sec. 1, Ch. 129, Laws 1963, and by Sec. 3, Ch. 212, Laws 1963.

#### 72-108 to 72-110. (3786 to 3788) **Repealed.**

##### **Repeal**

These sections (Secs. 1 to 3, Ch. 109, L. 1919; Sec. 1, Ch. 90, L. 1927), relating

to salaries of employees of the board, were repealed by Sec. 1, Ch. 129, Laws 1963.

#### 72-117. (3795) **Making schedules effective.**

##### **Publication and Notice**

The board of railroad commissioners is not required, when acting upon a petition or application for reduced rail rates, to cause publication and to give notice pursuant to this section and section 72-

118, in advance of any action on such petition or prior to issuance of any authorization thereon. State ex rel. Montana Motor Tariff Bureau, Inc. v. Smith, 144 M 110, 394 P 2d 758, 760.

#### 72-118. (3796) **Power to alter classification or rate, etc.**

##### **Publication and Notice**

The requirement of this section for publication and notice obtains only in the event the board of railroad commissioners makes or establishes any increase or raise in rate of charge for the transportation of freight. State ex rel. Montana Motor Tariff Bureau, Inc. v. Smith, 144 M 110, 394 P 2d 758, 760.

The board of railroad commissioners is not required, when acting upon a petition or application for reduced rail rates, to cause publication and to give notice pursuant to this section and section 72-117, in advance of any action on such petition or prior to issuance of any authorization thereon. State ex rel. Montana Motor Tariff Bureau, Inc. v. Smith, 144 M 110, 394 P 2d 758, 760.



**72-138. (3815) Repealed.****Repeal**

Section 72-138 (Sec. 33, Ch. 37, L. 1907), relating to annual report of the board of

railroad commissioners, was repealed by Sec. 44, Ch. 93, Laws 1969.

**72-144. (3821) Repealed.****Repeal**

This section (Sec. 1, Ch. 2, L. 1917), relating to rates for the transportation of

prisoners, was repealed by Sec. 101, Ch. 199, Laws 1965.

**72-164. (3842) Railroad commission may order electric signal, etc.****Contributory Negligence**

Knowledge or lack of knowledge of a custom to warn, or of the fact that customary protective signals have been abandoned or are not in operating condition, has an important bearing on the question of contributory negligence, but it does not affect the question of primary negligence. *Hernandez v. Chicago, Burlington & Quincy R. Co.*, 144 M 585, 398 P 2d 953.

Railroad was not liable for death of plaintiff's son, even though it had failed to put out fusees at time when car struck the train, since driver's view of the crossing was unobstructed, reflector signs warning of crossing were in well-kept condition, and there were no other extrahazardous conditions. *Hernandez v. Chicago, Burlington & Quincy R. Co.*, 144 M 585, 398 P 2d 953.

**Does Not Absolve Motorist from Using Reasonable Care**

A railroad crossing is as a matter of law a place of known danger and one is bound by law to recognize it as such. *Hernandez v. Chicago, Burlington & Quincy R. Co.*, 144 M 585, 398 P 2d 953.

**Duty of Driver to Stop**

A railroad has a right to expect motorists to approach a railroad crossing with caution and it is not bound to protect against the negligence of a motorist. *Hernandez v. Chicago, Burlington & Quincy R. Co.*, 144 M 585, 398 P 2d 953.

Motorist who was killed when car hit train at railroad crossing was negligent in that he did not comply with statutory mandate to bring his vehicle to complete stop not less than 10 nor more than 100 feet from railroad crossing when a train is within sight or hearing or if crossing and view is not clear, full and distinct. *O'Brien v. Great Northern R. Co.*, 148 M 429, 421 P 2d 710.

**Duty of Guest of Driver**

The negligence of a driver in failing to

stop at a railroad crossing, as required by this section, cannot be imputed to his passenger. *Hernandez v. Chicago, Burlington & Quincy R. Co.*, 144 M 585, 398 P 2d 953.

**Hazardous Conditions**

The number of automobiles passing over a railroad crossing will not, of itself, make a crossing extrahazardous. *Hernandez v. Chicago, Burlington & Quincy R. Co.*, 144 M 585, 398 P 2d 953.

Dark-colored road surfaces which tend to absorb the lights of an automobile do not make a railroad crossing extrahazardous. *Hernandez v. Chicago, Burlington & Quincy R. Co.*, 144 M 585, 398 P 2d 953.

A railroad cannot make a crossing which is not extrahazardous, extrahazardous simply by putting out fusees. *Hernandez v. Chicago, Burlington & Quincy R. Co.*, 144 M 585, 398 P 2d 953.

**Railroad's Duty**

At an ordinary crossing where a train has stopped on the crossing or is moving slowly over it, it is not negligence on the part of the railroad company if it fails to blow a whistle, ring a bell, place warning lights along the train or to provide a flagman to warn the traffic. *Hernandez v. Chicago, Burlington & Quincy R. Co.*, 144 M 585, 398 P 2d 953.

The infrequent use of a railroad crossing may affect the degree of care required to be taken by the train in approaching the crossing, but when the train is on the crossing, this is, in itself, a sufficient warning of danger to the traveling public. *Hernandez v. Chicago, Burlington & Quincy R. Co.*, 144 M 585, 398 P 2d 953.

**References**

*Hannigan v. Northern Pacific Ry. Co.*, 142 M 335, 384 P 2d 493; *Sztaba v. Great Northern Ry. Co.*, 147 M 185, 411 P 2d 379.

## CHAPTER 2—RAILROAD COMPANIES—GENERAL POWERS AND DUTIES

Section 72-211. May borrow money and secure payment.  
 72-224. May issue and secure bonds.

**72-204. (6506) Books to be opened for subscription, etc.****Compiler's Notes**

Section 15-401, referred to in the first paragraph of this section in the parent

volume, was repealed by Sec. 143, Ch. 300, Laws 1967.

**72-205. (6507) Powers of railroad corporations.****Subd. 5, Obstruction of Watercourses**

Railroad, which quitclaimed land including right of way across irrigation ditch, was not relieved of its statutory duty to maintain the cement drop, siphon

and wooden flume for the benefit of lower landowners who depended on the water. *Harrer v. Northern Pacific Ry. Co.*, 147 M 130, 410 P 2d 713.

**72-211. (6513) May borrow money and secure payment.** Any corporation organized under this chapter shall have power to borrow money on the credit of the corporation to an amount not exceeding its authorized capital stock, at a rate of interest to be agreed upon by the respective parties, and may execute bonds therefor in sum of not less than one hundred dollars, and secure the payment thereof by mortgage or pledge of the property and income of such corporation. [Effective January 1, 1965.]

**History:** En. Sec. 14, p. 102, Ex. L. 1873; re-en. Sec. 312, 5th Div. Rev. Stat. 1879; re-en. Sec. 691, 5th Div. Comp. Stat. 1887; re-en. Sec. 899, Civ. C. 1895; re-en. Sec. 4280, Rev. C. 1907; re-en. Sec. 6513, R. C. M. 1921; amd. Sec. 11-148, Ch. 264, L. 1963.

**Amendment**

The 1963 amendment deleted a second sentence reading, "And if the said mort-

gage shall so provide, it shall be and remain a valid lien upon all of the property of said corporation of whatever kind then existing, or that may thereafter be by it acquired, irrespective of the law now in force relating to chattel mortgages, and the same shall be taken, held, and enforced in the same manner as mortgages upon real estate now are held and enforced"; and made a minor change in phraseology.

**72-219. (6521) Penalties—exorbitant and discriminatory rates, etc.****References**

*Sztaba v. Great Northern Ry. Co.*, 147 M 185, 411 P 2d 379.

**72-221. (6523) May extend line into Montana.****Compiler's Notes**

Sections 15-108 and 15-109, referred to

in this section in the parent volume, were repealed by Sec. 143, Ch. 300, Laws 1967.

**72-222. (6524) Two or more may consolidate.****Compiler's Notes**

Section 15-405, referred to in the first paragraph of this section in the parent

volume, was repealed by Sec. 143, Ch. 300, Laws 1967.

**72-224. (6526) May issue and secure bonds.** Any railroad corporation whose line is wholly or partly within this state, whether chartered by or organized under the law of the state or territory of Montana, or of the United States, or of any other state or territory, shall have authority and power to make, issue, negotiate, and deliver its bonds, securities, or obligations to such amount, not exceeding its authorized capital stock, bearing

such rate of interest and payable at such time or times as its board of directors shall determine, and may negotiate, sell, pledge, or otherwise dispose of the same at such price, and on such terms, and in such manner as its board of directors may authorize or determine; and to secure the payment of all or any of such bonds, securities, or obligations, and the interest thereon, may make, execute, and deliver such mortgages or deeds of trust upon all or any part of its property, income, and franchises, as the board of directors may determine or direct. [Effective January 1, 1965.]

**History:** En. Sec. 706, 5th Div. Comp. Stat. 1887; re-en. Sec. 913, Civ. C. 1895; re-en. Sec. 4294, Rev. C. 1907; re-en. Sec. 6526, R. C. M. 1921; amd. Sec. 11-149, Ch. 264, L. 1963.

#### Amendment

The 1963 amendment deleted from the end of the section clauses reading, "and if any such mortgage or deed of trust shall so provide, and to the extent it shall provide, it shall be and remain a valid lien upon the property, rights, and franchises of the corporation of whatever nature or kind afterwards acquired, as well as upon property, rights, and franchises

owned or possessed by the corporation at the time of its execution, irrespective of the law relating to chattel mortgages, and any such mortgage or deed of trust shall be taken, held, and enforced in the same manner as mortgages of real estate; and the record thereof in the office of the secretary of state shall be notice of its existence and contents to all persons, without any further record thereof, and it shall be the duty of the secretary to record in his office any such mortgage or deed of trust, when presented for that purpose"; and made minor changes in phraseology and punctuation.

### CHAPTER 3—LEASES, SALES AND MORTGAGES OF RAILROAD EQUIPMENT AND ROLLING STOCK

#### 72-303. (6535) Repealed.

##### Repeal

This section (Sec. 3, p. 102, L. 1883; Sec. 1, Ch. 53, L. 1947), relating to chattel

mortgages of railroad equipment, was repealed by Sec. 10-102, Ch. 264, Laws 1963, effective January 1, 1965.

#### 72-305 to 72-307. (6537 to 6539) Repealed.

##### Repeal

These sections (Secs. 1 to 3, pp. 148, 149, L. 1893; Sec. 1, Ch. 148, L. 1923; Sec. 2, Ch. 53, L. 1947; Sec. 14, Ch. 117,

L. 1961), relating to conditional sales and chattel mortgages of railroad equipment, were repealed by Sec. 10-102, Ch. 264, Laws 1963, effective January 1, 1965.

### CHAPTER 6—GENERAL REGULATION OF BUSINESS OF RAILROADS

Section 72-627. Duty to furnish shipping facilities.

**72-627. (6582) Duty to furnish shipping facilities.** It is hereby made the duty of every person, corporation, and association operating a railroad in the state of Montana to maintain and staff facilities for shipment and delivery of freight, and to ship and deliver freight and accommodate passengers in at least one location, preferably the county seat, in each county through which the line of the railway passes and at any point upon the line of such railway where there is a city or town having a population, according to the last federal decennial census, of not less than one thousand people, provided, however, that this act shall not require the maintenance and staffing of such facilities in any county or at any city or town in which such facilities were not maintained and staffed on the effective date of this act. Nothing in this section shall be



construed to authorize the discontinuance of any facility presently established in any city, town or other location having a population of less than one thousand people without a hearing before the board of railroad commissioners as provided by law.

**History:** En. Sec. 1, Ch. 26, L. 1905; re-en. Sec. 4343, Rev. C. 1907; re-en. Sec. 6582, R. C. M. 1921; amd. Sec. 1, Ch. 266, L. 1969.

**Compiler's Notes**

This act became effective July 1, 1969.

**Amendments**

The 1969 amendment inserted "and

staff" after "to maintain" and "in at least one location \* \* \* line of the railway passes" after "accommodate passengers" and substituted "a city or town \* \* \* effective date of this act" for "a platted townsite of record having not less than one hundred inhabitants" at the end of the first sentence; and added the second sentence.



## TITLE 73—RECORDING TRANSFERS

Chapter 2. Effect of recording or failure to record conveyance of real property, 73-201, 73-208 to 73-211.

### CHAPTER 1—RECORDING TRANSFERS—RELEASE OF OIL, GAS AND MINERAL LEASES

73-114. (6902) Oil, gas and mineral leases, release of record of.

#### References

Beavers v. Rankin, 142 M 570, 385 P 2d 640.

73-115. (6903) Action to compel release—damages, etc.

#### Venue of Action

Although an action under this section combines three different causes of action, (1) an action for cancellation of the lease, (2) an action for the statutory penalty, and (3) an action for damages; the principal cause of action is for cancellation of the lease, which is a local nontransitory action in rem, and the defendant is not

entitled to a change of venue as to any part of the action from the county where the real estate is located to the county of his residence. Beavers v. Rankin, 142 M 570, 385 P 2d 640.

#### References

Hidden Hollow Ranch v. Collins, 146 M 321, 406 P 2d 365.

73-116. (6904) Demand for release—when and upon whom, etc.

#### References

Beavers v. Rankin, 142 M 570, 385 P 2d 640.

### CHAPTER 2—EFFECT OF RECORDING OR FAILURE TO RECORD CONVEYANCE OF REAL PROPERTY

- Section 73-201. Record—to whom notice—recording copies.  
73-208. Validation of conveyances recorded after defective execution.  
73-209. Validation of conveyances recorded after defective execution—1965 act.  
73-210. Validation of conveyances recorded after defective execution—1967 act.  
73-211. Validation of conveyances recorded after defective execution—1969 act.

73-201. (6934) Record—to whom notice—recording copies. Every conveyance of real property acknowledged or proved, and certified and recorded as prescribed by law, from the time it is filed with the county clerk for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees; and a certified copy of any such recorded conveyance may be recorded in any other county, and when so recorded the record thereof shall have the same force and effect as though it was of the original conveyance. Further, every conveyance and/or encumbrance of real property acknowledged or proved, and certified, and recorded as prescribed by law, and which is executed by one who thereafter acquires an interest in the said real property by a conveyance which said conveyance is constructive notice as aforesaid, is, from the time such latter conveyance is filed with the county clerk for record, constructive



notice of the contents of such earlier conveyance and/or encumbrance to subsequent takers, purchasers, mortgagees, or other encumbrance[r]s or transferees.

**History:** Ap. p. Sec. 259, 5th Div. Comp. Stat. 1887; re-en. Sec. 1640, Civ. C. 1895; re-en. Sec. 4683, Rev. C. 1907; amd. Sec. 1, Ch. 33, L. 1921; re-en. Sec. 6934, R. C. M. 1921; amd. Sec. 1, Ch. 147, L. 1967. Cal. Civ. C. Secs. 1213, 1218.

#### **Amendments**

The 1967 amendment added the second sentence.

#### **Repealing Clause**

Section 2 of Ch. 147, Laws 1967 re-

pealed all acts and parts of acts in conflict therewith.

#### **Recording of Restrictions**

Declaration of restrictions constitutes a conveyance under section 73-203, so that where residential restriction was filed with subdivision plat, it constituted constructive notice to subsequent purchaser who wanted to use land for commercial purposes. *Kosel v. Stone*, 146 M 218, 404 P 2d 894.

### **73-202. (6935) Conveyances to be recorded, or are void, etc.**

#### **Unrecorded Easement**

In condemnation proceeding, lower court erred in refusing to instruct in words of statute where owner of adjacent

land claimed compensation for unrecorded easement in condemned land. *Montana State Highway Commission v. Robertson & Blossom Inc.*, 151 M 205, 441 P 2d 181.

### **73-203. (6936) Conveyances defined.**

#### **Restrictions**

Declaration of restrictions constitutes an instrument which affects title to land under this section, so that where filed, subsequent purchaser had constructive

notice, pursuant to section 73-201, and could not use his land for commercial purposes. *Kosel v. Stone*, 146 M 218, 404 P 2d 894.

**73-208. Validation of conveyances recorded after defective execution.** Any instrument affecting real property, which was, previous to the date this act takes effect, copied into the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after the date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument or in the certificate of acknowledgment thereof, or the absence of any such certificate; and all such instruments heretofore acknowledged by the vice-president and assistant secretary of any corporation, or by either of them, or other person duly authorized by resolution by such corporation executing the same on behalf of the corporation, and recorded, shall be valid and shall have the same force and effect as though acknowledged by the president or secretary; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of the record of any such instrument may be read in evidence, with like effect as copies of any instrument duly acknowledged and recorded.

**History:** En. Sec. 1, Ch. 63, L. 1963.

#### **Title of Act**

An act validating certain instruments affecting real property and which were erroneously executed or acknowledged, notice imparted by recording thereof, and providing that duly certified copies there-

of may be read in evidence, with like effect as copies of an instrument duly executed, acknowledged and recorded.

#### **Repealing Clause**

Section 2 of Ch. 63, Laws 1963 repealed all acts and parts of acts in conflict therewith.

**73-209. Validation of conveyances recorded after defective execution—1965 act.** Any instrument affecting real property, provided no action is

now pending to set such instrument aside, which was, previous to the date this act takes effect, copied into the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument or in the certificate of acknowledgment thereof, or the absence of any such certificate; and all such instruments heretofore acknowledged by the vice-president and assistant secretary of any corporation, or by either of them, or other person duly authorized by resolution by such corporation executing the same on behalf of the corporation, and recorded, shall be valid and shall have the same force and effect as though acknowledged by the president or secretary; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of the record of any such instrument may be read in evidence, with like effect as copies of an instrument duly acknowledged and recorded.

**History:** En. Sec. 1, Ch. 58, L. 1965.

**Title of Act**

An act validating certain instruments affecting real property and which were erroneously executed or acknowledged,

imparting notice by recording thereof, providing that duly certified copies thereof may be read in evidence with like effect as copies of an instrument duly acknowledged and recorded, containing a repealing clause.

**73-210. Validation of conveyances recorded after defective execution—1967 act.** Any instrument affecting real property, provided no action is now pending to set such instrument aside, which was, previous to January 1, 1967, copied into the proper book kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument or in the certificate of acknowledgment thereof, or the absence of any such certificate; and all such instruments heretofore acknowledged by the vice-president and assistant secretary of any corporation, or by either of them, or other person duly authorized by resolution by such corporation executing the same on behalf of the corporation, and recorded, shall be valid and shall have the same force and effect as though acknowledged by the president or secretary; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of the record of any such instrument may be read in evidence, with like effect as copies of an instrument duly acknowledged and recorded.

**History:** En. Sec. 1, Ch. 181, L. 1967.

**Title of Act**

An act validating certain instruments affecting real property and which were erroneously executed or acknowledged

prior to January 1, 1967; imparting notice by recording thereof; and providing that duly certified copies thereof may be read in evidence with like effect as copies of an instrument duly acknowledged and recorded.

**73-211. Validation of conveyances recorded after defective execution—1969 act.** Any instrument affecting real property, provided no action is now pending to set such instrument aside, which was, previous to January 1, 1969, copied into the proper book kept in the office of the

county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument or in the certificate of acknowledgment thereof, or the absence of any such certificate; and all such instruments heretofore acknowledged by the vice-president and assistant secretary of any corporation, or by either of them, or other person duly authorized by resolution by such corporation executing the same on behalf of the corporation, and recorded, shall be valid and shall have the same force and effect as though acknowledged by the president or secretary; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of the record of any such instrument may be read in evidence, with like effect as copies of an instrument duly acknowledged and recorded.

**History:** En. Sec. 1, Ch. 74, L. 1969.

**Title of Act**

An act validating instruments affecting real property and which were erroneously executed or acknowledged prior to Jan-

uary 1, 1969; imparting notice by recording thereof; and providing that duly certified copies thereof may be read in evidence with like effect as copies of an instrument duly acknowledged and recorded.



## TITLE 74—SALES AND EXCHANGE

- Chapter 3. Rights and obligations of seller—delivery and warranty, 74-325.  
4. Rights and obligations of buyer—inspection and payment, Repealed—  
Section 10-102, Chapter 264, Laws of 1963.  
5. Exchange, 74-505.  
6. Retail installment sales, 74-608.

### CHAPTER 1—SALE AND AGREEMENTS FOR SALE

#### 74-110. (7590) Form of such covenants.

##### References

Kosel v. Stone, 146 M 218, 404 P 2d 894.

### CHAPTER 2—CONTRACT FOR SALE OF PERSONAL PROPERTY, WHEN VALID—FILING—SEIZURE ON DEFAULT

#### 74-201, 74-202. (7591, 7592) Repealed.

##### Repeal

These sections (Secs. 2340, 2341, Civ. C. 1895), a statute of frauds relating to con-

tracts for sales of personal property, were repealed by Sec. 10-102, Ch. 264, Laws 1963, effective January 1, 1965.

#### 74-204 to 74-207. (7594 to 7597) Repealed.

##### Repeal

These sections (Secs. 1 to 3, p. 124, L. 1899; Sec. 1, Ch. 52, L. 1911; Sec. 1, Ch. 146, L. 1919; Sec. 1, Ch. 145, L. 1925; Sec. 1, Ch. 112, L. 1935; Secs. 1 to 3, Ch.

70, L. 1943), relating to contracts for the sale of personal property with title retained by the vendor, were repealed by Sec. 10-102, Ch. 264, Laws 1963, effective January 1, 1965.

### CHAPTER 3—RIGHTS AND OBLIGATIONS OF SELLER—DELIVERY AND WARRANTY

#### Section 74-325. Uniform Commercial Code—applicability.

#### 74-321. (7618) Repealed.

##### Repeal

This section (Sec. 2382, Civ. C. 1895), relating to warranty of wholesomeness of

food sold, was repealed by Sec. 10-102, Ch. 264, Laws 1963, effective January 1, 1965.

#### 74-322. (7619) Warranty on sale of good will.

##### Breach by Seller

Where buyer of business broke contract by failing to make agreed payments for exclusive business rights in a territory and seller entered the territory after buyer's breach but in violation of the agree-

ment, buyer was entitled to a setoff of the amount of profit which seller took from the restricted territory against seller's action for the full amount of the contract. Leiman-Scott, Inc. v. Holmes, 142 M 58, 381 P 2d 489.

**74-325. Uniform Commercial Code—applicability.** This chapter shall not apply to sales subject to the Uniform Commercial Code. [Effective January 1, 1965.]

**History:** En. 74-325 by Sec. 11-150, Ch. 264, L. 1963.

CHAPTER 4—RIGHTS AND OBLIGATIONS OF BUYER—  
INSPECTION AND PAYMENT

(Repealed—Section 10-102, Chapter 264, Laws of 1963)

**74-401 to 74-403. (7622 to 7624) Repealed.****Repeal**

These sections (Secs. 2400 to 2402, Civ. C. 1895), relating to the rights and obli-

gations of the buyer of goods, were repealed by Sec. 10-102, Ch. 264, Laws 1963, effective January 1, 1965.

## CHAPTER 5—EXCHANGE

Section 74-505. Uniform Commercial Code—applicability.

**74-502. (7633) Repealed.****Repeal**

This section (Sec. 2431, Civ. C. 1895), making a statute of frauds applicable to

contracts for exchange, was repealed by Sec. 10-102, Ch. 264, Laws 1963, effective January 1, 1965.

**74-505. Uniform Commercial Code—applicability.** The provisions of this chapter shall not apply to exchanges subject to the Uniform Commercial Code. [Effective January 1, 1965.]

**History:** En. 74-505 by Sec. 11-151, Ch. 264, L. 1963.

## CHAPTER 6—RETAIL INSTALLMENT SALES

Section 74-608. Finance charge limitation.

**74-602. Definitions.****References**

Stalcup v. Montana Trailer Sales &amp; Equipment Co., 146 M 494, 409 P 2d 542.

**74-607. Requirements and prohibitions, etc.****Attorney's Fees**

This section, unlike other sections of this code governing recovery of attorney's fees, is permissive and designed to inform the holder of a retail installment sale contract what he may recover in addition to damages when the contract

has been breached by the buyer, and unless it is stipulated by contract, the buyer has no right to attorney fees should he successfully resist the action on the contract. Stalcup v. Montana Trailer Sales &amp; Equipment Co., 146 M 494, 409 P 2d 542.

**74-608. Finance charge limitation.** (a) Notwithstanding the provisions of any other law, the finance charge included in a retail installment transaction shall not exceed the following schedule:

## (1) As to motor vehicles:

Class 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made—seven dollars (\$7) per one hundred dollars (\$100) per year.

Class 2. Any new motor vehicle not in class 1 and any used motor vehicle designated by the manufacturer by a year model of the same or not more than two (2) years prior to the year

in which the sale is made—nine dollars (\$9) per one hundred dollars (\$100) per year.

Class 3. Any used motor vehicle not in class 2 and designated by the manufacturer by a year model more than two (2) years prior to the year in which the sale is made—eleven dollars (\$11) per one hundred dollars (\$100) per year.

- (2) As to services and goods other than motor vehicles: (i) On so much of the principal balance as does not exceed three hundred dollars (\$300), eleven dollars (\$11), per one hundred dollars (\$100) per year; (ii) if the principal balance exceeds three hundred dollars (\$300), but is less than one thousand dollars (\$1,000), nine dollars (\$9) per one hundred dollars (\$100) per year on that portion over three hundred dollars (\$300); (iii) if the principal balance exceeds one thousand dollars (\$1,000), seven dollars (\$7) per one hundred dollars (\$100) per year on that portion over one thousand dollars (\$1,000).

(b) Such finance charge shall be computed on the principal balance as determined under section 7(f) [74-607(f)] of this act on contracts payable in successive monthly payments substantially equal in amount from the date of the contract until the maturity of the final installment, notwithstanding that the total time balance thereof is required to be paid in installments. A minimum finance charge of twenty dollars (\$20) may be charged on any retail installment transaction.

(c) When a retail installment contract provides for payment, other than in equal successive monthly installments, the finance charge may be at a rate which will provide the same yield as is permitted on monthly payment contracts under subsections (a) and (b) hereof, having due regard for the schedule of payments in the contract.

**History:** En. Sec. 8, Ch. 282, L. 1959; amd. Sec. 11-152, Ch. 264, L. 1963.

#### **Amendment**

The 1963 amendment deleted a subsection (d), for text of which see parent volume.

#### **Interest on Conditional Sales Contracts**

In a diversity action to recover the balance due on a note and conditional sales contract executed and delivered by defendants to a North Dakota corporation and assigned by it to plaintiff, where de-

fendants contended that the rate of interest charged them pursuant to this section, was 16.3% which exceeded the maximum rate of 10% permitted by section 47-125 and constituted a special law regulating the rate of interest on money, proscribed by section 26, article V of the constitution, federal court applied the doctrine of abstention and postponed further action until the issue was determined by the supreme court of Montana. *B-W Acceptance Corp. v. Torgerson*, 234 F Supp 214, 216.





## TITLE 75—SCHOOLS

- Chapter 1. State board of education—composition, powers and duties, 75-106, 75-107.
2. Revenue-producing facilities at university of Montana, 75-216 to 75-223.
3. Control of state educational institutions, 75-301 to 75-303, 75-310, 75-313, 75-314.
4. The Montana university system, 75-401, 75-402.
5. University of Montana—law and forestry schools, 75-506.1 to 75-506.7.
6. State bureau of mines and geology, 75-606, 75-607.
7. **Montana state university—Montana wool laboratory—agricultural experiment stations, 75-706, 75-723.**
8. Montana grain inspection laboratory, 75-807, 75-811.
13. The public schools—superintendent of public instruction, 75-1301, 75-1303, 75-1315.
14. Exceptional children—courses of instruction for, 75-1406.
16. School trustees, 75-1604, 75-1614, 75-1618, 75-1620 to 75-1622, 75-1630, 75-1632, 75-1637, 75-1641 to 75-1647.
17. Budget system, 75-1706, 75-1713.1, 75-1716, 75-1719, 75-1720, 75-1723.
18. School districts, 75-1802, 75-1804, 75-1805, 75-1810, 75-1813, 75-1813.1, 75-1816.
19. Clerks of school districts—school census, 75-1904.
20. Grades and courses of study in the public schools—correspondence schools—visual teaching, 75-2009.
22. School day, month and year—holidays—constitution, pioneer and arbor day, 75-2212.
24. Teachers—powers and duties—election—dismissal, 75-2401, 75-2405.1.
25. Teachers' examinations and certificates, 75-2501, 75-2516, 75-2518, 75-2521.
27. Teachers' retirement system, 75-2701, 75-2703 to 75-2705, 75-2707 to 75-2709, 75-2709.1, 75-2709.2.
30. Juvenile disorderly persons—commitment to industrial school, Repealed—Section 16, Chapter 262, Laws 1969.
31. Schoolhouse sites and construction, 75-3109 to 75-3125.
33. School buses—requirements—drivers' qualifications—construction and operation, 75-3308.
34. Transportation of pupils, 75-3403, 75-3413, 75-3414.
35. Free textbooks, 75-3503, 75-3505.
36. Uniform system of free public schools—state support—schedule of contributions, 75-3611 to 75-3612.3, 75-3613 to 75-3621, 75-3624.
37. Finance, 75-3701, 75-3706, 75-3722, 75-3738 to 75-3742.
38. Extra taxation for school purposes, 75-3801, 75-3806.
39. Bonds, 75-3904, 75-3908, 75-3914.
41. High schools—county—junior and district—joint school systems, 75-4120 to 75-4128, 75-4130, 75-4133, 75-4134, 75-4138, 75-4139, 75-4146.
42. High schools—county—junior and district—joint school systems continued—vocational education, 75-4202, 75-4230, 75-4241, 75-4246.
43. Post-secondary vocational-technical education, 75-4309 to 75-4323.
44. Community college districts, 75-4413 to 75-4430.
45. High School Budget Act, 75-4516.1, 75-4518.1, 75-4521, 75-4524, 75-4525.
46. High school districts—public works, 75-4601, 75-4607, 75-4612 to 75-4614.
48. School lunch and child nutrition program, 75-4802, 75-4803, 75-4805, 75-4806.
50. Education classes for mentally retarded and physically handicapped children, 75-5001, 75-5003, 75-5005.
51. Federal aid, 75-5101.
52. Law enforcement academy, 75-5203, 75-5205, 75-5206, 75-5208.
53. Driver education, 75-5310 to 75-5317.
54. School safety patrols, 75-5401 to 75-5405.
55. School districts for nonsectarian child care institutions, 75-5501 to 75-5508.

## CHAPTER 1—STATE BOARD OF EDUCATION—COMPOSITION, POWERS AND DUTIES

Section 75-106. Meetings, per diem and expenses.

75-107. Powers and duties.

**75-106. (835) Meetings, per diem and expenses.** The board shall hold quarterly meetings at the state capitol or at any other town or city in the state of Montana in or near which may be located any institutions under its jurisdiction on the second Monday in April, July, September and December in each year, and may hold special meetings at any time and place it may direct. The president and secretary of the board may also call special meetings of said board at any time and place, if in their judgment necessity requires it. The secretary of the board shall notify the members of all regular and special meetings. The members of the board, other than ex officio members shall receive twenty (\$20) dollars per day each for each day in attendance on meetings of said board or in the performance of any duty or services as members of such board and necessary and actual expenses incurred. All expenses of the state board of education, including per diem and expenses of members and the salary and expenses of the executive secretary of the Montana university system incurred while transacting university business, shall be paid out of the appropriations made by the legislative assembly for said university.

**History:** En. Sec. 6, p. 159, L. 1893; re-en. Sec. 1515, Pol. C. 1895; re-en. Sec. 647, Rev. C. 1907; amd. Sec. 105, Ch. 76, L. 1913; amd. Sec. 1, Ch. 196, L. 1919; re-en. Sec. 835, R. C. M. 1921; amd. Sec. 1, Ch. 146, L. 1929; amd. Sec. 1, Ch. 115, L. 1935; amd. Sec. 1, Ch. 158, L. 1945; amd. Sec. 1, Ch. 236, L. 1953; amd. Sec. 1, Ch. 103, L. 1967.

### Amendments

The 1967 amendment increased from \$15 to \$20 the per diem of members of the state board of education; deleted "provided, however, that no one of such members shall receive more than five hundred (\$500.00) dollars per diem in any one (1) fiscal year" at the end of the fourth sentence; and substituted "Montana university system" for "university of Montana" before "incurred while transacting" in the last sentence.

**75-107. (836) Powers and duties.** The state board of education shall have power and it shall be its duty:

1. To have general control and supervision of the Montana state university, university of Montana, Montana college of mineral science and technology, western Montana college, eastern Montana college, and northern Montana college, all being units of the university of Montana. It is the purpose of this act that the said six (6) units of our university system shall be considered for all purposes one university. The state board of education shall serve ex officio as regents of the university of Montana and shall use and adopt this style in all its dealings therewith.

2 to 7. \* \* \* [Same as parent volume.]

8. To report as provided in section 2 [82-4002] of this act.

9 to 14. \* \* \* [Same as parent volume.]

**History:** Ap. p. Sec. 7, p. 159, L. 1893; re-en. Sec. 1516, Pol. C. 1895; re-en. Sec. 648, Rev. C. 1907; amd. Sec. 1, Ch. 73, L. 1909; amd. Sec. 106, Ch. 76, L. 1913; Subd.

7, amd. Sec. 2, Ch. 196, L. 1919; re-en. Sec. 836, R. C. M. 1921; amd. by repealing Subd. 7, Ch. 131, L. 1923; amd. Sec. 2, Ch. 158, L. 1945; amd. Sec. 1, Ch. 92, L.



1951; amd. Sec. 2, Ch. 236, L. 1953; amd. Sec. 1, Ch. 266, L. 1959; amd. Sec. 31, Ch. 93, L. 1969.

#### Amendments

The 1969 amendment substituted "university of Montana, Montana college of mineral science and technology, western Montana college, eastern Montana college" for "Montana state college, Montana school of mines, Montana state normal college, eastern Montana state normal

school" in subsection (1); and, in subsection 8, substituted the reporting requirements of section 82-4002 for former provision requiring an annual report on or before the first day of January.

#### Delegation of Powers

This section restricts the state board of education from delegating to college officials its power to select teachers or instructors. *Brown v. State Board of Education*, 142 M 547, 385 P 2d 643.

## CHAPTER 2—REVENUE-PRODUCING FACILITIES AT UNIVERSITY OF MONTANA

- Section 75-216. Powers of regents enumerated.  
 75-217. Title to facilities.  
 75-218. Borrowing by regents.  
 75-219. State not obligated.  
 75-220. Units of financing.  
 75-221. Restriction on use of state funds.  
 75-222. Previous contracts unimpaired.  
 75-223. Prior obligations not affected.

### 75-207 to 75-215. Repealed.

#### Repeal

These sections (Sec. 1, Ch. 158, L. 1961; Secs. 1 to 8, Ch. 232, L. 1961), relating to student housing facilities at the university

of Montana and to the handling of pledged fees therefrom, were repealed by Sec. 9, Ch. 252, Laws 1963.

**75-216. Powers of regents enumerated.** The regents of the Montana university system may:

(1) Purchase, construct, equip, or improve, at any unit of the Montana university system, any of the following types of revenue-producing facilities: land, residence halls, dormitories, houses, apartments and other housing facilities; dining rooms and halls, restaurants, cafeterias and other food service facilities; student union buildings and facilities; and these [those] other facilities specifically authorized by joint resolution of the legislative assembly.

(2) Rent housing facilities and provide food and other services to the students, officers, guests and employees of the unit at rates that will insure a reasonable net income over operating expenses and will provide for debt service and reserves, and provide for the collection of charges, admissions and fees for the use of other facilities by students and other persons, which charges, admissions and fees shall not be deemed to be tuition within the meaning of section 75-506 of the Revised Codes of Montana, 1947, and may be collected from any or all students. Student building fees established and in effect on [January 1, 1965] which are imposed uniformly upon all students, or upon all of a specified class of students in attendance at any unit of the Montana university system, shall not be increased without authorization by law, unless absolutely necessary and then only to the extent necessary to pay principal or interest due on obligations for which such fees have been or shall be pledged, or to maintain reserves securing the payment of such obligations, in accordance with the indentures, resolutions, contracts or other instruments authorizing the issu-

ance of such obligations; provided that at any unit of the Montana university system [where] the aggregate amount of student building fees in effect on January 1, 1965, was less than fifty dollars (\$50) per student per academic year, such fees may be increased or additional student building fees may be established, to an aggregate amount not exceeding fifty dollars (\$50) per student per academic year, and provided further that additional student building fees may be established or existing student building fees may be increased at the university of Montana, at Missoula, to an aggregate amount not to exceed ninety dollars (\$90) per student per academic year. This limitation shall not affect admission or use charges, which are made to individual students or others in proportion to their use or occupancy of particular facilities or services and shall not affect any student building fees or other charges which are made to nonresident students as defined in section 75-506, R. C. M. 1947.

(3) Hold the net income derived from the operation of such facilities and the charges, admissions and fees so collected and devote the revenues from these sources to debt service and reserves, repairs, replacements and betterments of the facilities or, so far as such revenues have not been previously obligated for these purposes, to the acquisition, erection, equipping, enlarging or improvement of additional facilities of the types described in this section.

(4) Exercise full control and complete management of such facilities.

(5) Rent the facilities to other public or private persons, firms and corporations for such uses, at such times, for such periods and at such rates as in the regents' judgment will be consistent with the full use thereof for academic purposes and will add to the revenues available for capital costs and debt service.

(6) Do all things necessary to plan for, and to propose financing including all necessary loan applications, for classroom, laboratory, library, bookstore and other instructional facilities; office, record-keeping, storage, equipment maintenance and other administrative and operational facilities; stadiums, fieldhouses, armories, arenas, gymnasiums, swimming pools and other facilities for athletic and military instruction, exhibitions, games and contests; auditoriums, theaters, music halls and other assembly, theatrical, musical and entertainment facilities, hospital, nursing and other health instruction and service facilities; nurseries, barns, arenas, pavilions and other facilities for agricultural and livestock breeding, development and exhibition; parking lots and ramps and other parking facilities; and land needed for such facilities.

**History:** En. Sec. 1, Ch. 252, L. 1963; amd. Sec. 1, Ch. 246, L. 1965; amd. Sec. 1, Ch. 13, L. 1967; amd. Sec. 1, Ch. 264, L. 1969.

#### Compiler's Notes

The compiler has inserted the bracketed references in subdivision (2) since they were part of this section prior to the 1969 amendment and appear to have been inadvertently omitted.

#### Title of Act

An act relating to the acquisition, erection, equipment, enlargement and improvement of housing and other revenue-producing facilities at units of the university of Montana, and the borrowing of funds therefor by the regents by the issuance and sale of negotiable bonds and other securities and the making of purchases on time, payable solely from net income from rents and board, receipts

from charges, admissions or fees for the facilities, and gifts, contributions and grants of funds, without obligating the state of Montana or using state funds except as provided, and the provision of security for such borrowing, and the refunding of outstanding obligations; repealing sections 75-207, 75-208, 75-209, 75-210, 75-211, 75-212, 75-213, 75-214 and 75-215, R. C. M. 1947.

#### Amendments

The 1965 amendment added the material at the end of subsection (1) commencing with "and those other facilities"; added the last two sentences to subsection (2); inserted "and the charges, admissions and fees so collected" after "operation of such facilities" in subsection (3); inserted "the revenues from these sources" after "devote" in subsection (3); added subsection (5); and made numerous changes in phraseology.

The 1967 amendment substituted "Montana university system" for "university of Montana" wherever it appears in the sec-

tion; inserted "land" after "revenue-producing facilities," "houses" after "dormitories," and "restaurants, cafeterias" after "dining rooms and halls" in the first sentence of subsection (1); deleted a sentence at the end of subsection (1) which read "When a facility or part of a facility has been designated as a student union, such facility or part of facility shall be used only as a student union"; and substituted "the university of Montana" for "Montana state university" preceding "at Missoula" near the end of the second sentence of subsection (2).

The 1969 amendment, in the introductory clause, deleted "of Montana" after "Montana university system"; in subdivision (1), substituted "Purchase, construct, equip, or improve" for "Acquire, erect, equip, enlarge and improve" and "these" for "those" before "other facilities"; in the second sentence of subdivision (2), substituted "and then only to the extent necessary to pay principal and interest" for "to the extent to pay only principal and interest"; and added subdivision (6).

**75-217. Title to facilities.** The title to all real estate and improvements acquired and erected under the provisions of this chapter shall be taken and held in the name of the state of Montana, except that title to fixtures and equipment purchased on a time or installment basis may remain in the vendor until the latter has been paid.

**History:** En. Sec. 2, Ch. 252, L. 1963.

**75-218. Borrowing by regents.** In carrying out the above powers, the regents may:

(1) Borrow money for any purpose or purposes stated in this chapter, including, if deemed desirable by the regents, the payment of interest on the money borrowed for a facility during the construction thereof and for one (1) year thereafter and the creation of a reserve for the payment of bond principal and interest.

(2) Make purchases on a time or installment basis.

(3) Issue bonds, notes and other securities, negotiable or otherwise, secured as provided in this section, including bearer bonds with appurtenant interest coupons, which shall be fully negotiable notwithstanding any limitation on the source of payment thereof, or fully registered bonds, or bonds registered as to ownership of principal only.

(4) Pledge for the payment of the purchase price of any facility or of the principal and interest on bonds, notes or other securities authorized in this chapter or otherwise obligate:

(a) The net income received from rents, board or both in housing, food service and other facilities.

(b) Receipts from student building, activity, union and other special fees prescribed by the regents for all students.



(c) Other income in the form of gifts, bequests, contributions, federal grants of funds, including the proceeds or income from grants of lands or other real or personal property, receipts from athletic and other contests, exhibitions and performances and collections of admissions and other charges for the use of facilities, including all use by other persons, firms and corporations for athletic and other contests, exhibitions and performances and for the conduct of their business, educational or governmental functions.

(5) Make payments on loans or purchases from any other available income not obligated for such purposes, including receipts from sales of materials, equipment and fixtures of such facilities, or from sale of the facilities themselves other than land.

(6) Secure any bonds authorized hereunder by a trust indenture between the regents and any bank or trust company within or without the state of Montana, or by a resolution establishing covenants of the regents with the holders of such bonds, relating to the construction, operation, use and insurance of the facilities, the segregation, expenditure and audit of accounts of the bond proceeds and of the income pledged, the establishment and collection of rents, charges, admissions and fees sufficient to provide net income adequate for prompt payment of principal and interest on bonds and creation and maintenance of reserves for that purpose, and such other matters as the regents may determine to be necessary or desirable for the security and marketability of the bonds.

(7) Issue and sell or exchange bonds, secured as provided in this section, for the refunding of any outstanding bonds or other obligations heretofore or hereafter issued by the regents, subject to the following provisions:

(a) Refunding bonds may, with the consent of the holders of the bonds to be refunded thereby, be exchanged at par plus accrued interest for all or part of such bonds, or may be sold at a price not less than par plus accrued interest. They may be secured by a pledge of the same revenues as the bonds refunded, or by a pledge of different or additional revenues received at the same unit of the university. Nothing herein shall require the holder of any outstanding bond to accept payment thereof or the delivery of a refunding bond in exchange therefor, except in accordance with the terms of such outstanding bond. Bonds may be issued to refund interest as well as principal actually due and payable, if the revenues pledged therefor are not sufficient, but not to refund any bonds or interest due which can be paid from revenues then on hand.

(b) Refunding bonds may bear interest at a rate lower or higher than the bonds refunded thereby, if they are issued to refund matured principal or interest for the payment of which revenues on hand are not sufficient, or if they are issued to refund before maturity bonds issued before January 1, 1965, for the purpose of releasing revenues required for payment of the outstanding bonds permitting the pledge thereof for the security of other bonds as well as the refunding bonds, subject to the rights of the holders of the outstanding bonds until those bonds are fully paid and redeemed. Except as authorized in the preceding sentence, re-

funding bonds shall not be issued unless their average annual interest rate, computed to their stated maturity dates and excluding any premium from such computation, is at least three eighths of one per cent ( $\frac{3}{8}$  of 1 %) less than the average annual interest rate on the bonds refunded thereby, computed to their respective stated maturity dates.

(c) In any case where refunding bonds are issued and sold six (6) months or more before the earliest date on which all bonds refunded thereby mature or are prepayable in accordance with their terms, the proceeds of the refunding bonds, including any premium and accrued interest, shall be deposited in escrow with a suitable bank or trust company, having its principal place of business within or without the state, which is a member of the federal reserve system and has a combined capital and surplus not less than one million dollars (\$1,000,000), and shall be invested in such amount and in securities maturing on such dates and bearing interest at such rates as shall be required to provide funds sufficient to pay when due the interest to accrue on each bond refunded to its maturity or, if it is prepayable, to the earliest prior date upon which such bond may be called for redemption from the proceeds of the refunding bonds, and to pay and redeem the principal amount of each such bond at maturity or, if prepayable, at said redemption date, and any premium required for redemption on such date; and the resolution or indenture authorizing the refunding bonds shall irrevocably appropriate for these purposes the escrow fund and all income therefrom, and shall provide for the call of all prepayable bonds in accordance with their terms. The securities to be purchased with such escrow funds shall be limited to general obligations of the United States, securities whose principal and interest payments are guaranteed by the United States, and securities issued by the following United States government agencies: banks for co-operatives, federal home loan banks, federal intermediate credit banks, federal land banks, and the federal national mortgage association. Such securities shall be purchased simultaneously with the delivery of the refunding bonds.

(d) Revenues or other funds on hand, in excess of amounts pledged by resolutions or indentures authorizing outstanding bonds for the payment of principal and interest currently due thereon and reserves securing such payment, may be used to pay the expenses incurred by the regents for the purpose of such refunding, including but without limitation the cost of advertising and printing refunding bonds, legal and financial advice and assistance in connection therewith, and the reasonable and customary charges of escrow agents and paying agents. Revenues and other funds on hand, including reserves pledged for the payment and security of outstanding revenue bonds, may be deposited in an escrow fund created for the retirement of such bonds and may be invested and disbursed as provided in subsection (c) hereof, to the extent consistent with the resolutions or indentures authorizing such outstanding bonds.

(8) Sell bonds and sell or exchange refunding bonds issued hereunder in such manner and upon such terms as to maturities, interest rates and redemption privileges, and for such price, as the regents shall determine with the approval of the state controller.

**History:** En. Sec. 3, Ch. 252, L. 1963; amd. Sec. 2, Ch. 246, L. 1965.

#### **Amendment**

The 1965 amendment substituted "athletic and other contests, exhibitions and performances" for "athletic contests" after "receipts from" in paragraph (4)(c); added the material at the end of paragraph (4)(c) commencing with "including all use"; inserted the second sentence in paragraph (7)(a); substituted "they are issued to refund before maturity bonds issued before January 1, 1965, for the purpose of releasing revenues required for payment of the outstanding bonds permitting the pledge thereof for the security of other bonds as well as the refunding bonds, subject to the rights of the holders of the outstanding bonds until those bonds are fully paid and redeemed" for "the refunding bonds are combined with an

issue of new bonds for replacements, repairs, betterment or new facilities, and the lien of such new bonds upon the net income and receipts pledged must be junior and subordinate to the lien of the outstanding bonds refunded, under the terms of the resolution or indenture authorizing the outstanding bonds, as applied to circumstances existing on the date of refunding" at the end of the first sentence of paragraph (7)(b); inserted "from the proceeds of the refunding bonds" after "called for redemption" in the first sentence of paragraph (7)(c); and made minor changes in punctuation and phraseology.

#### **Effective Date**

Section 3 of Ch. 246, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved March 9, 1965.

**75-219. State not obligated.** No obligation created under this chapter shall ever become a charge against the state of Montana, and all such obligations, including principal and interest, shall be payable solely from the sources authorized in this chapter.

**History:** En. Sec. 4, Ch. 252, L. 1963.

**75-220. Units of financing.** In creating and discharging obligations under this chapter, all of the revenue-producing facilities at each unit of the university of Montana may be considered as one; but income received at one (1) unit shall not be used to discharge obligations created for facilities at another unit.

**History:** En. Sec. 5, Ch. 252, L. 1963.

**75-221. Restriction on use of state funds.** No state funds except those specified in section 3 [75-218] shall be obligated or used for the purposes of this chapter, unless specifically directed by the legislative assembly.

**History:** En. Sec. 6, Ch. 252, L. 1963.

**75-222. Previous contracts unimpaired.** This chapter shall not impair any contract, indenture or agreement executed under previous laws.

**History:** En. Sec. 7, Ch. 252, L. 1963.

**75-223. Prior obligations not affected.** No provision of this chapter shall affect or impair:

(1) Any contract or undertaking, or the financing or agreement to finance any contract or undertaking entered into under the provisions of the laws repealed hereby prior to the effective date of this chapter;

(2) The issuance of bonds to finance facilities authorized or commenced under the laws repealed hereby prior to the effective date of this chapter.



**History:** En. Sec. 8, Ch. 252, L. 1963.

**Effective Date**

**Repealing Clause**

Section 9 of Ch. 252, Laws 1963 read "Sections 75-207, 75-208, 75-209, 75-210, 75-211, 75-212, 75-213, 75-214 and 75-215, R. C. M. 1947 are repealed."

Section 10 of Ch. 252, Laws 1963 provided the act should be in effect from and after its passage and approval. Approved March 9, 1963.

## CHAPTER 3—CONTROL OF STATE EDUCATIONAL INSTITUTIONS

- Section 75-301. General control of state institutions.  
 75-302. Local executive boards—creation, residence and powers.  
 75-303. Officers.  
 75-310. Control of expenditures of state institutions.  
 75-313. Research and development programs of educational units authorized—experimentation and testing.  
 75-314. Powers of educational units in conducting research programs.

**75-301. (841) General control of state institutions.** The general control and supervision of the Montana state university, Montana state college, Montana school of mines, western Montana college of education, eastern Montana college of education and northern Montana college, all being units of the university of Montana, and Montana state school for the deaf and blind are vested in the state board of education.

**History:** New section recommended by code commissioner, 1921; amd. Sec. 4, Ch. 160, L. 1925; amd. Sec. 1, Ch. 12, L. 1943; amd. Sec. 3, Ch. 158, L. 1945; amd. Sec. 78, Ch. 266, L. 1963.

"Montana state normal college" and "eastern Montana college of education" for "eastern Montana state normal school"; and deleted "the state vocational school for girls, state orphans' home, Montana state industrial school, Montana state training school" which followed "university of Montana."

**Amendment**

The 1963 amendment substituted "western Montana college of education" for

**75-302. (842) Local executive boards—creation, residence and powers.** There shall be an executive board consisting of three (3) members, for each of said institutions named in the preceding section, all of whom shall be appointed by the governor, by and with the advice and consent of the state board of education. The president of such institution shall not be eligible to appointment as a member of the board. At least two (2) of said members shall reside in the county where such institution is located. Said executive board shall have such immediate direction and control, other than financial, of the affairs of such institution as may be conferred on such board by the state board of education, subject always to the supervision and control of said state board.

**History:** En. Sec. 2, Ch. 73, L. 1909; re-en. Sec. 107, Ch. 76, L. 1913; re-en. Sec. 842, R. C. M. 1921; amd. Sec. 4, Ch. 158, L. 1945; amd. Sec. 3, Ch. 242, L. 1953; amd. Sec. 79, Ch. 266, L. 1963.

ing the Montana state industrial school" following "the preceding section" in the first sentence; and deleted from the end of the section a proviso reading, "provided this section shall not apply to the executive board for the state vocational school for girls."

**Amendment**

The 1963 amendment deleted "except-

**75-303. (843) Officers.** The board shall elect a chairman and shall also appoint a secretary who may or may not be a member of said board.

**History:** En. Sec. 3, Ch. 73, L. 1909; amd. Sec. 107, Ch. 76, L. 1913; re-en. Sec. 843, R. C. M. 1921; amd. Sec. 4, Ch. 242, L. 1953; amd. Sec. 80, Ch. 266, L. 1963; amd. Sec. 32, Ch. 177, L. 1965.

#### Amendments

The 1963 amendment deleted "excepting the board of the Montana state industrial school herein provided for" following "The board" at the beginning of the section.

The 1965 amendment deleted second, third, and fourth sentences reading, "The treasurer of said board shall be treasurer of the institution, and such secretary and treasurer shall give bond with good and sufficient surety for the faithful performance of his duties as such, and for the

faithful accounting for and paying over to, and for the use of said institution, all moneys received by him as treasurer. Said bond shall run to the state of Montana and shall be in such sum as may be designated by the state board of examiners, and when executed shall be approved by said board of examiners. The duties of the chairmen and secretaries of each of said executive boards shall be those usually performed by such officers, or which may be designated by the state board of education or the state board of examiners."

#### Cross-References

Bonds of state officers and employees, sec. 6-105 et seq.

**75-310. (850) Control of expenditures of state institutions.** The state board of education pursuant to the terms of appropriations of the state legislature or of Congress or of gifts of donors, shall determine the need for all expenditures and control the purposes for which all funds of said institutions shall be spent, subject to the provisions of the law dealing with the state purchasing agent, sections 82-1901 to 82-1923.

**History:** En. Sec. 13, Ch. 73, L. 1909; re-en. Sec. 110, Ch. 76, L. 1913; re-en. Sec. 850, R. C. M. 1921; amd. Sec. 1, Ch. 82, L. 1951; amd. Sec. 24, Ch. 271, L. 1963.

#### Amendment

The 1963 amendment substituted "subject to the provisions of the law dealing with the state purchasing agent, sections 82-1901 to 82-1923" at the end of the section for a sentence reading, "Subject to this control and to the provisions of the law dealing with the state purchasing agent, sections 82-1901 to 82-1923, the

state board of examiners shall let all contracts, issue all bonds for any and all buildings or improvements, and shall audit all claims to be paid from all moneys; but said state board of examiners shall have authority to confer upon the executive boards of such institutions such power and authority in contracting current expenses, and in auditing, paying and reporting bills for salaries or other expenses incurred in connection with said institutions, as may be deemed by said state board of examiners to be to the best interest of said institution."

#### 75-312. Repealed.

##### Repeal

This section (Sec. 1, Ch. 25, L. 1957), relating to the budget committee of the

state board of education, was repealed by Sec. 82, Ch. 266, Laws 1963.

**75-313. Research and development programs of educational units authorized—experimentation and testing.** Subject to the prior approval of the state board of education of the state of Montana ex officio regents of the Montana university system, the several units of the Montana university system, and the other educational institutions of the state of Montana under the control of the state board of education are authorized and empowered to sponsor, engage in, or participate with other units in programs of research and development including such experimental and testing work as may be appropriate thereto in the fields of science, health, education, and natural resources. Such authorized programs may be conducted by and through any department or school in the unit or educational institution or by and through any foundation or organization which is established for the purpose of assisting the unit or educational institution in the accomplishment of its purposes.

**History:** En. Sec. 1, Ch. 99, L. 1967.

**Title of Act**

An act authorizing programs of research and development in the fields of science, health, education and natural resources through authorized agencies of the Montana university system in co-

operation with other governmental and private agencies and providing that the same shall not be a charge upon the state of Montana.

**Cross-Reference**

Authority for institution inmates to participate, sec. 80-1410.

**75-314. Powers of educational units in conducting research programs.** Any such unit, educational institution, foundation, or organization engaged in an authorized program may:

(1) enter into contracts with private organizations, companies, firms, or individuals for conducting such authorized programs;

(2) subject to the prior approval of the governing board of such institution, conduct activities concerning such authorized programs within any of the penal, corrective, or custodial institutions of the state of Montana and engage the voluntary participation of the inmates thereof in such programs;

(3) accept contributions, grants, or gifts from any private organization, company, firm, or individual, or any governmental agency or department for such programs for the advancement of research and development in the fields of science, health, education, and natural resources; and enter into agreements or co-operative undertakings with any private organization, company, firm, or individual or any governmental agency or department with respect thereto, including the matching of funds from such sources with funds otherwise available to it;

(4) retain, accumulate, invest, commit and expend the funds and proceeds from such authorized programs, including the acquisition of real and personal property reasonably required for the accomplishment of the same, provided, however, that no portion thereof may be diverted from or used for purposes other than those authorized herein, and that no program authorized or undertaken pursuant to the provisions hereof shall ever become a charge upon or obligation of the state of Montana or the general funds appropriated for the normal operation of such unit or agency.

**History:** En. Sec. 2, Ch. 99, L. 1967.

## CHAPTER 4—THE MONTANA UNIVERSITY SYSTEM

Section 75-401. Institutions constituting university system.

75-402. Names of units of university system.

**75-401. (852) Institutions constituting university system.** The university at Missoula, the state university at Bozeman, the college of mineral science and technology at Butte, the college at Dillon, the college at Billings and the college at Havre, and such departments of said institutions as may hereafter be organized, shall constitute the Montana university system. All references in the Revised Codes of Montana 1947 to the "university of Montana" shall mean "the Montana university system."

**History:** En. Sec. 1, Ch. 92, L. 1913: 1, Ch. 6, L. 1927; amd. Sec. 1, Ch. 3, re-en. Sec. 852, R. C. M. 1921; amd. Sec. L. 1965.



**Amendment**

The 1965 amendment deleted "state" before "university at Missoula"; substituted "state university" for "college of agriculture and mechanic arts" before "at Bozeman"; substituted "college of mineral science and technology" for "school of mines"; deleted "normal" before "college at Dillon"; substituted "college" for

"eastern Montana state normal school" before "at Billings"; substituted "college at Havre" for "northern agricultural and manual training school at Fort Assiniboine"; substituted "Montana university system" for "university of Montana, under the name and style of university of Montana" at the end of the first sentence; and added the second sentence.

**75-402. (852.1) Names of units of university system.** The legal names of the units of the Montana university system shall be as follows:

Unit at Missoula, university of Montana.

Unit at Bozeman, Montana state university.

Unit at Butte, Montana college of mineral science and technology.

Unit at Dillon, western Montana college.

Unit at Billings, eastern Montana college.

Unit at Havre, northern Montana college.

**History:** En. Sec. 1, Ch. 28, L. 1935; amd. Sec. 2, Ch. 3, L. 1965.

**Amendment**

The 1965 amendment substituted "Montana university system" for "university of Montana" in the preliminary clause; substituted "university of Montana" for "Montana State University"; substituted "Montana state university" for "Montana State College"; substituted "college of mineral science and technology" for "School of Mines"; deleted "of Education" following "western Montana col-

lege" and following "eastern Montana college"; deleted "Fort Assiniboine and" preceding "Havre" in the final line; and made another minor change in phraseology.

**Repealing Clauses**

Section 3 of Ch. 3, Laws 1965 read "Section 75-402.1 R. C. M. 1947, is repealed."

Section 4 of Ch. 3, Laws 1965 repealed all acts and parts of acts in conflict therewith.

**75-402.1. Repealed.****Repeal**

This section (Sec. 1, Ch. 30, L. 1949), changing the names of schools at Dillon

and Billings, was repealed by Sec. 3, Ch. 3, Laws 1965.

**75-403. (853) Control vested in state board of education, etc.****Delegation of Powers**

Section 75-107 restricts the state board of education from delegating to college

officials its power to select teachers and instructors. *Brown v. State Board of Education*, 142 M 547, 385 P 2d 643.

**75-410. (860) Repealed.****Repeal**

This section (Sec. 1, Ch. 123, L. 1917; Sec. 1, Ch. 49, L. 1923; Sec. 1, Ch. 41, L.

1925), relating to the refunding of fares to students, was repealed by Sec. 1, Ch. 127, Laws 1967.

## CHAPTER 5—UNIVERSITY OF MONTANA—LAW AND FORESTRY SCHOOLS

- Section 75-506.1. Indians permitted to attend without payment of fees—selection.  
 75-506.2. Determination of residence—intent of act.  
 75-506.3. Definition of terms.  
 75-506.4. Presumptions as to domicile.  
 75-506.5. Evidence as to domiciliary intent—changes in status.  
 75-506.6. Residence of minors—period of residence required to change status.  
 75-506.7. Appeal.

**75-506.1. Indians permitted to attend without payment of fees—selection.** Any person of one-fourth ( $\frac{1}{4}$ ) Indian blood or more who shall have completed the regular course of a four-year accredited high school or federal Indian school in Montana, and shall have shown evidence of studious and industrious habits, shall be entitled, upon the recommendation of the state board of education, to enroll in any of the units of the Montana university system for four (4) years without the payment of fees required of students attending such institutions. The number of such Indians chosen each year shall not exceed ninety-six (96). Rules and regulations governing the selection of these pupils shall be formulated by the state board of education and the state superintendent of public instruction is hereby designated as the agent of the board in carrying out this act.

**History:** En. Sec. 1, Ch. 108, L. 1951; amd. Sec. 1, Ch. 87, L. 1961; amd. Sec. 1, Ch. 129, L. 1967; amd. Sec. 1, Ch. 173, L. 1969.

#### Amendments

The 1967 amendment deleted "who shall receive a diploma and" after "or more" in the first sentence; substituted "forty-eight (48)" for "twenty-four (24)" and

deleted "of whom at least six (6) shall be enrolled for the purpose of training to become teachers" at the end of the second sentence.

The 1969 amendment substituted "Montana university system" for "university of Montana" in the first sentence; and at the end of the second sentence, substituted "ninety-six (96)" for "forty-eight (48)."

**75-506.2. Determination of residence—intent of act.** It is the intent of this act that the units of the university of Montana shall apply uniform rules, as prescribed in this act and not otherwise, in determining whether students shall be classified as resident or nonresident students for the purpose of charging tuition and additional fees for nonresident students as authorized by section 75-506, R. C. M. 1947.

**History:** En. Sec. 1, Ch. 164, L. 1965.

#### Title of Act

An act to establish presumptions and

rules to aid in determining the resident status of students attending the university of Montana for tuition and fee purposes and providing an effective date.

**75-506.3. Definition of terms.** Wherever used in this act:

"Unit" shall mean a unit of the Montana university system.

"Resident student" shall mean a student who has been domiciled in Montana for one (1) year or more immediately preceding registration at any unit of the Montana university system for any term or session for which resident classification is claimed, provided, that attendance in Montana as a full or part-time student at any college, university, or other institution of higher education shall not alone be sufficient to qualify for residence in Montana. Any graduate of a Montana high school whose parents, parent or guardian have resided in the state of Montana at least one (1) full year of the two (2) years immediately preceding his graduation from high school shall also be entitled to classification as a resident student for tuition and fee purposes, for a period not to exceed four (4) academic years provided the student remains in continuous attendance at a unit of the Montana university system for such period of time.

"Domicile" shall mean a person's true, fixed, and permanent home and place of habitation.

"Minor" shall mean a male or female person who has not obtained the age of twenty-one (21) years.

"Qualified person" shall mean a person legally qualified to determine his own domicile.

"Emancipated minor" shall mean a person under the age of twenty-one (21) years who supports himself from his own earnings or is married. Any person who receives more than twenty-five per cent (25%) of the cost of supporting himself from any person other than an agency of the government shall not be considered an "emancipated minor" under this act.

History: En. Sec. 2, Ch. 164, L. 1965; amd. Sec. 2, Ch. 299, L. 1967; amd. Sec. 1, Ch. 139, L. 1969.

#### Amendments

The 1967 amendment substituted "Montana university system" for "university of Montana" in the sentence defining "unit"; in the sentence defining "resident student," substituted "Montana university system" for "university of Montana," and substituted the passage beginning "attendance in Montana as a full or part time student" for "that attendance at a unit of the university of Montana shall not alone be sufficient to qualify for residence

in Montana" after "provided that"; added the definition of "emancipated minor" at the end of this section; and inserted the arabic number after the written number throughout the section.

The 1969 amendment, in the second sentence of the second paragraph, inserted "full year" after "at least one (1)" and substituted "for a period not to exceed \* \* \* such period of time" for a proviso which read, "provided that said student's parents or guardian have not established a domicile in another state which will give him the right to be classified as a resident student in that state" at the end.

**75-506.4. Presumptions as to domicile.** Unless the contrary appears to the satisfaction of the registering authority of the unit at which a student is registering, it shall be presumed that:

(1) The domicile of a minor is that of his father, or if no father that of his mother, or if there is a guardian of his person that of such guardian; provided that the court appointing such guardian shall certify that the primary purpose of such appointment is not to qualify such minor as a resident of this state; or if one parent has custody of the minor that of such parent.

(2) The domicile of a married woman is normally that of her husband; provided, however, that a resident woman student who marries a nonresident does not by that fact alone lose her resident status for tuition and fee purposes for a period of four (4) years after said marriage.

(3) A person does not gain or lose resident status by reason of his presence in any state or country while a member of the armed forces of the United States; provided, that a member of the armed forces may obtain resident status for himself, his spouse, or his children, after living in Montana for one (1) year, and complying with the provisions of this act.

(4) The establishment of a new domicile in Montana by a qualified person formerly domiciled in another state has occurred if he is physically present in Montana without a present intention to return to such other state or to acquire a domicile at some other place outside of Montana.

(5) Once established a domicile has not been lost by mere absence unaccompanied by intention to establish a new domicile.

(6) Any graduate of a Montana high school who shall apply for admittance to a unit of the Montana university system within one (1)



year after his or her graduation and whose parent or parents, having custody of such graduate, has or have resided in the state of Montana in at least one (1) full year of the two (2) years immediately preceding such graduate's graduation from a Montana high school, shall be presumed to be a resident student for such time as he or she attends any unit of the university system during the regular school year for the next four (4) consecutive years.

**History:** En. Sec. 3, Ch. 164, L. 1965; amd. Sec. 3, Ch. 299, L. 1967; amd. Sec. 3, Ch. 139, L. 1969.

#### **Amendments**

The 1967 amendment added the proviso at the end of subdivision (2), and added subdivision (6).

The 1969 amendment, in subsection (6), inserted "full year" after "at least one (1)" and deleted "or until his or her parent or parents, having custody, have established such residence in another state as will classify such student as a resident student of the latter state" at the end.

**75-506.5. Evidence as to domiciliary intent—changes in status.** To aid the units in deciding whether a student, or parent, or guardian of the person of a student, is domiciled in Montana the following rules shall be applied:

(1) Nonpayment of Montana income tax by a person whose income is sufficient to be taxed is highly persuasive evidence of non-Montana domicile.

(2) A qualified person cannot establish a new domicile in Montana if he lacks the intention of so doing.

(3) After a student has registered at a unit his classification for tuition and fee purposes remains unchanged in the absence of satisfactory evidence to the contrary. Such evidence shall be reduced to writing and filed with the registering authority of the unit. Changes in classification established by such evidence, and whether from resident to nonresident or the reverse, shall be in writing, signed by the registering authority of the unit, and shall be given effect at the time of the student's next registration.

**History:** En. Sec. 4, Ch. 164, L. 1965.

**75-506.6. Residence of minors—period of residence required to change status.** A minor shall qualify for a change in status only if his parents or legal guardian or person having legal custody shall have completed the requirements for establishing domicile as defined in this act. A minor or adult student who has registered at any unit of the university of Montana shall not qualify for a change in his classification for tuition purposes unless he shall have completed twelve continuous months of residence while not attending a unit of the university of Montana or while serving in the armed forces.

**History:** En. Sec. 5, Ch. 164, L. 1965.

#### **Effective Date**

Section 6 of Ch. 164, Laws 1965 pro-

vided the act should be in effect from and after its passage and approval. Approved March 4, 1965.

**75-506.7. Appeal.** Any student whose request for classification as a resident student is denied by the registering authority of a unit of the Montana university system shall have the right of appeal from such

denial to the executive secretary of the regents of the Montana university system. Immediately upon rejection and at the request, of the student, the registering authority shall forward a copy of his decision, together with his complete file on the student requesting resident status to the executive secretary. The executive secretary may accept other evidence of residence from either the student, the registering authority, or other interested persons. Within thirty (30) days of the receipt of the decision of the registering authority, the executive secretary shall determine the resident status of the student and shall notify the student and the registering authority of his decision, which may be appealed to the full board of regents if said board in its discretion, agrees to entertain such an appeal.

**History:** En. 75-506.7 by Sec. 1, Ch. 299, L. 1967; amd. Sec. 2, Ch. 139, L. 1969.

#### **Title of Act**

An act to provide a uniform method of appeal for university students classified as nonresidents for tuition purposes; and amending sections 75-506.3 and 75-506.4, R. C. M. 1947, enacted as sections 2 and 3

of chapter 164, Laws of 1965, relating to rules for determining resident status of university students, to enlarge the definition of persons presumed to be residents.

#### **Amendments**

The 1969 amendment deleted "automatic" before "appeal" in the first sentence and substituted "and at the request, of the student," for "of such request" in the second sentence.

### **75-508. (868) Appropriations for support of university.**

#### **Compiler's Notes**

Chapter 372, Laws 1969 appropriated \$2,600,000 from the earmarked revenue fund to Montana state university for construction of physical education, athletic, and recreation facilities, provided for a maximum student assessment fee for the

facilities, and provided that construction of the facilities should begin only upon approval of the board of education ex officio regents and the affirmative vote of a majority of the student body voting on the issue.

## **CHAPTER 6—STATE BUREAU OF MINES AND GEOLOGY**

Section 75-606. Appointment of director, assistants and employees.

75-607. Objects and duties of bureau.

**75-606. (883) Appointment of director, assistants and employees.** The state board of education shall have power and it shall be its duty to appoint a certified professional geologist or registered mining engineer as the director of the said bureau, who shall be designated as the state geologist, and to appoint such assistants and employees as may be necessary, and to fix the compensation of all persons connected with the said bureau.

**History:** En. Sec. 2, Ch. 161, L. 1919; re-en. Sec. 883, R. C. M. 1921; amd. Sec. 1, Ch. 287, L. 1969.

#### **Amendments**

The 1969 amendment substituted "certi-

fied professional geologist or registered" for "qualified" before "mining engineer" and inserted "who shall be designated as the state geologist" after "the said bureau."

**75-607. (884) Objects and duties of bureau.** The bureau shall have for its object and duties the following:

1 to 3. \* \* \* [Same as parent volume.]

4. To study the geological formations of the state, with special reference to their economic mineral resources, both metallic and nonmetallic, and with special reference to ground water.

5 to 12. \* \* \* [Same as parent volume.]

Subject to the same limitations and conditions as above enumerated, the bureau of mines and geology shall carry on field examinations for other branches and agencies of the government of the state.

Traveling expenses incurred by the examiner, including meals, lodging and incidental expenses, shall be paid by the department requesting the examination from available appropriations upon the presentation of claims in the ordinary form.

**History:** En. Sec. 3, Ch. 161, L. 1919;  
re-en. Sec. 884, R. C. M. 1921; amd. Sec.  
1, Ch. 58, L. 1937; amd. Sec. 2, Ch. 287, L.  
1969.

#### Amendments

The 1969 amendment added "and with special reference to ground water" at the end of paragraph 4.

### CHAPTER 7—MONTANA STATE UNIVERSITY—MONTANA WOOL LABORATORY—AGRICULTURAL EXPERIMENT STATIONS

Section 75-706. Designation of station as beneficiary—income from sale of products.  
75-723. Disposal of moneys received by laboratory.

**75-706. (894) Designation of station as beneficiary—income from sale of products.** Until otherwise provided by law the agricultural experiment station, now established at Bozeman, Gallatin county, state of Montana, shall be the beneficiary of the funds in said act mentioned, and shall use and disburse said funds only for the purposes and in the manner provided in said act. The treasurer of the executive board of the agricultural college and agricultural experiment station, at said city of Bozeman, is hereby authorized to receive and shall be the custodian of said funds, and he shall account for said funds and make reports to the secretary of agriculture, as required by said act of Congress.

Any income received from the sale of agricultural products by the agricultural experiment station at Bozeman or by any of the agricultural substations shall be deposited in the state treasury and shall be used to defray the costs of operating the station and substations.

**History:** En. Sec. 2, Ch. 64, L. 1907;  
Sec. 741, Rev. C. 1907; re-en. Sec. 894,  
R. C. M. 1921; amd. Sec. 235, Ch. 147, L.  
1963.

#### Amendment

The 1963 amendment added the second paragraph.

**75-723. Disposal of moneys received by laboratory.** All moneys collected by the Montana wool laboratory shall be paid to the state treasurer and used by the wool laboratory for the payment of salaries and expenses, including purchase of equipment and supplies, and erection of necessary buildings.

In addition, there is hereby appropriated for the Montana wool laboratory, all federal funds which may by the federal government be provided for the maintenance and operation of said Montana wool laboratory and also all funds which may be received by said laboratory or for its use and benefit for special purposes incident to, and in harmony with the purpose of said laboratory.



**History:** En. Sec. 10, Ch. 166, L. 1945; amd. Sec. 238, Ch. 147, L. 1963.

**Amendment**

The 1963 amendment deleted the former first paragraph, for text of which see parent volume; and, in the present first

paragraph, substituted "used by the wool laboratory for" for "by him shall be set aside in a special trust fund, from which fund there is hereby appropriated for the use of said wool laboratory as much thereof as may be necessary for."

## CHAPTER 8—MONTANA GRAIN INSPECTION LABORATORY

Section 75-807. Fees chargeable for making tests.

75-811. Disposition of fees and annual report of expenditures.

**75-807. (908) Fees chargeable for making tests.** Samples of wheat sent in by individuals, the results from the testing of which samples are of no general or market value, shall be charged a fee sufficient to cover the cost of making the test. Fees so collected are to be deposited in the earmarked revenue fund to be used in support of the laboratory.

**History:** En. Sec. 7, Ch. 119, L. 1913; re-en. Sec. 908, R. C. M. 1921; amd. Sec. 236, Ch. 147, L. 1963.

**Amendment**

The 1963 amendment substituted "in the earmarked revenue fund" for "in a

fund in charge of the director of the experiment station" in the second sentence; and deleted a third sentence reading, "Any surplus remaining in this fund at the close of the state's biennium shall be turned over to the state treasurer and shall revert to the state general fund."

**75-811. (912) Disposition of fees and annual report of expenditures.** All fees collected by the Montana grain inspection laboratory for the tests conducted shall be deposited in the earmarked revenue fund to be used in the support of the laboratory. A full report of the expenditures of the laboratory with a statement of the source of the income, whether from state appropriations or from fees collected, shall be made a part of the annual report.

**History:** En. Sec. 9, Ch. 54, L. 1917; re-en. Sec. 912, R. C. M. 1921; amd. Sec. 237, Ch. 147, L. 1963.

**Amendment**

The 1963 amendment substituted "in the earmarked revenue fund" for "in a

fund in charge of the director of the laboratory" in the first sentence; and deleted a former third sentence reading, "Any surplus remaining at the close of the state's biennium shall be turned over to the state treasurer and shall revert to the general fund of the state."

## CHAPTER 10—WESTERN MONTANA COLLEGE

**75-1006. (929) Acceptance of public lands.**

**Compiler's Notes**

Sections 75-201 to 75-215, contained in the reference to chapter 2 of Title 75 in this section in the parent volume have

been repealed. Sections 75-201 to 75-206 were repealed by Sec. 9, Ch. 232, Laws 1961; sections 75-207 to 75-215 were repealed by Sec. 9, Ch. 252, Laws 1963.

## CHAPTER 13—THE PUBLIC SCHOOLS—SUPERINTENDENT OF PUBLIC INSTRUCTION

Section 75-1301. Election, qualification, oath.

75-1303. Official staff.

75-1315. Apportionment of school interest and income moneys.

**75-1301. (931) Election, qualification, oath.** There shall be chosen by the qualified electors of the state, at the time and place of voting for

members of the legislature, a superintendent of public instruction, who shall have attained the age of thirty years at the time of his election, and shall have resided within the state two years next preceding his election, and is the holder of a state certificate of the highest grade, issued in some state, and recognized by the state board of education, or is a graduate of some university, college, or normal school recognized by the state board of education as of equal rank with a unit of the university of Montana. He shall hold his office at the seat of government for the term of four years from the first Monday in January following his election, and until his successor is elected and qualified. Before entering upon his duties, he shall take the oath of a civil officer.

**History:** En. Sec. 1700, Pol. C. 1895; re-en. Sec. 805, Rev. C. 1907; amd. Sec. 200, Ch. 76, L. 1913; re-en. Sec. 931, R. C. M. 1921; amd. Sec. 33, Ch. 177, L. 1965.

#### **Amendment**

The 1965 amendment substituted "a unit of the university of Montana" at the end of the first sentence for "the university of Montana or the state normal school"; deleted from the end of the sec-

tion a clause reading, "and give bond in the penal sum of three thousand dollars, with not less than two sureties, to be approved by the governor and attorney general"; and corrected a typographical error going back at least to the 1935 Revised Codes.

#### **Cross-References**

Bonds of state officers and employees, sec. 6-105 et seq.

**75-1303. (933) Official staff.** The superintendent of public instruction shall have the power to appoint one or more assistant superintendents one of whom may be designated as assistant superintendent for vocational education. In addition, he may appoint one high school supervisor, one elementary supervisor, one music supervisor, and such other assistants as may be required to aid in carrying out the duties of his office. Such assistant superintendents, supervisors and assistants shall perform such duties pertaining to the office as the superintendent may direct. Such music supervisor shall be qualified to perform the following duties: Supervise the teaching of music in the graded, rural and high schools of this state, and assist the teachers and faculty in said schools in establishing and carrying out a progressive music program for the benefit of all children in the public schools of the state, and perform all other duties required relating to music education in the public schools. The music supervisor must possess the following qualifications: A graduate in public school music from an accredited college or university, and said supervisor shall have had five (5) years teaching experience in public school music. The music supervisor shall perform only such duties as apply to music supervision.

For the purposes of organization of the staff and administration of the duties and services of the superintendent of public instruction, there is hereby created under the office of the superintendent of public instruction a department of public instruction, of which department the superintendent of public instruction shall be the executive and administrative head.

**History:** En. Sec. 201, Subd. 2, Ch. 76, L. 1913; amd. Sec. 4, Ch. 196, L. 1919; re-en. Sec. 933, R. C. M. 1921; amd. Sec. 1, Ch. 149, L. 1937; amd. Sec. 1, Ch. 68, L. 1959; amd. Sec. 1, Ch. 316, L. 1969.

#### **Amendments**

The 1969 amendment divided the former first sentence into the present first and second sentences; in the first sentence, deleted "one deputy" and added "one or

more assistant superintendents \* \* \* vocational education"; inserted "In addition, he may appoint" at the beginning of the second sentence, substituted "one elementary supervisor" for "one rural school su-

pervisor"; and, at the beginning of the present third sentence, substituted "Such assistant superintendents" for "Such deputy."

## 75-1308. (938) Printing of school laws.

### Cross-References

Printing defined, sec. 19-103.1.

## 75-1309, 75-1310. (939, 940) Repealed.

### Repeal

Sections 75-1309 and 75-1310 (Secs. 1712, 1713, Pol. C. 1895; Sec. 202, Ch. 76, L. 1913), relating to report to governor by

the superintendent of public instruction, were repealed by Sec. 44, Ch. 93, Laws 1969.

## 75-1313. (943) County superintendents.

### Appeal from Superintendent's Decision

While this section gives the state superintendent of public instruction the power to "decide all appeals from the decisions of the county superintendent," section 75-1518 allows an appeal from the superintendent's decision to the state courts. *Potter v. Miller*, 145 M 197, 399 P 2d 994.

### Grounds for Appeal

Where state superintendent of public instruction approved county superintend-

ent's attachment under section 75-1522 of abandoned territory to a contiguous district rather than to another more convenient one, thus requiring children to travel fourteen miles farther each way to get to more overcrowded schools and worked an "undue hardship" on both parents and children, this constituted sufficient facts for appeal from state superintendent's decision as authorized by section 75-1518. *Potter v. Miller*, 145 M 197, 399 P 2d 994.

**75-1315. (945) Apportionment of school interest and income moneys.** He shall, between the first and tenth day of February of each year, apportion the state school interest and income moneys among the several counties of the state, in proportion to the number of children of school age in each as shown by the last enumeration authorized by law. It shall be the duty of the state board of land commissioners to order a warrant drawn on or before the tenth day of January of each year in the amount of the state school interest and income moneys subject to apportionment. The state treasurer shall certify such apportionment to the several county treasurers not later than the first Monday in March; provided, that the several county treasurers have fully complied with section 84-4401, in which case the county treasurers, upon receiving notice from the state treasurer of the amounts due their counties from state school interest and income moneys, may deduct said amount from the amount found due the state by their counties and remit the balance to the state treasurer. The superintendent of public instruction shall certify to the county superintendent of schools of each county, the amount apportioned to that county.

**History:** En. Sec. 1714, Pol. C. 1895; re-en. Sec. 819, Rev. C. 1907; re-en. Sec. 202, Ch. 76, L. 1913; re-en. Sec. 945, R. C. M. 1921; amd. Sec. 226, Ch. 147, L. 1963.

### Amendment

The 1963 amendment substituted "state

school interest and income moneys" for "state school fund" in three places; substituted "order a warrant drawn" in the second sentence for "notify the state auditor"; deleted from the end of the second sentence a clause reading, "and the said



auditor, immediately upon receipt of such notification, shall issue his warrant on the state treasurer for the said amount"; and made minor changes in phraseology.

## CHAPTER 14—EXCEPTIONAL CHILDREN—COURSES OF INSTRUCTION FOR

Section 75-1406. Crippled children—home instruction—transportation—tax levy.

**75-1406. Crippled children — home instruction — transportation — tax levy.** The board of trustees of any school district, at its discretion, is authorized to assist the education of crippled children of five (5) to sixteen (16) years of age, who, because of physical handicap cannot regularly attend public school by furnishing home tutorial service for such crippled children or by furnishing transportation to and from adequate school facilities locally or elsewhere within, or outside of the state, whichever best meets the child's needs as determined by the said board of trustees together with the superintendent of schools based upon recommendations of the division of service for crippled children of the Montana state board of health, and if in any school district there is a need of such special provision for crippled children located therein, then the board of county commissioners may levy a tax not to exceed one (1) mill on the dollar on all taxable property, within the district, in addition to all other levies, for school purposes, for the support and maintenance of such crippled children's education, provided that the board of school trustees of any such district requiring such levy must call an election in the manner prescribed by law for such extra levies for the purpose of obtaining the approval of the district to the making of such additional levy and provided further that such election must be held before the 1st day of July.

**History:** En. Sec. 1, Ch. 163, L. 1949; amd. Sec. 1, Ch. 183, L. 1969.

### Amendments

The 1969 amendment inserted "or outside of" before "the state" in the first sentence.

## CHAPTER 15—COUNTY SUPERINTENDENT OF SCHOOLS

### 75-1518. (966) Controversies.

#### Appeal from Superintendent's Decision

Besides section 75-1313, which gives the state superintendent of public instruction the power to "decide all appeals from the decisions of the county superintendent," this section allows an appeal from the superintendent's decision to the state courts. *Potter v. Miller*, 145 M 197, 399 P 2d 994.

#### Consolidation Election

School elections and procedures therefor are not administrative matters governed by this section and the validity of such elections is determined by the laws of general elections as set forth in section

23-1704. *Woolsey v. Carney*, 141 M 476, 378 P 2d 658.

#### Grounds for Appeal

Where state superintendent of public instruction approved county superintendent's attachment under section 75-1522 of abandoned territory to a contiguous district rather than to another more convenient one, thus requiring children to travel fourteen miles farther each way to get to more overcrowded schools and worked an "undue hardship" on both parents and children, this constituted sufficient facts for appeal from state superintendent's decision as authorized by this section. *Potter v. Miller*, 145 M 197, 399 P 2d 994.

**75-1522. (970) Abandonment of school districts.****Grounds for Review**

The fact that a district is contiguous is not the only requirement for attaching an abandoned district to it, so that where parents sought to have abandoned territory attached to another contiguous district from one to which it had been attached by the county superintendent and approved by the state superintendent of public instruction, thus requiring children to travel fourteen miles farther each

way to get to more overcrowded schools and worked an "undue hardship" on both parents and children, there were sufficient facts alleged in the petition to move the discretion of the district court to grant a writ of review. *Potter v. Miller*, 145 M 197, 399 P 2d 994.

**References**

*Woolsey v. Carney*, 141 M 476, 378 P 2d 658.

**CHAPTER 16—SCHOOL TRUSTEES**

**Section 75-1604. Elections in districts of second and third class—nominations.**

75-1614. Vacancy in school board.

75-1618. Qualifications of electors.

75-1620. Expenses of election.

75-1621. Organization.

75-1622. Meetings.

75-1630. Transfer of funds.

75-1632. Duties of trustees.

75-1637. Letting contracts and furnishing supplies, trustees not to be interested in—advertising for bids required, when.

75-1641. Transportation of pupils living near school—charges to parents—preference to children farthest from school.

75-1642. Regular bus routes not used to capacity to be used.

75-1643. Standards for vehicles and drivers.

75-1644. Budgeting and accounting for reimbursable transportation.

75-1645. Purchase of liability insurance authorized—payment of premiums.

75-1646. Reserve fund for public employees' retirement.

75-1647. Use of reserve fund.

**75-1604. (988) Elections in districts of second and third class—nominations.** In districts of the second and third class, the names of all candidates for membership on the school board must be received and filed by the clerk and posted at each polling place at least twenty days next preceding the election. Any five qualified electors of the district may file with the clerk the nominations of as many persons as are to be elected to the school board at the ensuing election.

**History:** En. Sec. 502, Ch. 76, L. 1913; re-en. Sec. 988, R. C. M. 1921; amd. Sec. 1, Ch. 46, L. 1965.

from five to twenty days before the election.

**References**

*State ex rel. Running v. Jacobson*, 140 M 221, 370 P 2d 483, 485.

**Amendment**

The 1965 amendment changed the date specified at the end of the first sentence

**75-1605. (989) Conduct of election.****Validity of School Election**

The validity of school elections is determined by the laws of general elections as set forth in section 23-1704. *Woolsey v. Carney*, 141 M 476, 378 P 2d 658.

**References**

*State ex rel. Running v. Jacobson*, 140 M 221, 370 P 2d 483, 485.

**75-1608. (992) Board of trustees to call election—notice of.****References**

*State ex rel. Running v. Jacobson*, 140 M 221, 370 P 2d 483, 485.

**75-1612. (996) Poll and tally list, certificate of judges, etc.****Failure To Canvass Bond Election**

Failure of board of trustees to canvass vote as required by statute did not make bonds issued by school district illegal and void. *Long v. School District No. 44*, 149 M 220, 425 P 2d 822.

**Withdrawal of Votes**

Where the judge's intentional withdrawal of five votes "for consolidation," rather than drawing by lot as required by this section, left the result of the election doubtful, then the election was void. *Woolsey v. Carney*, 141 M 476, 378 P 2d 658.

**75-1614. (998) Vacancy in school board.** A vacancy in the office shall be filled by appointment by the county superintendent of schools; except that in districts of the first and second class, such appointment shall be made by a majority of the remaining members of said board, if those remaining constitute a majority of the total number of the board. The trustee so appointed shall hold office until the next annual election, at which election there shall be elected a school trustee for the unexpired term. When any vacancy occurs in the office of trustee of any school district by death, resignation, failure to elect at the proper time, removal from the district, or other cause, the fact of such vacancy shall be immediately certified by the clerk of the school district, to the county superintendent, or to the remaining members of the board in districts of first or second class, and the county superintendent, or the remaining members of the board in districts of first or second class, shall immediately appoint in writing, some competent person, who shall qualify and serve until the next annual school election. The county superintendent or the board shall at the time notify the clerk of the school district of every such appointment; provided, that absence from the school district for sixty consecutive days, or failure to attend three consecutive meetings of the board of trustees without good excuse, shall constitute a vacancy in the office of trustee.

**History:** Ap. p. Sec. 1782, Pol. C. 1895; amd. Sec. 13, p. 143, L. 1897; Secs. 862 and 1019, Rev. C. 1907; amd. Sec. 502, Ch. 76, L. 1913; amd. Sec. 11, Ch. 196, L. 1919; re-en. Sec. 998, R. C. M. 1921; amd. Sec. 1, Ch. 275, L. 1967.

**Amendments**

The 1967 amendment substituted "except" for "provided" after "superintendent of schools" and substituted "made" for

"subject to confirmation" before "by a majority" in the first sentence; substituted "by the clerk of the school district \* \* \* of the first or second class" for "to the county superintendent by the clerk of the school district, and the county superintendent" after "immediately certified" in the third sentence; and inserted "or the board" after "county superintendent" in the last sentence of this section.

**75-1618. (1002) Qualifications of electors.** Every citizen of the United States of the age of twenty-one years or over who has resided in the state of Montana for one year, and thirty days in the school district next preceding the election, and who is a registered voter, may vote thereat.

**History:** En. Sec. 1777, Pol. C. 1895; amd. Sec. 8, p. 138, L. 1897; re-en. Sec. 857, Rev. C. 1907; amd. Sec. 502, Ch. 76, L. 1913; re-en. Sec. 1002, R. C. M. 1921; amd. Sec. 1, Ch. 83, L. 1939; amd. Sec. 1, Ch. 65, L. 1941; amd. Sec. 1, Ch. 143, L. 1965.

**Amendment**

The 1965 amendment inserted "and who is a registered voter" near the end of the section.



**75-1620. (1004) Expenses of election.** All the expenses necessarily incurred in the matter of holding any and all elections for school trustees, extra levies, bonds, school sites, disposal of property, or any other election provided by law in any school district, high school building district, or county high school, shall be paid out of the general school funds of the district, or in the case of a high school building district, out of the high school general funds; or in the case of county high schools, out of the county high school general fund. In its discretion, the board of trustees may pay judges of any such election at a rate not to exceed one dollar (\$1) per hour of service in connection with any such election.

**History:** Ap. p. Sec. 14, p. 145, L. 1897; re-en. Sec. 866, Rev. C. 1907; amd. Sec. 502, ch. 76, L. 1913; re-en. Sec. 1004, R. C. M. 1921; amd. Sec. 1, Ch. 104, L. 1963.

#### Repealing Clause

Section 2 of Ch. 104, Laws 1963 repealed all acts and parts of acts in conflict therewith.

#### Amendment

The 1963 amendment substantially rewrote this section. For previous text, see parent volume.

#### Effective Date

Section 3 of Ch. 104, Laws 1963 provided the act should be in effect from and after its passage and approval. Approved March 1, 1963.

**75-1621. (1005) Organization.** The school trustees shall meet annually after due and legal notice at a time between the school trustee election and on or before the third Saturday in April and organize by choosing one of their number chairman, and a competent person, not a member of the board, as clerk. The chairman shall preside at all the meetings of the board, and shall perform such duties as usually pertain to such officer, and in accordance with the customary rules of order.

**History:** Ap. p. Sec. 1793, Pol. C. 1895; amd. Sec. 4, p. 59, L. 1899; re-en. Sec. 871, Rev. C. 1907; amd. Sec. 504, Ch. 76, L. 1913; re-en. Sec. 1005, R. C. M. 1921; amd. Sec. 1, Ch. 46, L. 1967.

#### Amendments

The 1967 amendment inserted "after due and legal notice at a time between the school trustee election and on or before" after "annually" in the first sentence.

**75-1622. (1006) Meetings.** The board shall hold, in districts of the first class, at least one and not more than five meetings each month for the transaction of its business; and in all districts at least four meetings each year shall be held, to wit: On the third Saturdays of April, July, October and January, at such places and hours as shall be fixed by the board. A special meeting of the board may be held upon the call of the chairman or any two members of the board; at least forty-eight hours' written notice shall be given to each member of the board of any special meetings, and no business transacted by the board shall be valid unless transacted at a regular or special meeting thereof. All school trustees regularly qualified for office in first, second, and third class districts, including the extra high school trustees provided for in section 75-4601, R.C.M. 1947, who live three (3) miles from the meeting place shall be entitled to mileage at the rate of eight cents (8¢) per mile for travel from their homes to the meeting place and return, for attendance at all regular and special meetings of the board of trustees held according to law. The payment for mileage may accumulate until the end of the fiscal year at the discretion of the trustee.

History: Ap. p. Sec. 1794, Pol. C. 1895; amd. Sec. 5, p. 59, L. 1899; re-en. Sec. 872, Rev. C. 1907; amd. Sec. 505, Ch. 76, L. 1913; re-en. Sec. 1006, R. C. M. 1921; amd. Sec. 1, Ch. 264, L. 1967.

#### Amendments

The 1967 amendment added the last two sentences to this section.

#### Failure to Meet

Where record showed that there was no meeting of the school board, either special or regular, as required by this section, prior to schoolteacher being summarily fired on ground of incompetency pursuant to section 75-2411, board's dismissal of teacher was void for want of jurisdiction. Wyatt v. School District No. 104, 148 M 83, 417 P 2d 221, 223, 225.

**75-1630. (1013) Transfer of funds.** Children may attend public elementary schools in districts in the county outside of the district in which they reside, or in a district in an adjoining county, or in a district in a county in another state when the district in such other state adjoins the district in which they reside, or is situated in a county in such other state, which county adjoins the state of Montana, when written permission is secured from the board of trustees of the district in which they reside, the board of trustees of the district in which they are to attend school, and when written permission has been given by the county superintendents of schools of the counties concerned. Permission must be granted for such attendance in another district within or without the county of such children's residence when the following conditions exist:

1. When a child lives less than three (3) miles from a public elementary school in another district or county and three (3) or more miles from a public elementary school in the district or county of his own residence.

2. When a child resides more than three (3) miles distance from a public elementary school within his own district or county and no transportation is furnished by the home district or county to such school.

3. When regular bus transportation is furnished by a public elementary school in another district or county and his own district or county does not furnish transportation.

Such distances mentioned above shall be measured from the point where the private family dwelling house is situated to the schoolhouse by the shortest traveled route.

4. When a family has children who must attend high school outside of its own district or county and such family also has elementary school children who can more conveniently attend the elementary grades in the same district where the high school is located, provided such elementary children live more than three (3) miles from the home school or that a parent must move to town to provide high school education for his children.

5. When the county superintendent of schools of the county where the child resides, for any other reason than stated above shall approve the attendance of any child in a public elementary school in another county. In approving such attendance in another district or county, the county superintendent shall take in consideration such items as distance to school, road conditions, trading center of parents, opportunity to live with relatives, dormitory facilities, living conditions, transportation and type of educational program.

If the board of trustees of the district to be attended shall find that, due to insufficient room and overcrowding the accreditation of the receiving school in the ensuing school year would be adversely affected by acceptance of a transfer pupil from another school district, the board may disapprove the attendance provided it mails written notice of disapproval to the parents or guardian of the pupil within fifteen (15) days after written notification by the county superintendent of the proposed attendance.

In the event that the residence, for determining tuition obligations, of such child is in dispute, then the rules for determining residence as outlined in section 83-303, shall be used by the county superintendent of the county of the child's residence, or in case the dispute is between districts of two (2) counties by the county superintendents of such counties, to finally determine the residence of such child.

When approval of attendance in another district within or without the county has been granted, the district in which such child resides shall pay to the school district where such child attends, an amount based on the following tuition rates: in the case of attendance at an elementary school with an average number belonging up to one hundred (100), the tuition to be paid shall be two hundred seventy-five dollars (\$275); where the school attended has an average number belonging between one hundred one (101) and three hundred (300), the tuition shall be two hundred and fifty dollars (\$250); and where the school attended has an average number belonging over three hundred (300), the tuition rate shall be two hundred twenty-five dollars (\$225) per pupil.

It is hereby made the duty of the board of school budget supervisors in approving the budgets, to include therein an item to care for the above tuition, if this has not already been done by the board of trustees in preparing the budget for the district.

Applications for permission to attend a school outside the district or county shall be made to the county superintendent before July 1, previous to the year of attendance, excepting in those cases where circumstances prevent such application. These applications are to be approved or disapproved, except as otherwise provided by law, by the county superintendents concerned, by the trustees of the district in which the pupil resides, and by the trustees of the district the pupil wishes to attend. However, nothing in this section shall be so construed as to deny a parent whose children cannot qualify under this section the right to send his children, at his own expense, to a public elementary school of any other district willing to accept them. Such parent must pay to the receiving district, tuition in the amount set forth herein, provided, however, if a parent of the child is a property taxpayer on the last completed assessment rolls in the receiving district and has paid school taxes in an amount of two hundred (\$200) dollars or more, the board of trustees of the receiving district shall waive any and all tuitions.

At the close of the school term of the year in which such pupil attends this school outside the district, the clerk of such district shall transmit to the county superintendent the names of pupils from other districts



attending his school, together with the number of days attended. This information in turn shall be transmitted by the county superintendent to the districts affected and such district shall reimburse the school attended for all pupils of its district; provided such pupil has attended at least forty (40) days. This amount of reimbursement shall be made an item of the budget for the coming year and reimbursement shall be made to the district of attendance out of the first funds available to the budget; provided, however, that the trustees of the district receiving pupils from another district may waive any or all tuition; provided, however, that such waiver must apply equally to all pupils, and provided, further, that the amount of this tuition shall not reduce the foundation program of the school paying it, but shall be an additional item added to it to be raised without a vote of the people; and provided further, that the district receiving the tuition may apply it against the needs of the budget after the regular district, county and state aid have been received.

In the case of a district which does not operate a school, the amount of this tuition can be raised without a vote of the people if the five (5) mill district levy and other local revenue is insufficient to raise the amount needed.

It shall be the responsibility of the superintendent of schools and the boards of trustees of the public elementary schools sending and receiving the pupils and the county superintendents of the schools concerned to determine and agree upon eligibility of pupils transferring under the provisions of this act; provided, that an appeal may be taken to the state superintendent of public instruction.

Whenever elementary pupils residing in Montana are approved for attendance in an elementary school in an adjoining state; and whenever elementary pupils in an adjoining state are approved for attendance in an elementary school in Montana, the above schedule of tuition payments may be waived and payments arrived at on a reciprocal basis with the state involved. The state superintendent of public instruction is hereby authorized to negotiate with the state superintendent of public instruction of each state involved in arriving at tuition payments, which may either be on a per pupil basis of a flat amount or on an actual cost basis.

Whenever a child has been declared by a district court of the state of Montana a dependent and neglected child as defined in section 10-501, or a juvenile delinquent child, as defined in section 10-602, and has been ordered to be placed in a duly licensed child care institution in the state of Montana, which institution is approved by the state department of public welfare, and as a result of such order such child is required to attend a public elementary school in a school district outside of the district in which he resides, the district receiving such pupil shall be entitled to receive tuition on the basis of the schedule established in this act, provided that the geographical relationship of the receiving district to the district of residence shall be of no consequence. All other provisions of this section, excepting solely the geographical relationship of the districts, shall be applicable to the payment of tuition for the education of such child.

**History:** En. Sec. 507, Ch. 76, L. 1913; amd. Sec. 12, Ch. 196, L. 1919; re-en. Sec. 1013, R. C. M. 1921; amd. Sec. 1, Ch. 109, L. 1929; amd. Sec. 2, Ch. 217, L. 1939; amd. Sec. 1, Ch. 203, L. 1943; amd. Sec. 2, Ch. 207, L. 1951; amd. Sec. 1, Ch. 21, L. 1953; amd. Sec. 1, Ch. 99, L. 1959; amd. Sec. 1, Ch. 228, L. 1961; amd. Sec. 1, Ch. 107, L. 1963; amd. Sec. 1, Ch. 176, L. 1963; amd. Sec. 1, Ch. 251, L. 1963; amd. Sec. 1, Ch. 127, L. 1965; amd. Sec. 1, Ch. 225, L. 1967; amd. Sec. 1, Ch. 322, L. 1967.

### Compiler's Notes

This section was amended twice in 1967, once by Ch. 225 and once by Ch. 322. Neither amendatory act referred to or incorporated the changes made by the other. Since the two amendments do not appear to conflict, the compiler has made a composite section embodying the amendments made by both 1967 acts.

### Amendments

Chapter 107, Laws 1963, added the final paragraph.

Chapter 176, Laws 1963, added the third and fourth sentences to the fifth paragraph after the numbered paragraphs; and inserted the words "provided, however, that such waiver must apply equally to all pupils, and" in the third sentence of the sixth paragraph after the numbered paragraphs.

Chapter 251, Laws 1963, inserted the first paragraph after the numbered paragraphs.

The 1965 amendment adopted the changes made by all three 1963 acts; and increased tuition by \$50 in each of the three classes of schools mentioned in the third paragraph after the numbered paragraphs.

Chapter 225, Laws 1967, inserted "the board of trustees of the district in which they reside" after "permission is secured from," and substituted "counties concerned" for "county in which the children reside" after "of the schools of the" in the first sentence of the first paragraph; inserted "concerned, by the trustees of the district in which the pupil resides" after "the county superintendents" in the second sentence of the fifth paragraph after the numbered paragraphs; inserted "sending and" before "receiving" and substituted "the schools concerned" for "schools of the county of the pupils' residence" before "to determine and agree" in the eighth paragraph after the numbered paragraphs; and made minor changes in phraseology and punctuation.

Chapter 322, Laws 1967, added the proviso at the end of the fifth paragraph after the numbered paragraphs.

### Effective Dates

Section 2 of Ch. 107, Laws 1963 provided the act should be in effect from and after its passage and approval. Approved March 1, 1963.

Section 2 of Ch. 322, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved March 3, 1967.

**75-1632. (1015) Duties of trustees.** Every school board unless otherwise specially provided by law shall have power and it shall be its duty:

1 to 6. \* \* \* [Same as parent volume.]

7. To repair and insure schoolhouses and to rent, lease and let to such persons or entities as the board may deem proper, the grade school halls, gymnasium and buildings, school owned employee housing and part thereof for such time and rental as the board may designate. All rentals shall be paid to the county treasurer for the credit of the school district. Such rentals may be credited to the school housing or rental fund of the district, the general school fund of the district or used to retire outstanding bonds issued by the district. Provided, however, that any expense incurred due to such rentals may be paid out of said rental or housing account, and provided further that any balance in such fund over three thousand dollars (\$3,000) at the end of the school year shall be transferred to the general fund.

8 to 10. \* \* \* [Same as parent volume.]

11. When deemed advisable, to employ a physician or registered nurse to make inspection into the sanitary conditions of the school and the general health conditions of each pupil, and to make a full, detailed report to the board of trustees. The clerk of the district shall furnish immedi-

ately to each parent or guardian a copy of such portion of the above mentioned report as pertains to his child or ward.

12 to 24. \* \* \* [Same as parent volume.]

History: Earlier acts governing the duties of trustees were the following: Sec. 27, p. 625, Cod. Stat. 1871; re-en. Sec. 26, p. 126, L. 1874; re-en. Sec. 1113, 5th Div. Rev. Stat. 1879; amd. Sec. 6, p. 55, L. 1883; amd. Sec. 1885, 5th Div. Comp. Stat. 1887; amd. Sec. 1797, Pol. C. 1895; amd. Sec. 5, p. 130, L. 1897; re-en. Sec. 875, Rev. C. 1907. The above section was enacted as Sec. 508, Ch. 76, L. 1913; Subds. 1-10 were amended by Sec. 1, Ch. 61, L. 1917; Subd. 11 amd. by Sec. 1, Ch. 61, L. 1917, and Sec. 13, Ch. 196, L. 1919; Subds. 12-13-14 re-en. Sec. 1, Ch. 61, L. 1917; Subd. 15 was amd. by Sec. 1, Ch. 61, L. 1917, and by Sec. 2, Ch. 81, L. 1917; Subds. 16-17-18 re-en. Sec. 1, Ch. 61, L. 1917; Subds. 19-20-21-22 re-en. Sec. 1, Ch. 61, L. 1917; re-en. Sec. 1015, R. C. M. 1921; amd. Sec. 1, Ch. 122, L. 1923; amd. Sec. 1, Ch. 122, L. 1931; amd. Sec. 1, Ch. 165, L. 1937; amd. Sec. 1, Ch. 103, L. 1943; amd. Sec. 3, Ch. 207, L. 1951; amd. Sec. 1, Ch. 233, L. 1953; amd. Sec. 1, Ch. 228, L. 1955; amd. Sec. 1, Ch. 168, L. 1959;

amd. Sec. 1, Ch. 105, L. 1961; amd. Sec. 1, Ch. 76, L. 1963; amd. Sec. 1, Ch. 175, L. 1963.

#### Compiler's Note

This section was amended twice in 1963, once by Ch. 76 and once by Ch. 175. Neither amendatory act mentioned nor included the changes made by the other. Since the amendments do not appear to conflict, however, the compiler has made a composite section incorporating both amendments.

#### Amendments

Chapter 76, Laws 1963, deleted the words "To provide clothing and medical aid for indigent children when it shall be made to appear that such aid is needed; and" which appeared at the beginning of subd. 11.

Chapter 175, Laws of 1963, inserted the words "school owned employee housing" in the first sentence of subd. 7; and added the third and fourth sentences to subd. 7.

75-1637. (1016) Letting contracts and furnishing supplies, trustees not to be interested in—advertising for bids required, when. It shall be unlawful for any school trustee to have any pecuniary interest, either directly or indirectly, in the erection of any schoolhouses, or for warming, ventilating, furnishing, or repairing the same, or be in any manner connected with the furnishing of supplies for the maintenance of the schools, or to receive or to accept any compensation or reward for services rendered as trustees, except as hereinbefore provided. No board of trustees shall let any contract for building, furnishing, repairing, or other work, for the benefit of the district, without first advertising in a newspaper published in the county for at least two (2) weeks, calling for bids to perform such work, except:

(a) A board of trustees of third class school districts maintaining one (1) or two (2) room elementary schools, may contract, without advertising and without bids, where the amount involved is not more than eight hundred dollars (\$800);

(b) A board of trustees of third class school districts, other than those mentioned in subparagraph (a) may contract, without advertising and without bids, where the amount involved is not more than fifteen hundred dollars (\$1,500);

(c) A board of trustees of districts of the first and second class, may contract without advertising and without bids where the amount involved is not more than two thousand five hundred dollars (\$2,500);

In all cases where advertising is required, the board shall award the contract to the lowest responsible bidder; provided, however, that the board of school trustees shall have the right to reject any and all bids.



**History:** Ap. p. Sec. 1802, Pol. C. 1895; re-en. Sec. 882, Rev. C. 1907; amd. Sec. 1, Ch. 32, L. 1909; amd. Sec. 509, Ch. 76, L. 1913; re-en. Sec. 1016, R. C. M. 1921; amd. Sec. 1, Ch. 44, L. 1955; amd. Sec. 1, Ch. 57, L. 1967.

#### **Amendments**

The 1967 amendment substituted "eight hundred dollars (\$800)" for "four hundred

dollars (\$400.00)" at the end of subdivision (a); substituted "fifteen hundred dollars (\$1,500)" for "seven hundred and fifty dollars (\$750.00)" at the end of subdivision (b); and deleted "maintaining elementary schools only" after "second class" and substituted "two thousand five hundred dollars (\$2,500)" for "one thousand two hundred and fifty dollars (\$1,250.00)" in subdivision (c).

**75-1641. Transportation of pupils living near school—charges to parents—preference to children farthest from school.** The board of trustees of any school district or county high school is authorized to provide school bus transportation to pupils who live less than three (3) miles distant from a public school and for this purpose the board may make such charges of parents, guardians or other representatives of pupils as may be necessary to pay the costs of providing such transportation, providing, however, the trustees shall in making such agreements give preference to those children living the farthest from the school to be attended.

**History:** En. Sec. 1, Ch. 249, L. 1965.

#### **Title of Act**

An act to authorize school boards of trustees to provide transportation for pu-

pils living less than three miles from school; providing standards for vehicles and drivers; and providing a fund to account for moneys collected and disbursed under the act.

**75-1642. Regular bus routes not used to capacity to be used.** The board of trustees may allow such pupils to be transported on such school buses as may be regularly scheduled on state-approved school bus routes and which are not filled to approved capacity by pupils residing three (3) or more miles distant from a public school, or on such other school buses as may be designated for transportation in accordance with this act.

**History:** En. Sec. 2, Ch. 249, L. 1965.

**75-1643. Standards for vehicles and drivers.** All school bus vehicles and drivers utilized under the provisions of this act shall meet the minimum standards set forth in section 75-3308, R. C. M. 1947.

**History:** En. Sec. 3, Ch. 249, L. 1965.

**75-1644. Budgeting and accounting for reimbursable transportation.** The transportation fund of the school budget shall be utilized for the purpose of budgeting and accounting for all collections of charges and fees authorized by this act. Such moneys shall be accounted for separately from public moneys.

**History:** En. Sec. 4, Ch. 249, L. 1965.

**75-1645. Purchase of liability insurance authorized—payment of premiums.** (1) The board of trustees of a school district, county high school, junior college, or community college may purchase insurance coverage for the school district, school officials, and employees against liability for the death, injury or disability of any person or damage to property.

(2) If insurance is purchased as authorized by this act, the board of trustees shall pay the insurance premium costs out of the school general fund.

(3) That the provisions of section 40-4402, the Revised Codes of Montana 1947, are applicable to this act.

**History:** En. Sec. 1, Ch. 58, L. 1967.

**Title of Act**

An act to authorize the board of trustees of a school district, county high

school, junior college, or community college to purchase liability insurance for the death, injury, or disability of any human being or for damage to property.

**75-1646. Reserve fund for public employees' retirement.** The board of trustees of school districts and county high schools may in their respective budgets make and provide an appropriation for payments to a reserve fund for public employees' retirement which reserve fund shall not exceed thirty-five per cent (35%) of the total amount budgeted annually for the retirement fund.

**History:** En. Sec. 1, Ch. 242, L. 1969.

**Title of Act**

An act authorizing school boards to make and provide an appropriation in school budgets for payment to a reserve fund for public employees' retirement,

not to exceed thirty-five (35) per cent of the total amount budgeted annually for the retirement fund, to be used for payment of public employees' retirement expenses incurred at the beginning of each school year.

**75-1647. Use of reserve fund.** The reserve fund may be used for the purpose of paying public employees' retirement expenses incurred at the beginning of each school year when funds for this purpose are not available as budgeted. The funds shall not be used for any other purpose.

**History:** En. Sec. 2, Ch. 242, L. 1969.

## CHAPTER 17—BUDGET SYSTEM

**Section 75-1706.** Preparation and adoption of preliminary budget.

75-1713.1. Changes in budget by budget board when in excess of foundation program—restrictions on budgets.

75-1716. Emergency budgets.

75-1719. Issuance of emergency warrants.

75-1720. Statement of total of emergency warrants—tax levy.

75-1723. Fixing tax levy.

**75-1706. (1019.6) Preparation and adoption of preliminary budget.** At the regular meeting of the board of trustees of each school district on the fourth Monday in June such board must consider, prepare and adopt a preliminary budget for the next ensuing school year. Any taxpayer in the district may appear at such meeting and be heard in regard to the preliminary budget or any item or amount proposed to be included therein. Such meeting may be continued from day to day, but not exceeding three (3) days in all; provided, that in first and second class districts such meeting may be continued over a period of not more than five (5) days. When the board has determined the amount necessary to be expended for each item contained in such budget form there shall be entered in column 2 of section I and in column 2 of section II of the budget form the amount proposed to be expended during the ensuing fiscal year for each item contained in such form, and such preliminary budget shall then be signed by a majority of the trustees and the clerk of

the district, and the clerk of the district must deliver or transmit such preliminary budget, when so filled in and signed, to the county superintendent of schools on or before the first day of July. If the estimated expenditures set forth in either lines 2 or 4 shall provide for payment of salary or compensation to more than one (1) person, there shall be set forth on a separate sheet but attached to and made a part of such preliminary budget, each position or employment with the salary or compensation to be paid to each person filling the same.

The elementary school budget for any school district in which no elementary school will be operated in the next ensuing school year shall consist of a single budget for the nonoperating fund, which fund shall incorporate all previously existing funds of the school district. Such budget for the nonoperating fund shall include all budgeted items of the district for the ensuing year, including any tuition payments to be made to the other districts, any transportation obligations, any maintenance of school district property and any other items deemed necessary by the board of trustees of the school district.

History: En. Sec. 6, Ch. 146, L. 1931;  
amd. Sec. 2, Ch. 63, L. 1941; amd. Sec. 1,  
Ch. 182, L. 1963.

Amendment

The 1963 amendment added the second paragraph.

**75-1713.1. Changes in budget by budget board when in excess of foundation program—restrictions on budgets.** If the total amount of the proposed elementary general fund expenses in the preliminary budget of any district shall exceed the foundation program of such district, the budget board shall, in the manner and subject to the limitations prescribed by section 75-1713, reduce such proposed general fund expenses to a total equal to said foundation program unless the board of trustees of said district shall establish to the satisfaction of the budget board that special circumstances exist which justify such additional expenses, and in such event a statement of the reasons for the allowance of such additional expenses shall be attached to said budget and signed by the chairman of the budget board, but the entire amount of such excess expense over the foundation program shall be paid solely from levies upon the property in such district and shall not in any manner increase the amounts to be apportioned hereunder from the county common school levy or from the moneys available for state equalization aid; and provided, that, except in the case of the existence of the emergencies specified in section 75-1716, the entire amount of such additional expense over the foundation program plus the foundation program to be included in the budget of any district shall not be greater than the maximum amounts in accordance with the following schedules: provided that nothing herein contained shall be construed as preventing the voting of an additional levy in accordance with the general school laws pertaining to the voting of additional levies.

### Elementary Schools

(1) For each elementary school having an ANB of nine (9) or fewer pupils, the maximum shall be seventy-two hundred forty-eight dollars (\$7,248), if said school is approved as an isolated school.



(2) For schools with an ANB of ten (10) pupils, but less than eighteen (18) pupils, the maximum shall be seventy-two hundred forty-eight dollars (\$7,248) plus two hundred fourteen [dollars] (\$214) per pupil on the basis of the average number belonging over nine (9).

(3) For schools with an ANB of eighteen (18) pupils and employing one (1) teacher, the maximum shall be ninety-one hundred seventy dollars (\$9,170) plus eighty-five dollars (\$85) per pupil on the basis of the average number belonging over eighteen (18), not to exceed an ANB over twenty-five (25).

(4) For schools with an ANB of eighteen (18) pupils and employing two (2) full-time teachers, the maximum shall be sixteen thousand four hundred seventy dollars (\$16,470) plus eighty-five dollars (\$85) per pupil on the basis of the average number belonging over eighteen (18), not to exceed an ANB over fifty (50).

(5) For schools having an ANB in excess of forty (40) the maximum on the basis of the total pupils (ANB) in the district for elementary pupils will be as follows:

For a school having an ANB of more than forty (40) and employing a minimum of three (3) teachers, the maximum of five hundred eighty dollars and twenty cents (\$580.20) shall be decreased at the rate of forty-three cents (\$.43) for each additional pupil until the total number (ANB) shall have reached a total of one hundred (100) pupils. For a school having an ANB of more than one hundred (100) pupils, the maximum of five hundred fifty-four dollars (\$554) shall be decreased at the rate of fifty-one cents (\$.51) for each additional pupil until the ANB shall have reached three hundred (300) pupils. For a school having an ANB of more than three hundred (300) pupils, the maximum shall not exceed four hundred fifty-one dollars and thirty-five cents (\$451.35) for each pupil; provided that the maximum per pupil, for all pupils, ANB, shall figure on the basis of the amount allowed herein on account of the last eligible pupil, ANB, and provided further that all schools operated within the incorporated limits of a city or town shall be treated as a school unit for the purpose of this schedule.

**History:** En. Sec. 9, Ch. 199, L. 1949; amd. Sec. 1, Ch. 208, L. 1951; amd. Sec. 1, Ch. 267, L. 1963; amd. Sec. 1, Ch. 198, L. 1965; amd. Sec. 1, Ch. 317, L. 1967; amd. Sec. 1, Ch. 3, Ex. L. 1969.

#### Amendments

The 1963 amendment substituted "moneys available for state equalization aid" for "state public school equalization fund" immediately before the first proviso; inserted "plus the foundation program" before "to be included in the budget" in the first proviso; substituted "the maximum amounts in accordance with the following schedules" at the end of the first proviso for "thirty per cent (30%) of the foundation program of any school"; and added everything after the first paragraph.

The 1965 amendment increased the amount specified in paragraph (1) from \$5,312 to \$5,631; deleted from the end of paragraph (1) clauses reading, "if said school is approved as an isolated school; if said school is not approved as an isolated school, then the maximum shall be twenty-six hundred fifty-six dollars (\$2,656.00)"; increased the amounts specified in paragraph (2) from \$5,312 plus \$156 per pupil to \$5,631 plus \$165.50 per pupil, in paragraph (3) from \$6,716 plus \$62.50 per pupil to \$7,119 plus \$66.25 per pupil, and in paragraph (4) from \$12,062 plus \$62.50 per pupil to \$12,786 plus \$66.25 per pupil; increased the maximum specified in the first sentence of the second paragraph of subdivision (5) from \$425 to \$450.50, in the second sentence of that paragraph from \$406 to \$430.36,

and in the third sentence of that paragraph from \$330 to \$349.80; increased the rate of decrease specified in the first sentence of the second paragraph of subdivision (5) from 32¢ to 34¢ per pupil, and in the second sentence of that paragraph from 38¢ to 40¢ per pupil; and deleted a former last paragraph, added by the 1963 amendment, which read: "On or before January 1 of odd-numbered years, the state superintendent of public instruction shall transmit to the legislative assembly of the state of Montana a revised schedule for elementary schools in accordance with classifications by size as set forth in this section. This revised schedule will be based on the median general fund budgeted expenditures for the current year, by ascertaining the median of the general fund budgets for each classification of elementary schools, and the total number of pupils (ANB) for all schools in each classification, and by computing the revised schedule therefrom."

The 1967 amendment increased the maximum general fund budgets under

Elementary Schools by substituting in subparagraph (1) \$6,472 for \$5,631 and adding "if said school is approved as an isolated school"; in subparagraph (2), substituting \$6,472 plus the additional rate of \$191 per pupil for \$5,631 plus \$165.50; in subparagraph (3), \$8,187 plus \$76 for \$7,119 plus \$66.25; in subparagraph (4), \$14,704 plus \$76 for \$12,786 plus \$66.25; and in the second paragraph of subparagraph (5), substituted \$518 for \$450.50; 39¢ for 34¢; \$495 for \$430.36; 46¢ for 40¢; and \$402.25 for \$349.80.

The 1969 amendment increased the maximum general fund budgets under Elementary Schools by substituting in subparagraph (1) \$7,248 for \$6,472, in subparagraph (2), substituting \$7,248 plus \$214 for \$6,472 plus \$191, in subparagraph (3), substituting \$9,170 plus \$85 for \$8,187 plus \$76; in subparagraph (4), substituting \$16,470 plus \$85 for \$14,704 plus \$76; and in the second paragraph of subparagraph (5), substituted \$580.20 for \$518; 43¢ for 39¢; \$554 for \$495; 51¢ for 46¢; and \$451.35 for \$402.25.

**75-1716. (1019.16) Emergency budgets.** (1) Whenever the board of trustees of a school district maintaining an elementary school or schools, at any time after December 31st of any school year, shall deem that an emergency exists by reason of an increase in the enrollment and attendance over that of the immediately preceding school year over and beyond the extent which such increase might reasonably have been anticipated at the time of the adoption of the budget for the then current school year, and that because of such increase in enrollment and attendance the budget approved and adopted for any or all of the regularly budgeted funds of the school district for the then current school year does not provide sufficient funds to properly maintain and support such school or schools during the whole of the then current school year; or shall at any time during a school year deem that an emergency exists because of the destruction of any school property necessary to the maintenance of school, or its impairment by fire, flood, storm, riot, insurrection or other act of God, to such an extent as to render it unfit or prevent its use for the school purposes for which theretofore used; or because of the entering by a court of competent jurisdiction of a judgment for damages against the district, or the enactment of legislation, after the adoption of the final budget, requiring expenditures not contemplated therein, such board of trustees by unanimous vote of all members of the board present at any meeting, the time and place of holding [of] which all of the trustees shall have had reasonable notice, may adopt and enter upon their minutes a resolution, stating the facts constituting the emergency, the estimated amount of money required to meet such emergency, and the time and place when the board will meet for the purpose of considering and adopting an emergency budget for such current school year.

Whenever such board of trustees shall deem that an emergency exists for any reason other than those reasons specified above, such

board may petition the state superintendent of public instruction for permission to adopt a resolution of emergency. Such petition shall set forth in writing the reasons for the request, the school district budget or budgets affected by the emergency, the estimated amount of money required to meet such emergency for each affected budget, the anticipated source or sources of financing for the emergency expenditures, and such other information as may be required by the superintendent of public instruction. Such petition shall be signed by all of the members of the board of trustees.

The state superintendent of public instruction shall have the power to approve or disapprove such petition. If such petition be approved, the board of trustees may proceed to adopt a resolution of emergency, and may subsequently take all other steps prescribed for meeting an emergency situation due to any of the causes specified above. Approval of such petition by the superintendent of public instruction shall merely authorize the board of trustees to initiate emergency budget proceedings by resolution and shall not relieve such board of trustees of the necessity of complying with the requirements for proceeding according to the provisions of this section and all other laws pertaining to emergency budgets. Approval of such petition shall not be construed as approval of any subsequent application for increased state aid on account of such emergency.

(2) and (3). \* \* \* [Same as parent volume.]

(4) In the event of any other emergency described in this section, the preliminary emergency budget shall state the amount to be appropriated therein as definitely as possible the details of the proposed expenditures of the appropriation.

(5) The board of trustees may adopt an emergency budget for any or all of the budgeted funds of the school district, for which fund or funds a regular budget has been approved and adopted for the current year in accordance with the provisions of section 75-1712.

(6) Whenever the board of trustees shall prepare an emergency budget for the transportation fund, such emergency budget shall be so itemized as to show the amount appropriated therein separately for bus transportation and for payments to parents or guardians in lieu of bus transportation. The board of trustees shall attach to such emergency transportation budget a copy of each transportation contract connected with the emergency, such contracts to be prepared and executed in accordance with the provisions of section 75-3405.

(7) Whenever the board of trustees shall prepare an emergency budget for the general fund or the transportation fund, or both, due to increased enrollment, such board of trustees may make application to the state superintendent of public instruction for increased payment from the state public school equalization fund for the foundation program, or for state transportation reimbursement, or both. The state superintendent of public instruction shall prepare and publish rules and regulations for such application. The state superintendent of public instruction shall consider all applications for increased state aid made in



accordance with the provisions of this act, and shall determine the amount of increase, if any, which shall be made in the payment of funds from the state public school equalization fund for the foundation program, or for state transportation reimbursement, or both, on account of any emergency budget due to increased enrollment. The superintendent of public instruction shall notify the board of trustees of the approval or disapproval of any application for increase in payment of state funds, and in the event of approval the budget or budgets to which such increased payment shall be applied, and the amount or amounts thereof. The board of trustees shall attach a copy of such notice of approval or disapproval to the preliminary emergency budget.

(8) Three (3) copies of the emergency budget shall be furnished the county superintendent of schools and such county superintendent must lay one (1) copy thereof before the board of county commissioners, which constitutes the board of school budget supervisors for the county, at the next regular meeting of such board. Such board shall have the power to make such change in such budget, if any, as it may deem proper and necessary, and shall then approve such budget, either as adopted by the board of school trustees, or as changed by the board of county commissioners.

**History:** En. Sec. 16, Ch. 146, L. 1931; amd. Sec. 1, Ch. 193, L. 1943; amd. Sec. 1, Ch. 134, L. 1945; amd. Sec. 1, Ch. 124, L. 1959; amd. Sec. 1, Ch. 147, L. 1965.

proved and adopted" in the first clause of the first paragraph of subsection (1); made another minor change in the first paragraph of subsection (1); added the second and third paragraphs to subsection (1); divided former subsection (4) into present subsections (4) and (8); and inserted new subsections (5), (6), and (7).

#### **Amendment**

The 1965 amendment inserted "for any or all of the regularly budgeted funds of the school district" after "the budget ap-

**75-1719. Issuance of emergency warrants.** After the approval of such emergency budget, if the budget is to provide additional funds for the maintenance and support of the school or schools, whenever the amount appropriated for any item in the annual budget for such current school year has been fully used and such appropriation is exhausted, expenditures made thereafter shall be made by emergency warrants against the amount appropriated in the emergency budget, which emergency warrants shall be issued in the same manner and form and subject to the same conditions and provisions as set out in section 75-1726, except that on each thereof shall be distinctly endorsed "ELEMENTARY EMERGENCY WARRANT SCHOOL DISTRICT NO. \_\_\_\_\_." After deducting from the amount of money standing to the credit of the fund of the school district for which the emergency budget was adopted the amount required to meet and take care of all unexpended appropriations in the annual budget for that fund for the current school year and after deducting the amount required for the reserve, if any, provided in such budget for the following school year, if any balance remains in that fund the same shall be used to pay such emergency warrants issued against that fund, in the order in which the same are presented for payment.

**History:** En. Sec. 4, Ch. 134, L. 1945; amd. Sec. 2, Ch. 147, L. 1965.

#### **Amendment**

The 1965 amendment substituted "the

fund of the school district for which the emergency budget was adopted" for "the general fund of the school district" in the final sentence; inserted "for that fund" after "all unexpended appropriations in the annual budget" in the final sentence; substituted "after deducting the amount

required for the reserve, if any" for "the reserve" in the final sentence; inserted "in that fund" after "if any balance remains" in the final sentence; and inserted "issued against that fund" after "used to pay such emergency warrants" in the final sentence.

**75-1720. Statement of total of emergency warrants—tax levy.** The county treasurer shall, not later than the first Monday in August of the following school year, make out a statement for such school district showing the total amount of such emergency warrants issued then outstanding against any fund or funds, and the amount of money, if any, in the said fund or funds of the school district applicable to the payment thereof, and the amount or amounts for the payment of which a special tax levy or tax levies should be made, and deliver the same to the board of county commissioners. For each fund of the emergency budget for which an emergency levy is required as determined herein, the board of county commissioners shall, on the second Monday in August, make and fix a levy against the taxable property in the school district which will raise sufficient funds to pay such outstanding emergency warrants, with interest thereon, and the county treasurer shall, when collected, place the proceeds of each levy in a special fund and use the same to pay such outstanding emergency warrants with interest thereon as may be obligations against such fund. If after all such emergency warrants have been paid any amount remains in any such special fund it shall be, by such county treasurer, transferred to the comparable regular fund of the school district.

History: En. Sec. 5, Ch. 134, L. 1945; amd. Sec. 3, Ch. 147, L. 1965.

#### Amendment

The 1965 amendment substituted "against any fund or funds" for "and unpaid" after "emergency warrants issued then outstanding" in the first sentence; substituted "the said fund or funds" for "the general fund" before "of the school district applicable to the payment thereof" in the first sentence; inserted "or amounts" after "amount" and "or tax levies" after "special tax levy" in the latter part of the first sentence; substituted

"For each fund of the emergency budget for which an emergency levy is required as determined herein, the board of county commissioners shall" at the beginning of the second sentence for "Such board shall"; substituted "the proceeds of each levy" in the second sentence for "the same"; added "as may be obligations against such fund" at the end of the second sentence; inserted "any" before "such special fund" in the third sentence; and substituted "the comparable regular fund" in the third sentence for "the general fund."

**75-1723. (1019.19) Fixing tax levy.** The county superintendent of schools, as clerk of the school budget board, shall, when the board of county commissioners meet on the second Monday in August for the purpose of fixing tax levies, lay before such board the elementary school budgets for all school districts in the county, as finally adopted and approved by the school budget board.

It shall further be the duty of the county commissioners of each county in the state to fix and levy a tax for each school district in the county within the limitations prescribed by this act in such number of mills as will produce the amount shown by the final budget to be raised by tax levy which may also include a reserve fund, not to exceed thirty-five

per cent (35%) of the amount appropriated in the final and approved budget for the then current school year, for the purpose of maintaining the elementary and high school of the district from July 1 to November 30 of the next succeeding year; provided that such school district tax plus federal reimbursements in lieu of taxes shall not, unless approved by a vote of the taxpaying electors, exceed the maximum budgets set forth in section 75-1713.1, R.C.M. 1947.

To finance the approved nonoperating budget of any school district in which no elementary school will be operated, the county commissioners shall fix and levy a tax for such school district in such number of mills as will produce the amount shown by the approved budget to be raised by tax levy, after deducting from the total amount to be financed the following:

(1) any net nonoperating fund cash balance; provided, that whenever a nonoperating district did not have a nonoperating fund the preceding year, the net cash balances in all of the regular funds of the district shall be combined to form a single balance which shall be called the nonoperating fund cash balance; provided, further, that any district which operated at least one (1) school in the year immediately preceding the budget year may retain separately any cash balance previously designated as its general fund cash reserve, if in the judgment of the trustees of such district the retention of such general fund cash reserve is essential to the operation of a school anticipated for the year following the budget year, and any such retained cash reserve shall not be deducted from the total amount required for the nonoperating budget;

(2) the amount of any transportation reimbursement anticipated from the county;

(3) the amount of any transportation reimbursement anticipated from the state public school equalization fund; and

(4) any miscellaneous revenues available to the district. The remainder of the nonoperating budget amount, after deduction of the above revenues, shall be financed by a tax levied on the taxable valuation of the property of the school district.

**History:** En. Sec. 19, Ch. 146, L. 1931; amd. Sec. 10, Ch. 199, L. 1949; amd. Sec. 2, Ch. 208, L. 1951; amd. Sec. 1, Ch. 247, L. 1953; amd. Sec. 1, Ch. 247, L. 1961; amd. Sec. 2, Ch. 182, L. 1963; amd. Sec. 2, Ch. 267, L. 1963.

#### **Compiler's Note**

This section was amended twice in 1963, once by Ch. 182 and once by Ch. 267. Neither amendatory act mentioned nor included the changes made by the other. Since the two amendments do not appear to conflict, however, the compiler has made a composite section incorporating both amendments.

#### **Amendments**

Chapter 182, Laws 1963, added the third paragraph, including the clauses numbered (1) to (4).

Chapter 267, Laws 1963, deleted from the end of the first paragraph clauses reading, "and it shall be the duty of the county commissioners of each county in the state to fix and levy a tax of five (5) mills on the dollar of the taxable value of all school districts within the county, provided that if a levy of less than five (5) mills will be sufficient to meet the approved budget of any school district, then such lesser levy shall be made, but no school district levying less than five (5) mills shall receive any apportionment from the state public school equalization fund"; and substituted "the maximum budgets set forth in section 75-1713.1, R. C. M. 1947" at the end of the second paragraph for "the rate of levy required to produce an amount equal to the foundation program and the additions thereto, within the limitations of thirty per cent



(30%), hereinbefore specified, and provided, further, that such last mentioned additional school district tax shall not, in any event, exceed fifteen (15) mills unless the excess above said fifteen (15) mill limitation shall first have been authorized at an election held in accordance with the general school laws pertaining to the voting of additional levies, save and except

that in any district wherein more than fifteen (15) mills is required to reach the thirty per cent (30%) limit above the foundation program, such increase above the fifteen (15) mill limit may be financed by federal reimbursements in lieu of taxes without a vote of the taxpayers up to the thirty per cent (30%) limit above the foundation program."

## CHAPTER 18—SCHOOL DISTRICTS

- Section 75-1802. Classifications of districts—number of trustees.  
 75-1804. Limitation in creating or changing boundaries of districts.  
 75-1805. Creation of new districts out of other districts—change of boundaries.  
 75-1810. Indebtedness to remain against original territory upon creation of new school district out of other districts—indebtedness to be assumed by new district when districts are consolidated.  
 75-1813. Consolidated districts—procedure in event of consolidation—annexation—bonded debts.  
 75-1813.1. Consolidated districts in two or more counties.  
 75-1816. Budget and tax levy in joint districts.

**75-1802. (1021) Classifications of districts—number of trustees.** All districts having a population of eight thousand (8000) or more shall be districts of the first class. All districts having a population of one thousand (1000) or more, and less than eight thousand (8000) shall be districts of the second class, and all districts having a population of less than one thousand (1000) shall be districts of the third class. In districts of the first class the number of trustees shall be seven (7); in districts of the second class the number of trustees shall be five (5), and in districts of the third class the number of trustees shall be three (3).

Whenever the population of any school district shall increase beyond or decrease below the number required as specified above for a certain class of school district, the county superintendent of schools shall declare such school district to be changed to the proper class. The county superintendent may compute the population by multiplying by three the number of school census children in the district. No school district shall be changed in classification more than once in any five (5) year period. The county superintendent of schools shall take the necessary steps to provide that at the next school election to elect the proper number of school trustees as designated above and to fill all vacancies due to any change of classification. Provided however that the provisions of this act shall not affect the terms of trustees heretofore elected.

**History:** En. Sec. 401, Ch. 76, L. 1913; re-en. Sec. 1021, R. C. M. 1921; amd. Sec. 1, Ch. 85, L. 1943; amd. Sec. 1, Ch. 203, L. 1963.

school district" in the first sentence of the second paragraph; and inserted the second and third sentences of the second paragraph.

### Amendment

The 1963 amendment deleted the words "as determined by the federal census next preceding" which followed "class of

### Cross-References

Interlocal co-operation agreements, secs. 15-4901 to 16-4904.

**75-1804. (1023) Limitation in creating or changing boundaries of districts.** No school district shall be created nor boundaries changed between

March 1st and July 1st of any calendar year; provided, that this limitation shall not apply to boundary changes made under section 75-1813.

**History:** En. Sec. 1760, Pol. C. 1895; re-en. Sec. 849, Rev. C. 1907; re-en. Sec. 403, Ch. 76, L. 1913; amd. Sec. 1, Ch. 69, L. 1917; re-en. Sec. 1023, R. C. M. 1921; amd. Sec. 1, Ch. 18, L. 1923; amd. Sec. 1, Ch. 37, L. 1933; amd. Sec. 1, Ch. 56, L. 1961; amd. Sec. 1, Ch. 140, L. 1963.

**Amendment**

The 1963 amendment added the proviso.

**Repealing Clause**

Section 2 of Ch. 140, Laws 1963 re-

pealed all acts and parts of acts in conflict therewith.

**Effective Date**

Section 3 of Ch. 140, Laws 1963 provided the act should be in effect from and after its passage and approval. Approved March 2, 1963.

**References**

State ex rel. Blackwood v. Lutes, 142 M 29, 381 P 2d 479.

**75-1805. (1024) Creation of new districts out of other districts—change of boundaries.** (1) A new school district may be created out of portions of one (1) or more existing school districts where the taxable valuation (the percentage valuation upon which levies are made and taxes computed) of property remaining in each district from which territory is taken is not reduced below seventy-five thousand dollars (\$75,000.00) and where the number of census children between the ages of six (6) and sixteen (16) years is not reduced below fifteen (15). For the purpose of organizing a new school district out of one (1) or more existing districts, a petition in writing shall be made to the county superintendent of schools, signed by parents or guardians of at least ten (10) census children between the ages of six (6) and sixteen (16) years, residing within the boundaries of the proposed new district, and residing at a greater distance than three (3) miles from any schoolhouse owned by any one of such school districts in which a school is maintained. The method for measurement of the distance between the residence and the schoolhouse shall be as provided in section 75-3411, R. C. M. 1947, in so far as the same may apply. The petition shall describe the boundaries of the proposed new district and give the names of all children of school age residing therein at the date of the presenting of said petition. The petition shall also show the taxable valuation (the percentage valuation upon which levies are made and taxes computed) of the property within the proposed new district which must not be less than seventy-five thousand dollars (\$75,000.00) as shown by the last completed assessment roll. Provided, however, that said provision as to the minimum remaining taxable valuation of each district from which territory is taken shall not apply in a case where such district has at least fifty thousand (50,000) acres of nontaxable Indian land remaining within its borders and provided, further, that said provision as to the minimum taxable valuation of such proposed new district shall not apply where such proposed district contains at least fifty thousand (50,000) acres of nontaxable Indian land.

(2) to (4). \* \* \* [Same as parent volume.]

(5) A majority of the resident taxpayers who are registered electors and whose names appear upon the last completed assessment roll for state, county and school district taxes, residing in territory which is a

part of any organized school district may present a petition in writing to the county superintendent of schools, asking that such territory be transferred to, or included in, any other organized district to which said territory is contiguous, provided, however, that no territory within three (3) miles of an established school in such district shall be so transferred. Under this subsection, the three (3) miles shall be measured between a residence and a schoolhouse as provided in section 75-3411, R. C. M. 1947, in so far as the same may apply; and provided further that the taxable valuation (the percentage valuation upon which levies are made and taxes computed) of property in the district from which territory is taken shall not be reduced to less than seventy-five thousand dollars (\$75,000.00); provided, however, that this latter provision shall not apply in cases where the remaining taxable valuation of the district from which the territory is taken contains at least fifty thousand (50,000) acres of nontaxable Indian land.

(6) to (8). \* \* \* [Same as parent volume.]

**History:** Ap. p. Sec. 1751; Pol. C. 1895; re-en. Sec. 840, Rev. C. 1907; amd. Sec. 1, Ch. 82, L. 1911; amd. Sec. 404, Ch. 76, L. 1913; amd. Sec. 8, Ch. 196, L. 1919; re-en. Sec. 1024, R. C. M. 1921; amd. Sec. 1, Ch. 138, L. 1927; amd. Sec. 1, Ch. 175, L. 1933; amd. Sec. 1, Ch. 61, L. 1943; amd. Sec. 1, Ch. 232, L. 1955; amd. Sec. 1, Ch. 163, L. 1957; amd. Sec. 1, Ch. 171, L. 1965.

#### **Amendment**

The 1965 amendment inserted the third sentence in subsection (1); divided subsection (5) into two sentences; and inserted that portion of the second sentence in subsection (5) preceding the provisos therein.

**75-1810. (1029.1) Indebtedness to remain against original territory upon creation of new school district out of other districts—indebtedness to be assumed by new district when districts are consolidated.** When a new school district shall be formed as provided in section 75-1805, the bonded indebtedness of any school district or portion of school district affected by such change of boundaries, shall remain the indebtedness against the original territory against which such bonds were issued and shall be paid for out of levies made against said original territory. When a new school district shall be formed as provided in section 75-1813, the bonded indebtedness of any school district affected by such consolidation or annexation shall become the indebtedness and obligation of the consolidated district and be paid by levies imposed upon the property therein.

**History:** En. Sec. 1, Ch. 163, L. 1933; amd. Sec. 1, Ch. 271, L. 1967.

#### **Amendments**

The 1967 amendment substituted "sec-

tion 75-1805" for "sections 75-1805 and 75-1813" after "as provided in"; deleted "consolidation or" before "change of boundaries"; and added the last sentence.

**75-1813. (1034) Consolidated districts—procedure in event of consolidation—annexation—bonded debts.** Any two or more school districts lying in one county may be consolidated, either by the formation of a district by consolidation, or by the annexation of one or more districts to an existing district, as hereinafter provided. When school districts plan to proceed under the provisions of this section, they must, jointly, es-



tablish whether such consolidation proposal shall be made with or without assumption of bonded indebtedness. Dependent upon such joint decision, one of the two following options shall be used:

A. Option A — When two or more school districts lying in one county wish to consolidate and assume each other's bonded indebtedness, or when one or more school districts in one county wish to annex their territory to an existing district and assume its bonded indebtedness, option A shall be used.

B. Option B — When two or more school districts wish to consolidate and not assume each other's bonded indebtedness, or when one or more school districts in one county wish to annex their territory to an existing district and not assume its bonded indebtedness, option B shall be used.

#### OPTION A

When severally the boards of trustees of two (2) or more school districts, in regular meeting called for the publicly announced purpose of considering plans for consolidation of said two (2) or more districts and by majority vote of each board of trustees acting separately shall ask for district consolidation of each and all such petitioning boards, the county superintendent of schools having jurisdiction of such districts, within not less than twenty (20) nor more than thirty (30) days, shall cause notice of election to be given by the clerk in each district seeking election on such proposed consolidation of districts. Such notice is to be posted in three (3) public places in each such district and published in a newspaper published in the county and having general circulation in the school districts, giving the time and place or places specified in each notice to vote on the question of consolidation with assumption of bonded indebtedness.

Consolidation of any two (2) or more school districts lying in one county may also be effected by the people of the districts concerned whenever a petition shall be directed to and received by the county superintendent of schools, and shall in each such district seeking consolidation be signed by not fewer than twenty per cent (20%) of the qualified electors in such district. The county superintendent shall within not less than twenty (20), nor more than thirty (30) days, cause notice to be given as provided in the next preceding paragraph.

The votes at such election shall be by ballot, which shall read "For consolidation with assumption of bonded indebtedness" or "Against consolidation with assumption of bonded indebtedness." At such election those qualified electors whose names appear upon the last preceding completed assessment roll shall be furnished ballots printed upon white paper and all other qualified electors shall be furnished ballots printed upon paper distinctly yellow in color. Separate ballot boxes shall be used for the receipt of voted ballots so that the white ballots will be segregated from the yellow ballots. The judge or judges at such election shall, within ten (10) days thereafter, certify the result of the vote to the county superintendent of the county in which the district lies.

If both the majority of the total votes cast in each district holding such election be for consolidation, and the majority of the votes cast by those qualified electors whose names appear upon the last preceding completed assessment roll in each district holding such election be for consolidation, provided that at least a percentage of such electors in each district, equal to the percentage required in section 75-3914, R.C.M. 1947, for approval of a bond issue, have voted, it carries, and the superintendent, within ten (10) days thereafter, shall make a proper order to give effect to such vote, and shall thereafter transmit a copy thereof to the county clerk and recorder and to the clerk of each district affected. If the order be for the formation of a new district, it shall specify the number of such district, and the county superintendent shall appoint trustees and designate the terms of office to be served by each until subsequent school elections shall determine their successors.

At the regular election succeeding there shall be elected by the regularly qualified electors the number of trustees required to replace those whose terms are expiring. The election of trustees and terms shall be the same as for other districts under the general school laws.

When, in the interest of reducing cost of operation or improving the school service for pupils, a board of trustees of a third class district seeking to annex its territory to a third class district or districts maintaining a high school, a second class district or districts, or a first class district or districts or any combination thereof; a board of trustees of a third class district maintaining a high school seeking to annex its territory to a second class district or districts or a first class district or districts or any combination thereof; or the board of trustees of a second class district seeking to annex its territory to a first class district or districts, shall by majority vote of its members or at the request of twenty per cent (20%) of the qualified electors of the districts indicated by a petition, ask the county superintendent of schools to annex the territory and property of such district to any district or districts as herein provided. As the board resolution or petition requests, the county superintendent shall, upon an approving vote of the trustees of the district or districts with which the annexation is sought, authorize an election in the petitioning district on such annexation within not less than twenty (20) nor more than thirty (30) days. Notice of such election shall be given in the same manner and the same general plan for balloting shall be utilized on the question of district annexation by the electors of the petitioning district that is authorized herein for district consolidation.

The ballot shall in this case be "For annexation with assumption of bonded indebtedness" and "Against annexation with assumption of bonded indebtedness." Should the action of the boards of trustees approving the plan of annexation be approved by majority vote of electors of the district or districts seeking election on the issue and by majority vote of the electors of the district or districts seeking election on the issue whose names appear upon the last completed assessment roll, provided that at least a percentage of such electors in each district, equal to the percentage required in section 75-3914, R. C. M. 1947, for approval of a bond issue, have voted, then the consolidation sought shall be effect-

ed by order of the county superintendent of schools within ten (10) days after such election. In the event of a disapproving vote by majority of votes cast by all the electors or by the electors whose names appear on the last preceding completed assessment roll or if the percentage of the electors whose names appear upon the last preceding completed assessment roll and who vote in either of such voting districts is less than the percentage required in section 75-3914 for approval of a bond issue, the proposed annexation shall fail.

In case of annexation of any district to any existing district or districts, as herein provided, the proper officers of the annexed districts, within ten (10) days from the receipt of a copy of the annexation order, shall turn over to the proper officers of the district or districts to which it is annexed, all records, funds, and effects of such annexed district. When a district is proportionately annexed, as provided herein, section 75-1808, Revised Codes of Montana, 1947, controls. In case of the formation of a district by consolidation the proper officers of the discontinued district or districts in like manner, within ten (10) days after the organization of the district by consolidation, shall turn over the records, funds, and effects of such old district to the proper officers of the district created by consolidation.

In case of creation of a district by annexation, the title to schoolhouses and sites of the petitioning district shall vest in the receiving district or districts in which the schoolhouses and sites are located. The officers of the receiving district or districts shall continue to hold office until the end of the terms for which they were duly elected and their successors shall be regularly elected as provided by law.

School districts created by consolidation or annexation shall be governed by the general school laws of the state.

Bonded indebtedness of any district resulting from merger by consolidation or annexation shall become the indebtedness and obligation of the consolidated district and be paid by levies imposed upon property therein, provided that when a third class district is proportionately annexed to any number of first or second class districts, as herein provided, the bonded indebtedness, if any, of such third class district shall become the bonded indebtedness of such first or second class districts in the same proportions as the taxable valuation of each annexed portion bears to the total taxable valuation of such third class district.

#### OPTION B

When severally the boards of trustees of two (2) or more school districts, in regular meeting called for the publicly announced purpose of considering plans for consolidation of said two (2) or more districts and by majority vote of each board of trustees acting separately shall ask for district consolidation of each and all such petitioning boards, the county superintendent of schools having jurisdiction of such districts, within not less than twenty (20) nor more than thirty (30) days, shall cause notice of election to be given by the clerk in each district seeking election on such proposed consolidation of districts. Such notice is to be posted in three (3) public places in each such district and pub-



lished in a newspaper published in the county and having general circulation in the school districts, giving the time and place or places specified in each notice to vote on the question of consolidation without assumption of bonded indebtedness.

Consolidation of any two (2) or more school districts lying in one county may also be effected by the people of the districts concerned whenever a petition shall be directed to and received by the county superintendent of schools, and shall in each such district seeking consolidation be signed by not fewer than twenty per cent (20%) of the qualified electors in such district. The county superintendent shall within not less than twenty (20), nor more than thirty (30) days, cause notice to be given as provided in the next preceding paragraph.

The votes at such election shall be by ballot, which shall read "For consolidation without assumption of bonded indebtedness" or "Against consolidation without assumption of bonded indebtedness." The judge or judges at such election shall, within ten (10) days thereafter, certify the result of the vote to the county superintendent of the county in which the district lies.

If the majority of the votes cast in each district holding such election be for consolidation, it carries, and the superintendent, within ten (10) days thereafter, shall make a proper order to give effect to such vote, and shall thereafter transmit a copy thereof to the county clerk and recorder and to the clerk of each district affected. If the order be for the formation of a new district, it shall specify the number of such district, and the county superintendent shall appoint trustees and designate the terms of office to be served by each until subsequent school elections shall determine their successors.

At the regular election succeeding there shall be elected by the regularly qualified electors the number of trustees required to replace those whose terms are expiring. The election of trustees and terms shall be the same as for other districts under the general school laws.

When, in the interest of reducing costs of operation or improving the school service for pupils, a board of trustees of a third class district seeking to annex its territory to a third class district or districts maintaining a high school, a second class district or districts, or a first class district or districts or any combination thereof; a board of trustees of a third class district maintaining a high school seeking to annex its territory to a second class district or districts or a first class district or districts or any combination thereof; or the board of trustees of a second class district seeking to annex its territory to a first class district or districts, shall by majority vote of its members or at the request of twenty per cent (20%) of the qualified electors of the districts indicated by a petition, ask the county superintendent of schools to annex the territory and property of such district to any district or districts as herein provided. As the board resolution or petition requests, the county superintendent shall, upon an approving vote of the trustees of the district or districts with which the annexation is sought, authorize an election in the petitioning district on such annexation within not less

than twenty (20) nor more than thirty (30) days. Notice of such election shall be given in the same manner and the same general plan for balloting shall be utilized on the question of district annexation by the electors of the petitioning district that is authorized herein for district consolidation.

The ballot shall in this case be "For annexation without assumption of bonded indebtedness" and "Against annexation without assumption of bonded indebtedness." Should the action of the boards of trustees approving the plan of annexation be approved by majority vote of electors of the district seeking annexation then the annexation sought shall be effected by order of the county superintendent of schools within ten (10) days after such election. In the event of a disapproving vote by majority of votes cast the proposed annexation shall fail.

In case of annexation of any district to any existing district or districts, as herein provided, the proper officers of the annexed districts, within ten (10) days from the receipt of a copy of the annexation order, shall turn over to the proper officers of the district or districts to which it is annexed, all records, funds, and effects of such annexed district. When a district is proportionately annexed, as provided herein, section 75-1808, R. C. M. 1947, controls. In case of the formation of a district by consolidation the proper officers of the discontinued district or districts in like manner, within ten (10) days after the organization of the district by consolidation, shall turn over the records, funds, and effects of such old district to the proper officers of the district created by consolidation.

In case of creation of a district by annexation, the title to schoolhouses and sites of the petitioning district shall vest in the receiving district or districts in which the schoolhouses and sites are located. The officers of the receiving district or districts shall continue to hold office until the end of the terms for which they were duly elected and their successors shall be regularly elected as provided by law.

School districts created by consolidation or annexation shall be governed by the general school laws of the state.

Bonded indebtedness of any district resulting from merger by consolidation, or annexation shall remain the indebtedness and obligation of the district which originally incurred such bonded indebtedness and be paid by levies imposed upon property therein.

**History:** En. Sec. 407, Ch. 76, L. 1913; re-en. Sec. 1034, R. C. M. 1921; amd. Sec. 1, Ch. 201, L. 1943; amd. Sec. 1, Ch. 32, L. 1951; amd. Sec. 1, Ch. 23, L. 1953; amd. Sec. 1, Ch. 205, L. 1965; amd. Sec. 2, Ch. 271, L. 1967; amd. Sec. 1, Ch. 364, L. 1969. Cal. Pol. C. Sec. 1577.

#### Amendments

The 1965 amendment deleted subsection designations; substituted "formation of a district by consolidation" for "formation of a new district" in the first paragraph; substituted "notice of election" for "a ten (10) days' posted notice" near the end

of the first sentence of the second paragraph; substituted "published in a newspaper published in the county and having general circulation in the school districts" for "in one or more newspapers of the district or county, if there be such" in the second sentence of the second paragraph; substituted "cause notice to be given as provided in the next preceding paragraph" at the end of the third paragraph for "cause a ten (10) days' posted notice to be given by the clerk in each district seeking election on such proposed consolidation of districts. Such notice is to be posted in three (3) public places in

each such district, and in one or more newspapers of the district or county, if there be such, giving the time and place or places specified in each notice to vote on the question of consolidation"; substituted "The judge or judges" for "The presiding officer" at the beginning of the second sentence of the fourth paragraph; deleted "name and" before "number of such district" in the second sentence of the fifth paragraph; substituted "appoint trustees and designate the terms of office to be served by each until subsequent school elections shall determine their successors" at the end of the fifth paragraph for "appoint three (3) trustees to serve until the first Saturday in April succeeding"; substituted "the number of trustees required to replace those whose terms are expiring" at the end of the first sentence of the sixth paragraph for "three (3) trustees, one of whom shall serve for one (1) year, one for two (2) years, and one for three (3) years"; inserted "seeking to annex its territory to a third class district or districts maintaining a high school, a second class district or districts, or a first class district or districts or any combination thereof; or the board of trustees of a second class district seeking to annex its territory to a first class district or districts" in the first sentence of the seventh paragraph; substituted "such district to any district or districts as herein provided" at the end of the first sentence of the seventh paragraph for "such third class district to any second or first class district in its entirety, or proportionately to any number of first or second class districts"; inserted "or districts" after "district" in the second sentence of the seventh paragraph and twice in the first sentence of the ninth paragraph; inserted "in the petitioning district" after "authorize an election" near the end of the second sentence of the seventh paragraph; deleted "or districts as the case may be" after "petitioning district" in the third sentence of the seventh paragraph; substituted "district seeking annexation then the annexation sought shall be effected by order of the county superintendent" in the second sentence of the eighth paragraph for "district or districts seeking election on the issue then the consolidation sought shall be effected by the county superintendent"; deleted "by either of such voting districts" after "votes cast" in the third sentence of the eighth paragraph; deleted "or districts" after "annexation of any district" in the first sentence of the ninth paragraph; inserted the second sentence in the ninth paragraph; substituted "formation of a district by consolidation" and "organization of the district by consolidation" in the third sentence of the ninth paragraph for "formation of a new

district" and "organization of the new district"; inserted "district or" after "discontinued" in the third sentence of the ninth paragraph; substituted "district created by consolidation" for "new districts" at the end of the ninth paragraph; substituted "creation of a district" for "consolidation of districts" near the beginning of the tenth paragraph; substituted "petitioning district" for "separate districts" in the first sentence of the tenth paragraph; substituted "the receiving district or districts in which the school houses and sites are located" at the end of the first sentence of the tenth paragraph for "the new consolidated district"; substituted "the receiving district or districts" for "the first or second class district involved" in the second sentence of the tenth paragraph; substituted "School districts created by consolidation or annexation" for "Consolidated school districts" at the beginning of the eleventh paragraph; substituted "resulting from merger" for "merged" near the beginning of the final paragraph; and made several other minor changes in phraseology and punctuation.

The 1967 amendment inserted the second and third sentences in the fourth paragraph; inserted "both" before "the majority," and "total" before "votes cast" and "and the majority of the votes \* \* \* have voted" before "it carries" in the first sentence of the fifth paragraph; and inserted "or districts" before "seeking," and "election on the issue \* \* \* then the consolidation" before "sought shall be effected" and inserted "by all the electors \* \* \* of a bond issue" before "the proposed annexation" in the eighth paragraph.

The 1969 amendment added the second and third sentences of the first paragraph; inserted paragraphs A and B and the designation "OPTION A"; at the end of the first paragraph of Option A, added "with assumption of bonded indebtedness"; at the beginning of the third paragraph of Option A, substituted "For consolidation with assumption of bonded indebtedness" or "Against consolidation with assumption of bonded indebtedness" for "For consolidation" or "Against consolidation"; at the beginning of the seventh paragraph of Option A, substituted "For annexation with assumption of bonded indebtedness" and "Against annexation with assumption of bonded indebtedness" for "For annexation" and "Against annexation"; and added all the material designated "OPTION B."

#### Effective Dates

Section 2 of Ch. 205, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved March 6, 1965.



Section 2 of Ch. 364, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 14, 1969.

#### Preparation of Ballots

Where the ballots for a consolidation election were prepared to read only "For"

or "Against" rather than "For consolidation" or "Against consolidation" as required by subsection 2 of this section, and testimony showed that in at least one instance a voter was confused by this reading and mismarked her vote, the election was on its face null and void. *Woolsey v. Carney*, 141 M 476, 378 P 2d 658.

**75-1813.1. Consolidated districts in two or more counties.** (1) Any two or more school districts that are adjacent and contiguous lying in two (2) or more counties may be consolidated, either by the formation of a new district or by the annexation of one or more districts to an existing district, as hereinafter provided.

When severally the boards of trustees of two (2) or more school districts, in regular meeting called for the publicly announced purpose of considering plans for consolidation of said two (2) or more districts and by majority vote of each board of trustees acting separately shall ask for district consolidation of each and all such petitioning boards, the superintendents of each county affected having jurisdiction of such districts, within not less than twenty (20) nor more than thirty (30) days, shall cause a ten (10) days' posted notice to be given by the clerk in each district seeking election on such proposed consolidation of districts. Such notice is to be posted in three (3) public places in each such district and in one (1) or more newspapers of the district or county, if there be such, giving the time and place or places specified in each notice to vote on the question of consolidation.

Consolidation of any two (2) or more school districts that are adjacent and contiguous lying in two (2) or more counties may also be effected by the people of the districts concerned whenever a petition shall be directed to and received by the county superintendents of schools of each county affected, and shall in each such district seeking consolidation be signed by no fewer than twenty per cent (20%) of the qualified electors in such district. The county superintendents shall within not less than twenty (20) nor more than thirty (30) days, cause a ten (10) days' posted notice to be given by the clerk in each district seeking election on such proposed consolidation of districts. Such notice is to be posted in three (3) public places in each such district, and in one (1) or more newspapers of the district or county, if there be such, giving the time and place or places specified in each notice to vote on the question of consolidation.

(2) The votes at such election shall be by ballot, which shall read "For consolidation" or "Against consolidation." The presiding officer at such election shall, within ten (10) days thereafter, certify the result of the vote to the county superintendents of the counties affected in which the district lies.

(3) If the majority of the votes cast in each district holding such election be for consolidation, it carries, and the superintendents of each county affected, within ten (10) days thereafter, shall in concurrent action make proper orders to give effect to such vote, and shall thereafter transmit a copy thereof to the county clerk and recorder of each

county affected and to the clerk of each district affected. If the order be for the formation of a new district, it shall specify the name and number of such district, and county superintendents of the counties affected in concurrent action shall appoint three (3) trustees to serve until the first Saturday in April succeeding.

(4) At the regular election succeeding there shall be elected by the regularly qualified electors three (3) trustees, one (1) of whom shall serve for one (1) year, one (1) for two (2) years, and one (1) for three (3) years. The election of trustees and terms shall be the same as for other districts under the general school laws.

(5) Consolidated school districts shall be governed by the general school laws of the state.

(6) Bonded indebtedness of any district merged by consolidation shall remain the indebtedness and obligation of the district which originally incurred such bonded indebtedness and be paid by levies imposed upon property therein.

**History:** En. Sec. 1, Ch. 141, L. 1965.

**Effective Date**

**Title of Act**

Section 2 of Ch. 141, Laws 1965 read  
"This act is effective April 1, 1965."

An act providing for formation and control of joint school districts.

**75-1816. (1036.1) Budget and tax levy in joint districts.** The board of school trustees of each joint school district shall consider, prepare and adopt a preliminary budget according to the provisions of section 75-1706, provided that a copy of such budget shall be transmitted to the county superintendent of schools of each county in which any part of such joint school district is situated. The county superintendents of all such counties must, either by correspondence, meetings, or in some other manner, ascertain and determine the number of mills which should be levied in such joint school district for each fund for which a levy is to be made. After ascertaining and determining the number of mills which should be levied for each said fund, in the manner herein provided, all such county superintendents of schools shall make and sign a joint statement, addressed to the board of county commissioners of each county in which a part of the joint school district is situated, setting forth the number of mills which should be levied for each fund, as so ascertained and determined by such county superintendents, by the boards of county commissioners of such counties, and shall deliver or transmit one copy of such statement to each such board of county commissioners not later than the Saturday immediately preceding the second Monday in August.

The number of mills to be levied on all of the property of such joint district for each tax-supported fund shall be determined in accordance with the general laws pertaining to tax levies for school districts, provided that the following exceptions to general financing procedures shall be made:

(a) In the general fund budget and solely for the purpose of determining the amounts of county equalization aid to be allocated to the joint district for its foundation program, the total foundation program amount of the joint district shall be considered as consisting of as many separate

foundation programs as there are counties in which any portion of the joint district is situated. The amount of each such separate foundation program shall bear to the total amount of the foundation program the same relationship that the number of ANB pupils in the joint district residing in each such county bears to the total ANB of the joint district. To the requirements of each such separate foundation program shall be applied the estimated state interest and income payment based on the number of census pupils in such portion. The amount of county equalization aid to be allocated to such separate foundation program shall then be determined in accordance with the provisions of section 75-3618. Following the determination of the amount of county equalization aid from each county in which any portion of the joint district is situated, the total remaining requirements of the general fund budget shall be financed in accordance with the general laws, provided that, to receive state equalization aid, such joint district must apply to its foundation program all district revenue from the state permanent school fund.

(b) In the transportation fund budget and solely for the purpose of apportioning among the counties wherein any portion of the joint district is situated the amount of county reimbursement for elementary transportation to be allocated to the joint district, the obligation for the total amount of such county reimbursement shall be distributed among such counties in the same proportion as the ANB of the joint district is distributed by residence in each such county.

**History:** En. Sec. 1, Ch. 105, L. 1925; amd. Sec. 2, Ch. 182, L. 1951; amd. Sec. 3, Ch. 151, L. 1961; amd. Sec. 3, Ch. 267, L. 1963.

#### **Amendment**

The 1963 amendment deleted from the

end of the third sentence of paragraph (a) the words "plus the estimated revenue to be derived from a levy of five mills on the dollar of the taxable value of the property in such portion"; and deleted from the end of paragraph (a) the words "and a district-wide five-mill levy."

### **75-1832. (1039.8) Failure to properly keep books—penalty, etc.**

#### **Clerk of School Board**

The clerk of a school district board of trustees does not perform any of the sovereign functions of government; consequently, he is an employee rather than

a public officer, so that quo warranto is not available to test the right to the position. State ex rel. Running v. Jacobson, 140 M 221, 370 P 2d 483, 486.

## **CHAPTER 19—CLERKS OF SCHOOL DISTRICTS—SCHOOL CENSUS**

Section 75-1904. Checking census reports—maintaining files—census of handicapped.

### **75-1901. (1049) Clerk—duties of.**

#### **Bond Sale Resolution**

School bond election was not invalid for failure of clerk to set out in full in minute books of board of trustees resolution authorizing sale of bonds, in absence of showing that resolution itself was defective since statute does not require that minute books reflect exact contents of resolution. Elliot v. School District No. 64-JT, Musselshell-Rosebud County, 149 M 299, 425 P 2d 826.

#### **Nature of Position**

The clerk of a school district board of trustees does not perform any of the sovereign functions of government; consequently, he is an employee rather than a public officer, so that quo warranto is not available to test the right to the position. State ex rel. Running v. Jacobson, 140 M 221, 370 P 2d 483, 486.



75-1904. (1051.1) **Checking census reports—maintaining files—census of handicapped.** It shall be the duty of the county superintendent of schools upon receipt of the report as provided in section 75-1903 to carefully examine the same and check it for errors or duplications with other census reports filed by other clerks of school districts of his county. For the purposes of assisting him in checking duplication in such reports, he shall make an alphabetical card index, classified by families, showing the names of all children on the school census, which index shall be kept current according to the census reports turned in to him each year. If the name of the same person be found upon more than one report or if the report contains names which are fictitious or names which properly belong in some other school district, he shall strike out such fictitious names and all duplicate names from all lists except that of the district in which such person was residing in good faith on the first day of October. If the county superintendent should find upon any census list the names of any persons who he believes were not residents in good faith in such district as aforesaid or which he believes are fictitious, he shall notify the clerk of the particular school district and if said clerk shall not establish the correctness of the list within fifteen (15) days after such notification, such names shall be stricken from the list. At the time of taking the annual census the clerk, with the co-operation of the public health nurse or school nurse or public health medical officer, shall use reasonable diligence to ascertain the names of all handicapped children in the district and such information concerning the same as is required by the state superintendent of public instruction, except that such a survey of handicapped children need not be conducted annually but shall be made at the time of the annual school census when required by the state superintendent of public instruction in co-operation with the state board of health.

**History:** En. Sec. 2, Ch. 118, L. 1927; amd. Sec. 1, Ch. 140, L. 1955; amd. Sec. 1, Ch. 213, L. 1965; amd. Sec. 1, Ch. 153, L. 1967.

#### **Amendments**

The 1965 amendment inserted "with the co-operation of the public health nurse or school nurse or public health medical officer" near the beginning of the final sentence; and added "except that such a survey of handicapped children need not

be conducted annually but shall be made at least once every four years at the time of the annual school census as directed by the state superintendent of public instruction in co-operation with the state board of health" at the end of the section.

The 1967 amendment, in the final sentence, deleted "at least once every four years" before "at the time of the annual school census" and substituted "when required" for "as directed" before "by the state superintendent."

## **CHAPTER 20—GRADES AND COURSES OF STUDY IN THE PUBLIC SCHOOLS—CORRESPONDENCE SCHOOLS—VISUAL TEACHING**

Section 75-2009. Health instruction in public schools required.

### **75-2002. (1054) Courses of instruction.**

#### **Cross-Reference**

Driver education courses, secs. 75-5301 to 75-5309.

**75-2009. Health instruction in public schools required.** Instruction in health, physical education and recreation shall be a part of the course of

instruction and training in the public elementary and secondary schools. The course of instruction shall be prepared by the state superintendent. To provide supervision for the instruction, he shall appoint a supervisor who is a graduate of an accredited institution of higher education with a master's degree in physical education. The supervisor's annual salary shall be comparable to other supervisor's.

**History:** En. Sec. 1, Ch. 49, L. 1941; amd. Sec. 1, Ch. 252, L. 1967.

#### Amendments

The 1967 amendment deleted "That on and after September 1941" at the beginning of the section; deleted "established and made" before "a part of the course"; deleted "schools" after "public elementary"; and substituted the second, third and fourth sentences for "of the state,

provided, however, that no further special qualifications shall be required of persons teaching in the public elementary and secondary schools of the state until required by the state board of education."

#### Repealing Clause

Section 2 of Ch. 252, Laws 1967 read "Section 75-2010, R. C. M. 1947 is repealed."

### 75-2010. Repealed.

#### Repeal

This section (Sec. 2, Ch. 49, L. 1941), relating to the duties of the superintendent

of public instruction, was repealed by Sec. 2, Ch. 252, Laws 1967.

## CHAPTER 22—SCHOOL DAY, MONTH AND YEAR—HOLIDAYS—CONSTITUTION, PIONEER AND ARBOR DAY

### Section 75-2212. Arbor day—date of.

**75-2212. (1068) Arbor day—date of.** The last Friday of April in each year shall be known throughout the state of Montana as Arbor day.

**History:** En. Sec. 2040, 5th Div. Comp. Stat. 1887; amd. Sec. 1990, Pol. C. 1895; amd. Sec. 1, Ch. 11, L. 1907; re-en. Sec. 1022, Rev. C. 1907; amd. Sec. 1, Ch. 83, L. 1909; re-en. Sec. 1401, Ch. 76, L. 1913; re-en. Sec. 1068, R. C. M. 1921; amd. Sec. 1, Ch. 61, L. 1963.

Friday of April" for "second Tuesday of May."

#### Effective Date

Section 2 of Ch. 61, Laws 1963 provided that the act should be effective immediately upon its passage and approval. Approved February 21, 1963.

#### Amendment

The 1963 amendment substituted "last

## CHAPTER 24—TEACHERS—POWERS AND DUTIES—ELECTION—DISMISSAL

### Section 75-2401. Re-election of teachers—when automatic—acceptance. 75-2405.1. Opening school day with prayer authorized.

**75-2401. (1075) Re-election of teachers—when automatic—acceptance.** After the election of any teacher or principal for the fourth consecutive year in any school district in the state, such teacher or principal so elected shall be deemed re-elected from year to year thereafter at the same salary unless the board of trustees shall by majority vote of its members on or before the first day of April give notice in writing to said teacher or principal that he has been re-elected or that his services will not be required for the ensuing year, but in this written notice, the board of trustees, if requested by the teacher or principal, must declare clearly and explicitly the specific reason or reasons for the failure of re-employment

of such teacher. The teacher or principal, if he so desires, shall be granted a hearing and reconsideration of such dismissal, before the board of trustees of that school district. The request for a hearing and reconsideration must be made in writing and submitted to the board of school trustees within ten (10) days after receipt of notice of dismissal. The board of trustees must hold a hearing and reconsider its action within ten (10) days after receipt of such request for a hearing and reconsideration. Provided that nothing in this act shall be construed to prevent the re-election of such teacher or principal by such board at an earlier date, and also provided that in case of re-election of such teacher or principal, he shall notify the board of trustees in writing within twenty (20) days after the notice of such re-election of his acceptance of the position tendered him for another year and failure to so notify the board of trustees shall be regarded as conclusive evidence of his nonacceptance of the position.

The board of trustees of any school district or county high school may terminate the services for the ensuing year of any teacher who has attained, or will attain the age of sixty-five (65) years before the following first day of September, by giving notice in writing before the first day of April that his services will not be required for the ensuing year, provided, however, that a board of trustees may in its discretion continue to employ a teacher until the age of seventy (70) years has been attained.

**History:** En. Sec. 801, Ch. 76, L. 1913;  
re-en. Sec. 1075, R. C. M. 1921; amd. Sec.  
1, Ch. 87, L. 1927; amd. Sec. 1, Ch. 166,  
L. 1949; amd. Sec. 1, Ch. 26, L. 1957;  
amd. Sec. 1, Ch. 144, L. 1963.

**Amendment**

The 1963 amendment added the second paragraph.

**75-2405.1. Opening school day with prayer authorized.** Any member of the teaching or administrative staff of a public school may open the school day with a prayer.

**History:** En. Sec. 1, Ch. 365, L. 1969.

used to open the school day in the public schools.

**Title of Act**

An act to provide that a prayer may be

**75-2411. (1085) Dismissal—appeal.**

**Want of Jurisdiction**

Where record showed that there was no meeting of school board, either special or regular, as required by section 75-1622 prior to schoolteacher being summarily

fired on ground of incompetency pursuant to this section, board's dismissal of teacher was void for want of jurisdiction. *Wyatt v. School District No. 104*, 148 M 83, 417 P 2d 221, 223, 225.

**CHAPTER 25—TEACHERS' EXAMINATIONS AND CERTIFICATES**

**Section 75-2501. Examinations and certificates—certificates of qualification required of teachers.**

75-2516. Classes of certificates for teaching.

75-2518. Outstanding certificates for teaching.

75-2521. Fees for certificates for teaching.

**75-2501. (1088) Examinations and certificates—certificates of qualification required of teachers.** 1. Except as provided in subsection 2 of this section, no certificate to teach in the public schools of Montana shall



be granted to any person who is not a citizen of the United States. This requirement shall not apply to persons who are not citizens of the United States but who are approved annually by the state superintendent of public instruction for employment in the public schools, the public junior colleges and units of the university of Montana as exchange teachers from foreign countries, or for special instruction, study, or research.

2. The superintendent of public instruction, in accordance with section 75-2516 and upon request of a board of trustees, may issue a Class 5 provisional certificate to a person who is not a citizen.

3. \* \* \* [Same as 2 in parent volume.]

4. \* \* \* [Same as 3 in parent volume.]

5. \* \* \* [Same as 4 in parent volume.]

**History:** Ap. p. Sec. 900, Ch. 76, L. 1913; amd. Sec. 20, Ch. 196, L. 1919; re-en. Sec. 1088, R. C. M. 1921; amd. Sec. 8, Ch. 131, L. 1923; amd. Sec. 1, Ch. 147, L. 1931; amd. Sec. 1, Ch. 90, L. 1947; amd. Sec. 1, Ch. 83, L. 1961; amd. Sec. 1, Ch. 90, L. 1961; amd. Sec. 1, Ch. 242, L. 1965.

#### Amendment

The 1965 amendment inserted "Except as provided in subsection 2 of this section" at the beginning of subsection 1; substituted "state superintendent of public instruction" for "state board of education"

in the second sentence of subsection 1; made changes in arrangement and phraseology in the second sentence of subsection 1; deleted from subsection 1 a final sentence reading, "During no school or university year may the number of persons so approved for employment by the state board of education exceed a total of one hundred (100) persons for both the public schools and the units of the university of Montana"; inserted a new subsection 2; and appropriately renumbered the succeeding subsections.

**75-2516. Classes of certificates for teaching.** The state superintendent of public instruction may issue the following classes of certificates for teaching in accordance with the rules and regulations approved and adopted by the state board of education:

Class 1 to Class 4. \* \* \* [Same as parent volume.]

Class 5. Provisional certificate. The provisional certificate may be issued to applicants who provide evidence satisfactory to the state board of education of intent to qualify themselves in the future for the Class 1 professional certificate or the Class 2 standard certificate, and who have completed the following minimum of academic and/or professional training at a unit of the university of Montana or equivalent institution as provided by section 75-2515:

a. For elementary endorsement. Applicants shall have completed a minimum of two years in a teacher education program on or before August 31, 1966, and shall submit application for initial certification on or before December 31, 1966. On and after January 1, 1967, applicants shall have completed a four-year college program or its equivalent and shall hold a bachelor's degree.

b. \* \* \* [Same as parent volume.]

Certificates shall be endorsed in accordance with the rules and regulations established by the state board of education for such endorsement.

For purposes of evaluating the qualifications of applicants for teaching certificates, a year means that instructional period consisting of three quarters or two semesters or other terms which are recognized as an academic year by any unit of the university of Montana or equivalent institution.

History: En. Sec. 6, Ch. 142, L. 1949; amd. Sec. 1, Ch. 187, L. 1959; amd. Sec. 1, Ch. 34, L. 1965.

#### Amendment

The 1965 amendment added the second

sentence to paragraph a under Class 5 and added to the first sentence of said paragraph a the words "on or before August 31, 1966, and shall submit application for initial certification on or before December 31, 1966."

**75-2518. Outstanding certificates for teaching.** No provisions of sections 75-2511 through 75-2521, R. C. M. 1947, shall affect or impair the validity of any certificate for teaching in force on July 1, 1959, or the rights and privileges of the holders by virtue thereof, save that any certificate may be suspended or revoked for any of the causes and by the procedures specified by law.

Any holder of an elementary school standard certificate issued prior to July 1, 1959, under previous statute and in force on July 1, 1959, shall be eligible for renewal of such certificate in accordance with the rules and regulations of the state board of education until the holder qualifies for the Class 2 standard certificate as provided in section 75-2516, as amended.

Any holder of a Class 5 certificate in force on June 30, 1966, or issued between July 1, 1966, and December 31, 1966, shall be eligible for renewal of such certificate in accordance with the rules and regulations of the state board of education until the holder qualifies for the Class 2 standard certificate as provided in section 75-2516 as amended.

History: En. Sec. 7, Ch. 142, L. 1949; amd. Sec. 3, Ch. 187, L. 1959; amd. Sec. 2, Ch. 34, L. 1965.

#### Amendment

The 1965 amendment substituted "sections 75-2511 through 75-2521, R. C. M. 1947" for "this act" near the beginning of the first paragraph; and added the third paragraph.

**75-2521. Fees for certificates for teaching.** For the issuance, renewal or extension of a certificate to teach, each applicant for such certificate shall pay a fee of two dollars (\$2.00) for each year that the certificate is in force. Such fee shall be paid to the state superintendent of public instruction, who shall deposit such fees with the state treasurer to the credit of the general fund.

History: En. Sec. 10, Ch. 142, L. 1949; amd. Sec. 62, Ch. 147, L. 1963; amd. Sec. 32, Ch. 121, L. 1965.

#### Amendments

The 1963 amendment substituted "to the credit of the general fund" at the end of the second sentence for "and report each month to the state auditor the

amount of fees collected"; and deleted a third sentence reading, "The state auditor shall credit all such fees to the division of certification of the state department of public instruction."

The 1965 amendment increased the fee specified in the first sentence from \$1.00 to \$2.00.

## CHAPTER 27—TEACHERS' RETIREMENT SYSTEM

- Section 75-2701. Definitions.  
 75-2703. Administration.  
 75-2704. Membership.  
 75-2705. Membership application and creditable service.  
 75-2707. Benefits.  
 75-2708. Management of moneys.  
 75-2709. Method of financing.  
 75-2709.1. Inclusion in school budget of payments to teachers' retirement reserve fund.  
 75-2709.2. Use of reserve fund.

**75-2701. Definitions.** The following words and phrases used in this act shall have the following meanings unless a different meaning is plainly required by the content:

(1) to (12). \* \* \* [Same as parent volume.]

(13) "Earnable compensation" shall mean the full rate of the compensation, pay or salary that would be payable to a teacher if he worked the full normal working time provided that any teacher who received a salary or compensation in excess of seven thousand dollars (\$7,000) per annum subsequent to July 1, 1965, may use such salary as a basis of compensation for the purpose of this system if (a) he contributes five per cent (5%) of the excess of such salary subsequent to July 1, 1965, over seven thousand dollars (\$7,000) to his individual account in the annuity savings fund and (b) he contributes three and one-half per cent (3½%) of the excess of his salary subsequent to July 1, 1965, over seven thousand dollars (\$7,000) to the pension accumulation fund. In cases where compensation includes maintenance, the retirement board shall fix the value of that part of the compensation not paid in money.

(14) and (15). \* \* \* [Same as parent volume.]

(16) "Annuity" shall mean payments for life derived from the accumulated contributions of a member as provided in this act. All annuities shall be paid in equal monthly installments. The board may make an annual payment to the beneficiaries of the difference between the rate of interest used in calculating the benefit from the annuity reserve fund and the rate of interest earned on investments.

(17) to (22). \* \* \* [Same as parent volume.]

**History:** En. Sec. 1, Ch. 87, L. 1937; subd. (7) amd. Sec. 1, Ch. 202, L. 1939; amd. Sec. 1, Ch. 215, L. 1939; amd. Sec. 1, Ch. 137, L. 1945; amd. Sec. 1, Ch. 28, L. 1949; amd. Sec. 1, Ch. 216, L. 1953; amd. Sec. 1, Ch. 235, L. 1959; amd. Sec. 1, Ch. 209, L. 1963; amd. Sec. 1, Ch. 238, L. 1967.

#### Amendments

The 1963 amendment increased the amounts set forth in paragraph (13) from \$6,000 to \$7,000 in three places, and from \$5,000 to \$5,700 in three places; and substituted "July 1, 1961" for "July 1, 1957" in three places in paragraph (13).

The 1967 amendment rewrote paragraph 13, which prior to amendment read "(13) 'Earnable compensation' shall mean the full rate of the compensation, pay or salary that would be payable to a teacher if he worked the full normal working time except that any compensation in excess of seven thousand dollars (\$7,000) per annum, shall not be used for the purpose of this system provided that any teacher who received a salary or compensation in excess of five thousand seven hundred dollars (\$5,700) per annum sub-

sequent to July 1, 1961, may use such salary or that portion of it not in excess of seven thousand dollars (\$7,000) as a basis of compensation for the purpose of this system if (a) he contributes five per cent (5%) of the excess of such salary subsequent to July 1, 1961 over five thousand seven hundred dollars (\$5,700) and not exceeding seven thousand dollars (\$7,000) to his individual account in the annuity savings fund and (b) he contributes three and one-half per cent (3½%) of the excess of his salary subsequent to July 1, 1961, over five thousand seven hundred dollars (\$5,700) and less than seven thousand dollars (\$7,000) to the pension accumulation fund. In cases where compensation includes maintenance, the retirement board shall fix the value of that part of the compensation not paid in money" and in paragraph (16), added the third sentence.

#### Repealing Clause

Section 2 of Ch. 209, Laws 1963 repealed all acts and parts of acts in conflict therewith.

**75-2703. Administration.** (1) to (5). \* \* \* [Same as parent volume.]



(6) The members of the retirement board shall serve without compensation except that the members thereof, excluding superintendent of public instruction, shall receive a per diem fee of twenty dollars (\$20.00) each for each day in actual attendance at the meetings of said board or in the execution of their duties as members of said board; provided, however, that in no instance shall any such member of said board receive as said per diem fee, a sum in excess of three hundred dollars (\$300.00) in any one (1) year; and the members of said board shall be allowed their actual and necessary traveling expenses while performing their duties as members of said board, which shall be paid quarterly upon proper vouchers from the expense fund hereinafter named.

(7) The retirement board shall elect from its membership a chairman, and shall appoint a secretary who may be, but need not be one (1) of its members.

(8) to (14). \* \* \* [Same as parent volume.]

**History:** En. Sec. 3, Ch. 87, L. 1937; amd. Sec. 1, Ch. 157, L. 1953; amd. Sec. 34, Ch. 177, L. 1965; amd. Sec. 1, Ch. 84, L. 1967.

\$10 to \$20 and the yearly limit from \$100 to \$300; and re-enacted subsections (10) to (14), which had been deleted by the 1965 amendment, but without the centered heads appearing in the parent volume.

#### Amendments

The 1965 amendment deleted from subsection (7) a second sentence reading, "The secretary shall give bond in such amount and with such sureties as the board may require"; and apparently through clerical error, deleted subsections (10), (11), (12), (13), and (14), for text of which see parent volume.

The 1967 amendment increased per diem for members of the retirement board from

#### Effective Date

Section 2 of Ch. 84, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved February 21, 1967.

#### Cross-References

Bonds of state officers and employees, sec. 6-105 et seq.

**75-2704. Membership.** (1) and (2). \* \* \* [Same as parent volume.]

(3) The membership of any person in the retirement system shall cease:

(a). \* \* \* [Same as parent volume.]

(b) If he withdraws his accumulated contributions or retires on a pension or dies, but not otherwise, except that the membership of a teacher who has not withdrawn his contributions and who has not had sufficient service to be eligible for disability retirement shall not be canceled, provided the member shall prove to the satisfaction of the retirement board that absence from service was caused by personal illness constituting disability, or service in the armed forces of the United States which includes all members of the army, the navy, the marine corps, and the coast guard, or service in the American Red Cross and merchant marine during time of war, and provided any member with five (5) or more years of service, whose service is discontinued otherwise than by death or retirement, shall have the right to elect within one (1) year after such termination of service, and without right of revocation, whether to allow his accumulated contributions to remain in the retirement fund. Upon the qualification for retirement by reason of age or disability of a member who has elected to allow his accumulated con-

tributions to remain in the retirement fund, he shall receive a retirement allowance in accordance with the provisions of the Teachers' Retirement Act.

(4). \* \* \* [Same as parent volume.]

**History:** En. Sec. 4, Ch. 87, L. 1937; amd. Sec. 2, Ch. 215, L. 1939; amd. Sec. 1, Ch. 15, L. 1945; amd. Sec. 2, Ch. 28, L. 1949; amd. Sec. 2, Ch. 216, L. 1953; amd. Sec. 1, Ch. 240, L. 1967.

#### **Amendments**

The 1967 amendment, in subsection

(3) (b), decreased from 10 to 5 the number of years of membership service required to be eligible for vested rights.

#### **Cross-Reference**

Community college trustees and teachers eligible, sec. 75-4424.

**75-2705. Membership application and creditable service.** (1) to (8).

\* \* \* [Same as parent volume.]

(9) Any teacher who has become employed as a teacher in Montana subsequent to September first nineteen hundred and thirty-seven may receive credit for service for out-of-state teaching employment provided (a) that he contributes to the retirement fund five per cent (5%) of the salary for each year claimed based on the first year's salary earned in Montana; and (b) that the maximum number of such years shall not exceed five (5) and that a year out-of-state employment shall be equivalent to one year membership service in Montana, and (c) that payment of such contribution shall be made in a lump sum or in installments as agreed between such teacher and the retirement board.

(10). \* \* \* [Same as parent volume.]

**History:** En. Sec. 5, Ch. 87, L. 1937; amd. Sec. 3, Ch. 215, L. 1939; amd. Sec. 3, Ch. 28, L. 1949; amd. Sec. 3, Ch. 216, L. 1953; amd. Sec. 1, Ch. 242, L. 1967.

#### **Amendments**

The 1967 amendment, in subsection (9), decreased from 10 to 5 the number of years of out-of-state service a member is allowed to purchase as Montana service.

**75-2707. Benefits.** (1) Superannuation retirement benefit. (a) Any member who has completed five (5) years of creditable service, the last five (5) years of which shall have been in this state, and who has attained the age of sixty (60) may retire from service, if he files with the retirement board his written application setting forth the fact of his retirement.

(b) That from and after the passage and approval of this act, any member in service who has attained the age of seventy (70) years, during any school year shall be retired by said retirement board on the first day of September following his or her seventieth birthday, provided, however, that this provision shall not apply to teachers in the Montana university system who may be employed beyond the age of seventy (70) upon the recommendation of the president of the unit concerned to the board of regents. Provided further that such teachers (1) shall not be given credit toward retirement pay for teaching service rendered after the end of the school year in which the age of seventy (70) is attained, (2) shall not contribute to the retirement system after the end of said school year, and (3) shall not have the compensation received after the end of said school year used in computing final average salary. Initial employment of teachers in the Montana university system

beyond the age of seventy (70) may be made upon the recommendation of the president of the unit concerned to the board of regents but such employees are denied membership in the teachers' retirement system.

Provided, further, that any retired teacher may be employed as a teacher in Montana and may earn an amount not to exceed one-fourth ( $\frac{1}{4}$ ) of his final average compensation without loss of retirement benefits.

(2) Allowance on superannuation retirement. Upon superannuation retirement a member shall receive a superannuation retirement allowance which shall consist of:

(a) An annuity which shall be actuarial equivalent of his accumulated contributions at the time of his retirement, and

(b) A pension of one-quarter ( $\frac{1}{4}$ ) of his average final compensation provided his creditable service is at least thirty-five (35) years, otherwise, a pension of one one-hundred fortieth ( $\frac{1}{140}$ ) of his average final compensation multiplied by the number of years of his creditable service, and

(c) If he has a prior service certificate in full force and effect, an additional pension which shall be equal to one one-hundred fortieth ( $\frac{1}{140}$ ) of his average final compensation multiplied by the number of years of service certified to him on his prior service certificate.

(d) The minimum annual retirement allowance for a member who has completed thirty (30) years service and who retired after September 1, 1937, and before June 30, 1949, shall be fifteen hundred dollars (\$1,500) and the minimum retirement allowance for a member who retired after September 1, 1937, and before June 30, 1949, but whose service is less than thirty (30) years shall receive a minimum retirement allowance based on the proportionate amount of fifteen hundred dollars (\$1,500) that his service bears to thirty (30) years of service.

(e) The minimum annual retirement allowance for a member who has completed thirty-five (35) years of service and who retires after June 30, 1949, shall be fifteen hundred dollars (\$1,500).

(f) Every member receiving a superannuation allowance on June 30, 1967, shall be entitled to an increase in their original retirement allowance of two per cent (2%) for each year on retirement from July 1, 1937, to June 30, 1967, unless the benefit to those members eligible under paragraphs (d) and (e) are larger, then this increase shall not be allowed.

(g) In the event a member retired on a superannuation allowance has not received more than three (3) retirement payments prior to death, the beneficiary of the member shall receive a refund of the difference between the total paid and the amount of the accumulated contributions.

(3) Disability retirement benefit. Upon the application of a member in service or of his employer, any member who qualifies by reason of service for a retirement benefit may be retired by the retirement board not less than thirty (30) and not more than ninety (90) days next following the date of filing such application on a disability retire-



ment allowance, provided that the medical board after a medical examination of such member shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity is likely to be permanent and that such member should be retired.

If the applicant for disability retirement was prevented because of the disability from making application at the time [of the time] of the commencement of disability, the retirement board shall grant the disability retirement upon the proper application for disability retirement allowance and make payments retroactive to the thirtieth day after the date of commencement of disability.

(4). \* \* \* [Same as parent volume.]

(5) Re-examination of beneficiaries retired on account of disability. Once each year during the first five (5) years following the retirement of a member on disability retirement allowance, and once in every three (3) year period thereafter the retirement board may, and upon his application shall, require a disability beneficiary who has not yet attained the age of sixty (60) to undergo a medical examination by the medical board or a physician or physicians designated by the medical board, such examination to be made at the place of residence of said beneficiary or other place mutually agreed upon. Should any disability beneficiary who has not yet attained the age of sixty (60) refuse to submit to at least one (1) medical examination in any year by the medical board, his allowance may be discontinued until his withdrawal of such refusal, and should his refusal continue for one (1) year, all his rights in and to his pension may be revoked by the retirement board.

(6). \* \* \* [Same as parent volume.]

(7) Should a disability beneficiary under age sixty (60) be restored to active service at a compensation not less than his average final compensation his retirement allowance shall cease; he shall again become a member of the retirement system and contribute thereto. Any prior service certificate on the basis of which his service was computed at the time of his retirement shall be restored to full force and effect and in addition upon his subsequent retirement he shall be credited with all his service as a member, and should he be restored to active service on or after the attainment of the age of fifty-five (55) years, his pension upon subsequent retirement shall not exceed the pension that he would have received had he remained in service during the period of his previous retirement nor the sum of the pension which he was receiving immediately prior to his last restoration to service and the pension that he would have received on account of his service since his last restoration had he entered service at that time as a new entrant.

(8) (a) A member who withdraws from service or ceases to be a teacher for any cause other than death or retirement shall be paid only the amount contributed by the member to his annuity savings account after first deducting any unpaid annual membership fees of said member.

(b) Should a member die before retirement the amount of the member's accumulated contributions shall be paid to his estate or such person

as he shall have nominated on a form as the board may require which shall be filed with the board prior to the member's death.

(c) In lieu of benefits provided in (b) above, if the deceased member had qualified by reason of service for a retirement benefit, the beneficiary nominated by the deceased member may elect to receive a monthly life annuity. Said monthly life annuity to be based on the beneficiary's attained age at the time of the deceased member's death and to be calculated from an amount equal to the required reserve for the deceased member's creditable service, together with the deceased member's accumulated contributions.

(d) If the deceased member had qualified by reason of service for a retirement benefit and was actively engaged as a teacher in the state of Montana within one (1) year prior to his death, the sum of fifty dollars (\$50.00) per month shall be paid to each minor child of the deceased member until such child or children reach his or her eighteenth birthday.

(9) Optional benefits. With the provision that no optional selection shall be effective in case a beneficiary dies within thirty (30) days after retirement, and that such a beneficiary shall be considered as an active member at the time of his death; until the first payment on account of any benefit becomes normally due, any member may elect to receive his benefit in a retirement or disability allowance payable throughout life as hereinabove provided, or he may on retirement elect to receive the actuarial equivalent at that time of his retirement or disability allowance in a lesser retirement allowance payable throughout life with the provision that:

Options 1 to 4. \* \* \* [Same as parent volume.]

**History:** En. Sec. 6, Ch. 87, L. 1937; amd. Sec. 2, Ch. 137, L. 1945; amd. Sec. 4, Ch. 28, L. 1949; amd. Sec. 4, Ch. 216, L. 1953; amd. Sec. 1, Ch. 160, L. 1955; amd. Sec. 1, Ch. 270, L. 1959; amd. Sec. 1, Ch. 216, L. 1963; amd. Sec. 1, Ch. 33, L. 1965; amd. Sec. 1, Ch. 259, L. 1965; amd. Sec. 1, Ch. 241, L. 1967; amd. Sec. 1, Ch. 69, L. 1969.

#### Compiler's Notes

This section was amended twice in 1965, once by Ch. 33 and once by Ch. 259. Since the changes made by the two amendments do not appear to conflict, the compiler has made a composite section incorporating the changes made by both amendatory acts.

The compiler has bracketed the words "of the time" in the second paragraph of subsection (3) as being superfluous.

#### Amendments

The 1963 amendment increased the minimum annual allowances set forth in paragraphs (d) and (e) of subsection (2) from \$900 to \$1,200; and in the second paragraph of subsection (3) deleted su-

perfluous words "time of the" before "commencement of disability."

Chapter 33, Laws of 1965, added to subsection (1)(b) the two provisos in the first paragraph, the last sentence of the first paragraph, and the proviso constituting the second paragraph.

Chapter 259, Laws of 1965, deleted "but such payments shall not exceed in any one (1) month the sum of one hundred dollars (\$100.00)" from the end of the second paragraph of subdivision (8)(c).

The 1967 amendment, in subsection (1) (a), decreased from 10 to 5 the number of years wherever stated; in subsection (2)(e), deleted "and who has attained the age of sixty-five" after "years of service"; in subsection (3), substituted "qualifies by reason of service for a retirement benefit" for "has had ten or more years of creditable service in the state of Montana" after "any member who"; in subsection (8)(b), deleted "only" after "retirement," inserted "accumulated" before "contributions," and substituted "shall be paid to his estate or such person as he shall have nominated on a form as the board may require which shall be filed with the board prior to the member's death" for "to his annuity savings fund account after de-

ducting any unpaid annual membership fees shall be paid to his estate or such person as he shall have nominated by written designation duly executed and filed with the retirement board" after "contributions"; deleted the second paragraph in subsection (8)(c), which read, "If the beneficiary so electing be the surviving spouse of the deceased member, such beneficiary shall receive, in addition to the monthly annuity, provided the deceased member was actively engaged as a teacher in the state of Montana within one (1) year prior to his death, the sum of fifty dollars (\$50.00) per month for each child from the pension accumulation fund for the support of the minor child or children of the deceased member until

such child or children reach his or her eighteenth birthday"; and added subsection (8)(d).

The 1969 amendment increased the benefits payable under subsections (2)(d) and (2)(e) from \$1,200 to \$1,500; inserted subsection (2)(f); redesignated former subsection (2)(f) as subsection (2)(g); and inserted arabic numerals in parentheses following the written numbers throughout the section.

#### Effective Date

Section 2 of Ch. 259, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved March 9, 1965.

**75-2708. Management of moneys.** (1) The retirement board shall be the trustees of the moneys collected under this act and the same shall be invested and reinvested by the state board of land commissioners as part of the long term investment fund.

(2) The retirement board annually shall allow regular interest on the average amount for the preceding year on such moneys with the exception of moneys used for administrative expense. The amount so allowed shall be annually credited to such moneys by the retirement board from interest and other earnings on the moneys of the retirement system. Any additional amount required to meet the interest on the moneys of the retirement system shall be paid by the state during the ensuing year and any excess of earning over such amount required shall be deductible from the amounts to be contributed by the state during the ensuing year. Regular interest shall mean such per centum rate to be compounded annually as shall be determined by the retirement board on the basis of the interest earnings of the system for the preceding year and of the probable earnings to be made, in the judgment of the board, during the immediate future.

(3) The state treasurer is the custodian of the moneys collected under this act and of the securities in which said moneys are invested. All payments of such moneys shall be made only upon claims signed by two (2) persons designated by the retirement board. A duly attested copy of a resolution of the retirement board designating such persons and bearing on its face specimen signatures of such person shall be filed with the state controller as his authority for approving such claims.

(4). \* \* \* [Same as parent volume.]

(5) The board may in its discretion transfer the savings account of a member to the pension accumulation moneys if the account has been dormant for a period of ten (10) years provided that no right of the member shall be jeopardized by such transfer and the savings account shall be transferred to the member's name upon subsequent re-entry to membership.

(6) All of the funds referred to in section 75-2709 except the expense fund shall be replaced by one or more accounts in the agency fund. The



expense fund shall be replaced by an account in the earmarked revenue fund.

**History:** En. Sec. 7, Ch. 87, L. 1937; amd. Sec. 3, Ch. 176, L. 1953; amd. Sec. 5, Ch. 216, L. 1953; amd. Sec. 196, Ch. 147, L. 1963.

#### Amendment

The 1963 amendment, in subsection (1), substituted "moneys collected under" for "several funds created by"; in the first sentence of subsection (2), substituted "on such moneys with the exception of moneys used for administrative expense" for "in each of the funds with the exception of the expense fund"; deleted "shall be due and payable to said funds and" after "The amount so allowed" in the second sentence of subsection (2); substituted "to such moneys" for "thereto" in the second sentence of subsection (2); substituted "moneys" for "funds" in the

third sentence of subsection (2); substituted "moneys collected under this act" for "several trust funds" and "moneys" for "funds" in the first sentence of subsection (3); substituted "of such moneys" for "from said funds" and "claims" for "vouchers" in the second sentence of subsection (3); substituted "state controller" for "treasurer" and "approving such claims" for "making payments upon such vouchers" in the third sentence of subsection (3); deleted from subsection (3) a fourth sentence reading, "No voucher shall be drawn unless it has previously been authorized by resolution of the retirement board"; substituted "pension accumulation moneys" for "pension accumulation fund" in subsection (5); made minor changes in phraseology; and added subsection (6).

**75-2709. Method of financing.** There are hereby created and established an "annuity savings fund" and "annuity reserve fund," a "pension accumulation fund," a "pension reserve fund" and an "expense fund," into which funds all of the assets of the retirement system shall be credited according to the purpose for which they are held as hereinafter prescribed.

(1) Annuity savings fund. The annuity savings fund shall be a fund in which shall be accumulated the contributions from the compensation of members to provide for their annuities. Contributions to and payments from the annuity savings fund shall be made in the following manner:

(a) to (d). \* \* \* [Same as parent volume.]

(e) In addition to the contributions deducted from compensation as hereinbefore provided, subject to the approval of the retirement board, any member may redeposit in the annuity savings fund by a single payment or by an increased rate of contribution an amount equal to the total amount which he previously withdrew therefrom as provided in this act, or any part thereof; or any member may deposit therein by a single payment or by an increased rate of contribution amounts for the purchase of an additional annuity. Such additional amounts so deposited shall become a part of his accumulated contributions, except in the case of disability retirement, when they shall be treated as excess contributions returnable to the member in cash or as an annuity of equivalent actuarial value and shall not be considered in computing his pension. The accumulated contributions of a member withdrawn by him, or paid to his estate or to his designated beneficiary in event of his death as provided in this act, shall be paid from the annuity savings fund, and an amount equivalent to the difference between the accumulated contributions calculated at regular interest and the amount paid shall be transferred to the pension accumulation fund. Upon the retirement of a member his accumulated contributions shall be transferred from the annuity savings fund to the annuity reserve fund.

(2). \* \* \* [Same as parent volume.]

(3) Pension accumulation fund. The pension accumulation fund shall be the fund in which shall be accumulated all reserves for the payment of all pensions and from which pensions and benefits in lieu thereof shall be paid to or on account of beneficiaries credited with prior service. Contributions to and payments from the pension accumulation fund shall be made as follows:

(a) Each and every employer shall pay into the pension accumulation fund an amount equal to four and one-half per centum ( $4\frac{1}{2}\%$ ) of the earnable compensation of each member employed during the whole or such part of the preceding payroll period as such member was so employed by such employer. Provided, further, that for each payroll period after July 1, 1979, the employers' contribution shall be four per centum (4%).

(b) to (h). \* \* \* [Same as parent volume.]

(i). \* \* \* [Same as (m) in parent volume.]

(j). \* \* \* [Same as (n) in parent volume.]

(k). \* \* \* [Same as (o) in parent volume.]

(l). \* \* \* [Same as (p) in parent volume.]

(m). \* \* \* [Same as (q) in parent volume.]

(4). \* \* \* [Same as parent volume.]

(5) Expense fund. The expense fund shall be the fund to which shall be credited all moneys contributed for the administrative expenses of the retirement system and from which the expenses of administration of the retirement system shall be paid exclusive of amounts payable as retirement allowance and as other benefits provided herein. Contributions shall be made to the expense fund as follows:

(a). \* \* \* [Same as parent volume.]

(b) The expense not payable by contributions of members shall be paid from interest and dividends earned on the funds of the retirement system.

**History:** En. Sec. 8, Ch. 87, L. 1937; amd. Secs. 2 and 3, Ch. 202, L. 1939; amd. Sec. 3, Ch. 137, L. 1945; amd. Sec. 5, Ch. 28, L. 1949; amd. Sec. 1, Ch. 239, L. 1959; amd. Sec. 2, Ch. 216, L. 1963; amd. Sec. 1, Ch. 70, L. 1969.

#### Amendments

The 1963 amendment substituted "July 1, 1975" for "July 1, 1965" in the final proviso to paragraph (3) (a); and made a minor change in punctuation.

The 1969 amendment, in subdivision (1) (e), deleted "but such additional payments shall not exceed the amounts computed to provide with his prospective retirement allowance a total retirement allowance of one-half of his average final compensation at the minimum age at which the member will become eligible for superannuation retirement" at the end

of the first sentence, and substituted "pension accumulation fund" for "expense fund" at the end of the next to last sentence; in subdivision (3) (a), substituted "four and one-half per centum ( $4\frac{1}{2}\%$ )" for "three and seventy-five one hundredths per centum (3.75%)" in the first sentence and deleted a proviso reading, "provided, however, that no payments shall be made into said pension accumulation fund until after July 1, 1945. Provided further, until such time as the legislative assembly shall provide adequate funds for the establishment of such reserves as are set up in this act, such parts of such act as deal with reserves to be built up by contributions from the state shall be inoperative"; deleted former subdivisions (3) (i) to (l) and redesignated the remaining subdivisions; deleted former subdivision (5) (b) and redesignated former subdivision (5)

(c) as subdivision (5) (b) and substituted "shall be paid \* \* \* of the retirement system" for "and amounts transferred from the annuity savings fund as provided under paragraph (b) of this subsection shall be paid by the employers at a rate

fixed by the retirement board not in excess of one per centum (1%) of the earnable compensation of the members for whom the employers make contributions as herein provided."

**75-2709.1. Inclusion in school budget of payments to teachers' retirement reserve fund.** The board of trustees of school districts and county high schools may in their respective budgets make and provide an appropriation for payments to a reserve fund for teachers' retirement not to exceed thirty-five per cent (35%) of the total amount budgeted annually for the retirement fund.

**History:** En. Sec. 1, Ch. 117, L. 1967.

**Title of Act**

An act authorizing school boards to make and provide an appropriation in school budgets for payment to a reserve

fund for teachers' retirement not to exceed thirty-five per cent (35%) of the total amount budgeted annually for the retirement fund to be used for payment of teachers' retirement expenses incurred at the beginning of each school year.

**75-2709.2. Use of reserve fund.** The reserve fund may be used for the purpose of paying teachers' retirement expenses incurred at the beginning of each school year when funds for this purpose are not available as budgeted. The funds shall not be used for any other purpose.

**History:** En. Sec. 2, Ch. 117, L. 1967.

CHAPTER 30—JUVENILE DISORDERLY PERSONS—COMMITMENT TO INDUSTRIAL SCHOOL

(Repealed—Section 16, Chapter 262, Laws of 1969)

**75-3001, 75-3002. (1171, 1172) Repealed.**

**Repeal**

Sections 75-3001, 75-3002 (Secs. 4, 6, Ch. 45, L. 1903; Sec. 1, Ch. 80, L. 1905; Secs. 1106, 1107, Ch. 76, L. 1913; Sec. 88, Ch. 199, L. 1965), relating to juvenile

disorderly persons and commitment of juveniles to state vocational school for girls or state industrial school, were repealed by Sec. 16, Ch. 262, Laws 1969.

CHAPTER 31—SCHOOLHOUSE SITES AND CONSTRUCTION

- Section** 75-3109. Agreements authorized for joint interstate school facilities.  
 75-3110. Form of agreement—approval by superintendent of public instruction required.  
 75-3111. Election on interstate agreement—form of ballot.  
 75-3112. Location of joint interstate facilities.  
 75-3113. Financing of joint interstate facilities.  
 75-3114. Authority to enter into leases and agreements—"building" defined.  
 75-3115. Requirements before board may enter into lease or agreement.  
 75-3116. Maximum term of lease or agreement.  
 75-3117. Right of board to lease property under lease providing for construction of building thereon, and for building to vest in school district at expiration of term.  
 75-3118. Terms and conditions of agreement for construction of building—provisions for bids and bidding.  
 75-3119. Election before or after entering into lease or agreement.  
 75-3120. Contents of ballot and manner of election before entering into lease or agreement.



- 75-3121. Provisions for voiding authorization for increase in maximum tax rate.
- 75-3122. Resolution of governing board declaring intention to enter into lease or agreement—opening and accepting bids.
- 75-3123. Amount of rental agreed to be paid as district obligation for year of payment.
- 75-3124. Use of temporary quarters or portable buildings.
- 75-3125. Submission of certified copy of proceedings to attorney general—examination—validation of proceedings.

### 75-3103. (1175) Repealed.

#### Repeal

Section 75-3103 (Sec. 1602, Ch. 76, L. 1913; Sec. 1, Ch. 173, L. 1933; Sec. 2, Ch. 257, L. 1947), relating schoolhouse con-

struction regulations and specifications, was repealed by Sec. 27, Ch. 366, Laws 1969.

**75-3109. Agreements authorized for joint interstate school facilities.** The board of trustees of any school district with boundaries adjoining another state may enter into an agreement and contract with a school district in such adjoining state to provide for the joint erection, operation and maintenance of school facilities for both districts upon such terms and conditions as may be mutually agreed upon between such districts in accordance with the provisions of this act.

**History:** En. Sec. 1, Ch. 240, L. 1965.

#### Title of Act

An act authorizing school districts adjoining another state to contract with school districts in the neighboring state

for the joint erection, operation and maintenance of school facilities for both districts; providing for the financing of such joint facilities; and providing for the approval of contracts for such joint facilities by the electors of the school district.

**75-3110. Form of agreement—approval by superintendent of public instruction required.** An agreement proposed for adoption by a school board under this act shall be in the form and contain such terms as may be prescribed by the superintendent of public instruction and no agreement shall be submitted to a vote of the people under this act unless it has first been approved in writing by the superintendent of public instruction.

**History:** En. Sec. 2, Ch. 240, L. 1965.

**75-3111. Election on interstate agreement—form of ballot.** An approved agreement shall be submitted to the electorate of the school district at a special election called for that purpose or at a regular election for school trustees. The question on the ballot at said election shall be in substantially the following form.

“Shall the proposed agreement between this school district and school district number \_\_\_\_\_ of \_\_\_\_\_ county, state of \_\_\_\_\_, be executed?”

No agreement made pursuant to this act shall be valid until it has been approved by the electors of the district in the manner herein provided.

**History:** En. Sec. 3, Ch. 240, L. 1965.

**75-3112. Location of joint interstate facilities.** Facilities erected and maintained under this act may be located either in Montana or such adjoining state.

**History:** En. Sec. 4, Ch. 240, L. 1965.

**75-3113. Financing of joint interstate facilities.** The school district entering into such an agreement may borrow money, levy taxes and issue bonds for such joint facilities in the same manner and to the same extent as other school districts within this state.

**History:** En. Sec. 5, Ch. 240, L. 1965.

**75-3114. Authority to enter into leases and agreements—"building" defined.** Any school district may enter into leases and agreements relating to real property and buildings to be used by the district pursuant to this act. As used in this act, "building" includes on-site and off-site facilities, utilities or improvements which the school board determines are necessary for the proper operation or function of the school facilities to be leased. It also includes the permanent improvement of school grounds.

**History:** En. Sec. 1, Ch. 321, L. 1967.

**Title of Act**

An act authorizing school districts to enter into lease agreements for the rental of needed school buildings.

**75-3115. Requirements before board may enter into lease or agreement.** Before the board of trustees of a school district enters into a lease or agreement pursuant to this act, it shall have available a site upon which a building to be used by the district may be constructed and shall have complied with the provisions of law relating to the selection and approval of sites, and it shall have prepared and shall have adopted plans and specifications for such building which have been approved pursuant to section 75-3102, R. C. M. 1947. A district has a site available for the purposes of this section if it owns a site or if it has an option on a site which allows the school district or the designee of the district to purchase the site. Any school district may acquire and pay for an option containing such a provision.

**History:** En. Sec. 2, Ch. 321, L. 1967.

**75-3116. Maximum term of lease or agreement.** The term of any lease or agreement entered into by a school district pursuant to this act shall not exceed forty (40) years.

**History:** En. Sec. 3, Ch. 321, L. 1967.

**75-3117. Right of board to lease property under lease providing for construction of building thereon, and for building to vest in school district at expiration of term.** The board of trustees of a school district may let, at a minimum rental of one dollar (\$1) a year, to any person, firm, or corporation any real property which belongs to the district if the instrument by which such property is let requires the lessee therein to construct on the demised premises, or provide for the construction thereon of a building or buildings for the use of the school district during the term thereof, and provides that title to such building shall vest in the school district at the expiration of such term. Such instrument may provide for the means or methods by which such title shall vest in the school district prior to the expiration of such term, and shall contain such other terms

and conditions as the governing board may deem to be in the best interest of the school district.

**History:** En. Sec. 4, Ch. 321, L. 1967.

**75-3118. Terms and conditions of agreement for construction of building—provisions for bids and bidding.** The board of trustees of any school district may enter into an agreement with any person, firm, or corporation under which such person, firm, or corporation shall construct, or provide for the construction of, a building to be used by the district upon a designated site and lease such building and site to the district. Such instrument shall provide that the title to such building and site shall vest in the district at the expiration of such lease, and may provide the means or method by which the title to the building and site shall vest in the district prior to the expiration of such lease, and shall contain such other terms and conditions as the governing board of the district deems to be in the best interest of the district.

The agreement entered into shall be with the lowest responsible bidder who shall give such security as the board requires. The board may reject all bids. For the purpose of securing bids the board shall publish at least once a week for two (2) weeks in some newspaper of general circulation published in the district, or if there is no such paper, then in some paper of general circulation circulated in the county, a notice calling for bids, stating the proposed terms of the agreement and the time and place where bids will be opened.

**History:** En. Sec. 5, Ch. 321, L. 1967.

**75-3119. Election before or after entering into lease or agreement.** The governing board of a school district shall call and hold an election, pursuant to sections 7 and 8 [75-3120 and 75-3121] of this act, before entering into a lease or agreement.

**History:** En. Sec. 6, Ch. 321, L. 1967.

**75-3120. Contents of ballot and manner of election before entering into lease or agreement.** Before entering into a lease or agreement pursuant to this act, the board of trustees of the district shall call, hold, and conduct an election in the general manner provided for calling, holding and conducting school bond elections by sections 75-3910, 75-3912, 75-3913 and 75-3915, R. C. M. 1947, and the ballot used in the election shall contain substantially the words: "Shall the board of trustees of \_\_\_\_\_ District be authorized to issue and sell bonds, or enter into a lease agreement for the acquiring and equipping of a building for use by the school district at (designate location), and, for such purposes, shall the maximum tax rate of the district be increased from \_\_\_\_\_ to \_\_\_\_\_, such rate to be in effect in the \_\_\_\_\_ District for the year 19\_\_\_\_\_ to 19\_\_\_\_\_, be authorized and the amount of such increase used solely and exclusively for such purposes?" If such proposition shall be approved the trustees shall be authorized to bond or lease, whichever in their judgment shall be most advantageous to the school district. Bonding shall be accomplished under the laws of chapter 39 of Title 75, R. C. M. 1947, and subject to the limitations therein. Any



indebtedness incurred under this act shall be considered indebtedness within the meaning of article XIII, section 6 of the constitution of the state of Montana, in the same manner as bonded indebtedness.

**History:** En. Sec. 7, Ch. 321, L. 1967.

**75-3121. Provisions for voiding authorization for increase in maximum tax rate.** If the board of trustees of the district fails to enter into a lease pursuant to this article within one (1) year after the result of an election, held pursuant to section 7 [75-3120] of this act, at which a majority of the votes cast favors the proposition submitted, the authorization for an increase in the maximum tax rate shall become void.

**History:** En. Sec. 8, Ch. 321, L. 1967.

**75-3122. Resolution of governing board declaring intention to enter into lease or agreement—opening and accepting bids.** After the governing board of a school district has complied with section 2 [75-3115] of this act, it shall, in a regular open meeting, adopt a resolution declaring its intention to enter into a lease or agreement pursuant to this act. The resolution shall describe, in such manner as to identify it, the available site upon which the building to be used by the district shall be constructed, shall generally describe the building to be constructed and the minimum and maximum amount of floor space required in such building or state that the building shall be constructed pursuant to the plans and specifications adopted by the board of trustees therefor, shall, if such is the case, state the minimum yearly rental at which the governing board will lease real property belonging to the district upon which the building is to be constructed, and shall state the maximum number of years for which the school district will lease the building or site and building, as the case may be, and shall state that the proposals submitted therefor shall designate the amount of rental, which shall be annual, semiannual, or monthly, to be paid by the school district for the use of the building, or building and site, as the case may be. The resolution shall fix a time, not less than three (3) weeks thereafter for a public meeting of the governing board to be held at its regular place of meeting, at which sealed proposals to enter such a lease or agreement with the school district will be received from any person, firm, or corporation, and considered by the governing board. Notice thereof shall be given by publication in a newspaper published in the county, at least ten (10) days before the time set for such meeting.

At the time and place fixed in the resolution for the meeting of the governing body, all sealed proposals which have been received shall, in public session, be opened, examined, and declared by the board. Of the proposals submitted which conform to all terms and conditions specified in the resolution of intention to enter a lease or agreement and which are made by responsible bidders, the proposal which calls for the lowest rental shall be finally accepted, or the board shall reject all bids. The board may accept or reject a proposal at the meeting where such proposals are opened, or at a subsequent meeting.

**History:** En. Sec. 9, Ch. 321, L. 1967.

**75-3123. Amount of rental agreed to be paid as district obligation for year of payment.** The amount of rental which a district agrees to pay during any one (1) year, under a lease or agreement entered into pursuant to this act, is an obligation of such district and is an obligation of such district for such year only.

**History:** En. Sec. 10, Ch. 321, L. 1967.

**75-3124. Use of temporary quarters or portable buildings.** When the school enrollment of any school causes overcrowded schoolrooms, the governing board of the school district may make arrangements for the location of the school in temporary quarters or in portable buildings.

These quarters or portable buildings may be procured for a consideration, or at a rental, or by the construction of temporary or portable buildings on school property. The leasing of any portable buildings for placement on the school property shall not be made for a longer period than ten (10) years and may include a provision for the purchase of such buildings on a depreciated basis at the end of such ten (10) year period or prior thereto.

**History:** En. Sec. 11, Ch. 321, L. 1967.

**75-3125. Submission of certified copy of proceedings to attorney general—examination—validation of proceedings.** The governing body of any school district shall submit to the attorney general a certified copy of all proceedings relating to leases and agreements entered into by any school district with any person, firm or corporation where such lease or agreement provides for the construction of a building or buildings for the use of the school district during the term of such lease or agreement, together with such other proceedings, certificates and records as he may require and request his report as to examination and validity. It is hereby made the duty of the attorney general to examine such proceedings and if found regular and valid he shall deliver to the clerk of the school district a report of his examination and determination as to the validity of such proceedings. No proceedings submitted to and approved by the attorney general shall be held invalid because of any defect or failure to comply with any statutory provision relating to such proceedings unless the action to contest the validity thereof shall be brought within thirty (30) days after the sale.

**History:** En. Sec. 12, Ch. 321, L. 1967.

#### CHAPTER 33—SCHOOL BUSES—REQUIREMENTS—DRIVERS' QUALIFICATIONS—CONSTRUCTION AND OPERATION

**Section 75-3308.** Authority for regulating design, construction and operation of school buses.

**75-3308. Authority for regulating design, construction and operation of school buses.** (1) to (5). \* \* \* [Same as parent volume.]

(6) The Montana state board of education is authorized to adopt standards and specifications applicable to lighting equipment on and special warning devices to be carried by school buses, consistent with the provisions of this act, but supplemental thereto; except that such

standards and specifications may designate and permit the use of flashing warning lights on school buses for the purpose of indicating when children are boarding or alighting from any said bus. Such standards and specifications shall correlate with and, so far as possible, conform to the specifications then current as approved by the society of automotive engineers.

It shall be unlawful to operate any flashing warning signal light on any school bus except when any said school bus is preparing to stop or is stopped on a highway for the purpose of permitting school children to board or alight from said school bus.

**History:** En. Sec. 1, Ch. 183, L. 1947; amd. Sec. 1, Ch. 172, L. 1955; amd. Sec. 1, Ch. 68, L. 1961; amd. Sec. 4, Ch. 250, L. 1965.

paring to stop or" before "is stopped" in the second paragraph of subsection (6).

#### Effective Date

Section 5 of Ch. 250, Laws 1965 read "This act shall be in full force and effect from and after July 1, 1966."

#### Amendment

The 1965 amendment inserted "is pre-

### CHAPTER 34—TRANSPORTATION OF PUPILS

Section 75-3403. School board may operate buses or contract for transportation of pupils—school board may set up depreciation reserve for purchase of replacement buses and two-way radios for school bus or buses.

75-3413. Reimbursements.

75-3414. Budgets and levies for transportation.

#### 75-3401. Boards of trustees to furnish transportation.

##### Cross-Reference

Transportation of pupils living within

three miles of school, secs. 75-1641 to 75-1644.

75-3403. School board may operate buses or contract for transportation of pupils—school board may set up depreciation reserve for purchase of replacement buses and two-way radios for school bus or buses. The board of trustees shall have the power to purchase, or rent and provide for the upkeep, care, operation, maintenance, insurance, for two-way radios and for school buses; or to contract and pay for the transportation of eligible pupils, such contracts to run for terms not to exceed five (5) years; and provided further, that each district owning a school bus or buses may levy a sufficient number of mills to create a reserve of not to exceed twenty per cent (20%) per year of the original cost of the bus or buses for which the reserve is created; said fund to be kept separate and apart from all other funds, and to be used only for the purchase of the bus or buses needed to replace the bus or buses and two-way radios for which said reserve was created, unless authorized by a majority of the votes cast by the qualified electors of the district at an election called for that purpose. Provided, however, that school district trustees may authorize as standard equipment, the installation of two-way radios in a school bus or buses operating in school districts where weather and road conditions may constitute a hazard to the safety of the school pupil passengers. The two-way radios may be operated on the same frequency as that used by the Montana highway patrol and the sheriff of the county, with their permission and the permission of the federal communications commission wherein said school bus or buses operate, or any frequency assigned for such operation by the commission.



**History:** En. Sec. 3, Ch. 152, L. 1941; amd. Sec. 1, Ch. 163, L. 1951; amd. Sec. 1, Ch. 52, L. 1955; amd. Sec. 1, Ch. 202, L. 1957; amd. Sec. 1, Ch. 74, L. 1965.

#### Amendment

The 1965 amendment increased the maximum size of the reserve described in the first proviso from 12½% to 20% of original cost.

#### Repealing Clause

Section 2 of Ch. 74, Laws 1965 repealed all acts and parts of acts in conflict therewith.

#### Effective Date

Section 3 of Ch. 74, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved February 26, 1965.

### 75-3406. Requirements as to buses, drivers and operation of school buses.

#### Governmental Immunity Waived

Statute requiring school districts to carry liability insurance to cover injuries and property damage that might arise in connection with operation and maintenance

of school buses constitutes waiver of governmental immunity to extent of insurance required to be carried or actually carried. *Longpre v. Joint School District No. 2*, 151 M 345, 443 P 2d 1.

**75-3413. Reimbursements.** (a) Each school district and each county high school meeting the requirements of this act shall be entitled to reimbursement from such moneys as may be appropriated by the legislature for transportation, in an amount not to exceed one third ( $\frac{1}{3}$ ) of the schedule provided for transportation, or services rendered in lieu of transportation, semiannually on presentation to the state superintendent of public instruction, through the office of the county superintendent of schools, of certified claims for such reimbursement using for such purpose the forms provided by the state superintendent of public instruction, and this reimbursement shall not be withheld if the buses have been inspected and approved as provided in section 2 [32-21-155.1] of this act. A school bus route which travels through several school districts shall have the county and state reimbursement prorated among the school districts which are served by this bus route by the county transportation committee and that the schedules provided in this act for individual transportation and bus transportation or services in lieu thereof, shall be used instead of any schedule which may have been heretofore or may hereafter be fixed and promulgated by the state board of education. In determining the cost of transportation or services in lieu thereof, no amount shall be included except those which have been paid out by a school district or county high school in the regular manner provided for the payment of other financial obligations for the maintenance of their schools.

(b) and (c). \* \* \* [Same as parent volume.]

**History:** En. Sec. 13, Ch. 152, L. 1941; amd. Sec. 2, Ch. 189, L. 1943; amd. Sec. 1, Ch. 169, L. 1947; amd. Sec. 3, Ch. 200, L. 1949; amd. Sec. 7, Ch. 189, L. 1951; amd. Sec. 1, Ch. 242, L. 1961; amd. Sec. 61, Ch. 147, L. 1963; amd. Sec. 1, Ch. 179, L. 1969.

#### Amendments

The 1963 amendment, in the first sentence of subsection (a), deleted the phrase

"in the state public school equalization fund" after "from such moneys."

The 1969 amendment added "and this reimbursement \* \* \* section 2 of this act" at the end of the first sentence of subsection (a).

#### Cross-References

Annual inspection of school buses, sec. 32-21-155.1.

**75-3414. Budgets and levies for transportation.** (a) The board of trustees of any school district maintaining an elementary school, or schools, or providing for the transportation of its pupils to attend an

elementary school or schools, outside the district, or furnishing services in lieu thereof, shall have the authority and it shall be its duty to provide and adopt a complete transportation budget therefor, which budget shall show in detail and by items the estimated expenditures and receipts for the school year for which it is provided. The estimated expenditures may include a contingency item for the purpose of enabling the trustees of the district to fulfill any obligation to provide transportation in accordance with the provisions of the transportation act for any pupils not residing in the district at the time of adoption of the transportation budget who subsequently become residents of the district during the budget year. The amount of such contingency item shall not exceed ten per cent (10%) of the total amount of the regularly budgeted expenditures of the district arrived at in accordance with the schedule established in section 75-3407, provided, however, that when ten per cent (10%) of the budgeted schedule amount will provide less than one hundred dollars (\$100), the ten per cent (10%) limitation shall not apply and the district may budget for a contingency item of up to but not exceeding one hundred dollars (\$100). The form of such transportation budget shall be prescribed by the state superintendent of public instruction. The total amount of the estimated expenditures, as shown by such transportation budget, shall be shown and included in the elementary school budget form and the estimated receipts from reimbursements, as shown in such transportation budget, shall be shown and included in the elementary budget form as provided. A copy of the elementary transportation budget adopted, together with a duly signed copy of each and every contract form pertaining thereto shall be transmitted by the county superintendent of schools to the state superintendent of public instruction at the same time copies of the elementary school budgets are required to be so transmitted.

(1) When the total elementary transportation budget has been presented in detail on approved forms including duly signed contract forms for the contracting, operation, maintenance, rent or purchase of school buses, individual transportation, and increased transportation due to isolation, and after deducting all estimated receipts including reimbursements, the balance of the budget shall be paid out of receipts from a tax levied upon all the taxable property of the school district.

(2) The board of trustees of every school district maintaining a high school, or furnishing transportation for its pupils to another high school, or services in lieu thereof, and the board of trustees of every county high school, shall have the authority and it shall be its duty to provide a complete transportation budget therefor, including duly signed contract forms for the contracting, operation, maintenance, rent or purchase of school buses, individual transportation, and increased transportation due to isolation, or any service in lieu of transportation. The budget shall show in detail and by items the estimated expenditures and receipts, including the state transportation reimbursements, for the school year for which it is provided. The estimated expenditures may include a contingency item for the purpose of enabling the trustees of the high school to fulfill any obligation to provide transportation in accordance with the provisions of the

transportation act for any high school pupils not residing in the high school territory under the jurisdiction of the trustees at the time of adoption of the transportation budget who subsequently become residents of said territory during the budget years. The amount of such contingency item shall not exceed ten per cent (10%) of the total amount of the regularly budgeted expenditures of the high school arrived at in accordance with the schedule established in section 75-3407, provided, however, that when ten per cent (10%) of the budgeted schedule amount will provide less than one hundred dollars (\$100), the ten per cent (10%) limitation shall not apply and the high school may budget for a contingency item of up to but not exceeding one hundred dollars (\$100). The form of such transportation budget shall be prescribed by the state superintendent of public instruction. A copy of the high school transportation budget adopted for each high school, together with a duly signed copy of each and every contract form pertaining thereto, shall be transmitted by the county superintendent of schools to the state superintendent of public instruction at the same time copies of the final high school budgets are required to be so transmitted. For each high school transportation budget arrived at according to the schedule set up in section 75-3407, the amount remaining after deducting all estimated local receipts, and state transportation reimbursements from the total amount required for the transportation budget according to the schedule, shall be the amount required to be raised by tax levy for such high school transportation budget, and the total of all such amounts required to be raised by tax levy for all such high school transportation budgets shall be the total amount required to be raised by county-wide transportation levy, and the county commissioners, except as hereinafter provided, shall make a county-wide levy of such number of mills as will raise such total amount; provided that this amount shall not be more than two-thirds ( $\frac{2}{3}$ ) of the total of each high school transportation budget according to the schedule as set forth in section 75-3407. The amount remaining in each high school transportation budget over and above the amount arrived at according to the schedules in section 75-3407, as amended, shall be the amount required to be raised by tax levy for each such high school transportation budget and all such amounts required to be raised by tax levy for each such high school transportation budget shall be the total amount required to be raised by high school transportation levy on the high school district if there be one; and in case of a county high school by a county levy, excluding those districts maintaining high schools, otherwise on the common school district, of which each particular high school is a part, and the county commissioners shall make a levy of such number of mills as will raise such needed amount; provided that the amount budgeted for high school transportation in any high school budget shall not be deemed or considered as a part of or included within the maximums for high school budgets as fixed and determined by chapter 199, Laws of 1949, as amended, and the county-wide high school transportation levy herein provided for shall not be deemed or construed as a part of the county-wide high school levy authorized by section 75-4516.1, unless the trustees making such budget so desire and the board of county commissioners find that such high school transportation levy is not re-



quired to raise the amount necessary for such budget for all purposes including transportation or services in lieu thereof. Cash balances on hand at the end of the fiscal year shall be used to reduce the district levy for the ensuing year, provided that if there is a cash balance on hand at the end of a fiscal year and no district levy is required for the ensuing fiscal year under the foregoing provisions, then said cash balance shall be used to reduce the amount to be raised by county-wide levy as herein provided.

(3) The board of trustees of a school district or county high school may include, in each transportation budget, a reserve fund for maintaining transportation service from July first to November thirtieth of the next succeeding school year. The reserve fund shall not exceed twenty per cent (20%) of the amount appropriated in the final and approved transportation budget for the then current school year.

**History:** En. Sec. 14, Ch. 152, L. 1941; amd. Sec. 3, Ch. 189, L. 1943; amd. Sec. 8, Ch. 189, L. 1951; amd. Sec. 1, Ch. 126, L. 1961; amd. Sec. 1, Ch. 106, L. 1963; amd. Sec. 1, Ch. 243, L. 1967.

The 1967 amendment substituted "budgeted" for "budget" before "expenditures of the high school" in subdivision (2), and added subdivision (3).

#### Effective Date

#### Amendments

The 1963 amendment added the final sentence to paragraph (2).

Section 2 of Ch. 243, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved March 1, 1967.

## CHAPTER 35—FREE TEXTBOOKS

Section 75-3503. Textbooks—license to sell—conditions.  
75-3505. Textbooks—special or abridged editions.

**75-3503. Textbooks—license to sell—conditions.** Before any person, company, or corporation shall offer to any school district any textbook for adoption, sale or exchange, in the state of Montana, said person, company, or corporation shall comply with the following conditions:

First: Such person shall file a copy of such textbook in the office of the state superintendent of public instruction, with a sworn statement of the list price; the lowest wholesale price; and the lowest exchange price that will be given when old books in the same subject and of the like kind and grade, but of a different series, are received in exchange, such exchange price to be based on a three (3) year adoption period. Such prices are to be quoted FOB Chicago, FOB San Francisco, FOB any other city from which publishers may ship books, and FOB a textbook depository in Montana.

Second: Such persons shall file with the state superintendent of public instruction a written agreement, (1) to furnish said book or books to any school board in the state of Montana at the said lowest price so filed, and to maintain said prices uniformly throughout the state; (2) to reduce such prices automatically in Montana whenever reductions are made elsewhere in the United States; and (3) to guarantee that at no time shall any book so filed by such persons, be sold in Montana at a higher price than is received for such book elsewhere in the United States under similar conditions of transportation and marketing.

Third: Such persons shall file and maintain with the secretary of state a surety bond for not less than two thousand dollars (\$2,000.00) and not more than ten thousand dollars (\$10,000.00), such bond to be in an amount to be fixed by the state superintendent of public instruction and to run to the state of Montana, to be conditioned on the faithful performance of all things on the part of such persons to be performed under this act and such bond to be approved by the attorney general. Upon compliance with the foregoing conditions the state superintendent of public instruction shall issue a license to any such person to sell such textbooks to school districts in the state of Montana.

Fourth: License fees. The person receiving such license shall pay a fee of two dollars (\$2.00) for each book listed; provided that in the case of several books presented by one publisher in the same subject under the same series head for any one grade, the maximum filing fee in such case shall not exceed six dollars (\$6.00). Such moneys received through payment of said filing fees shall be deposited in the state treasury to the credit of the general fund.

History: En. Sec. 2, Ch. 138, L. 1941; amd. Sec. 63, Ch. 147, L. 1963; amd. Sec. 33, Ch. 121, L. 1965.

#### Amendments

The 1963 amendment substituted "deposited in the state treasury to the credit of the general fund" at the end of the section for "used to defray all expenses incurred under the provisions of this act. Provided that any surplus which might exist at the end of any biennium shall be transferred to the state public school general fund."

The 1965 amendment increased the fee specified near the beginning of paragraph

Fourth from \$1.00 to \$2.00; and increased the maximum fee specified at the end of the first sentence of paragraph Fourth from \$3.00 to \$6.00.

#### Separability Clause

Section 34 of Ch. 121, Laws 1965 read "It is the intent of the legislative assembly that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

**75-3505. Textbooks—special or abridged editions.** Whenever the publisher shall prepare an abridged or special edition of any of his books listed with the state superintendent of public instruction and shall supply such special edition elsewhere at a lower wholesale price than the wholesale price for the edition filed with the state superintendent of public instruction, the publisher must agree to furnish such special edition at the wholesale price at which it is furnished elsewhere, so long as it is supplied at the said lower price anywhere outside of Montana; and it shall be understood that the bond given by the publisher shall cover this provision as to special editions. In case an action is brought on such bond, the state, if successful, shall recover the full amount of the bond, which amount shall be paid into the state general fund.

History: En. Sec. 4, Ch. 138, L. 1941; amd. Sec. 64, Ch. 147, L. 1963.

#### Amendment

The 1963 amendment substituted "state general fund" for "state public school general fund" at the end of the section.

CHAPTER 36—UNIFORM SYSTEM OF FREE PUBLIC SCHOOLS—STATE  
SUPPORT—SCHEDULE OF CONTRIBUTIONS

- Section 75-3611. Definitions—schedules of financial program.  
 75-3612. Foundation program.  
 75-3612.1. Increase in foundation program in anticipation of unusual increase in enrollment—formulas for computation.  
 75-3612.2. Minimum increase required for application of act.  
 75-3612.3. Provisions supplemental.  
 75-3613. State equalization aid to public schools—enumeration of sources—definition.  
 75-3614. State board of education to administer state public school equalization aid.  
 75-3615. State superintendent of public instruction to compile data and make reports concerning state equalization aid.  
 75-3616. Distribution of funds—reports required.  
 75-3617. Application for approval as isolated schools—circumstances to be considered in acting upon application.  
 75-3618. Distribution of money available to districts—formula for apportionment of county funds.  
 75-3619. Formula for distribution of state funds.  
 75-3620. State superintendent to give notice if state funds inadequate.  
 75-3621. Resolution to issue warrants—hearing.  
 75-3624. State payments for children of employees residing at state institutions.

**75-3611. Definitions—schedules of financial program.** The term “average number belonging” or “ANB” shall mean the average number of regularly enrolled, full-time pupils attending a public school, or attending public schools in a school district as a whole, which average number shall be computed by dividing the sum of the aggregate days of attendance by regularly enrolled pupils and the aggregate days of absence by regularly enrolled pupils during the last completed school year, by the number one hundred eighty (180); provided that attendance for a part of a morning session or part of an afternoon session shall be counted as one-half ( $\frac{1}{2}$ ) day’s attendance in either case, and provided further, when any regularly enrolled pupil has been absent, with or without excuse, for more than ten (10) consecutive school days in such school year, his absence after the tenth (10th) day and until his return to school shall not be included in the aggregate days of absence. The average number belonging of secondary pupils of a school district or of elementary pupils of a school district does not include the pupils of any high school or of any elementary school which has not been accredited by the state board of education. Pupils of a junior high school which has been duly approved and accredited as such by the state board of education are to be deemed secondary school pupils for the purpose of computing average number belonging of the district in which the junior high school is situated.

Any school district may reopen a school which was not in operation the previous year, which such reopening is approved by the county budget board and the state superintendent of public instruction, and when the county superintendent estimates the probable enrollment for such school to be at least five (5), and the parents of at least three (3) of these five (5) children petition for such reopening; such approved reopened school shall be eligible for county and state aid on its foundation program. Any school district which opens a new school shall comply with at least the minimum requirements for reopening a closed school as herein provided, and no



foundation program shall be established for any new school not meeting the minimum requirements for opening.

Should a school district anticipate an increase in ANB, above the normal state-wide increase of the past year, due to the closing of any private or public school in the district or in neighboring districts, such district shall be allowed an increase in ANB for budget purposes, based on an estimate arrived at by the district superintendent, board and county superintendent and approved by the state superintendent.

The terms, "minimum foundation program" and "foundation program," shall mean the amount required to operate and maintain an adequate and efficient school, as fixed and established by the schedules of minimum operating revenues set forth in section 75-3612.

The term "isolated school," shall mean an elementary school having an ANB of nine (9) or less pupils, the maintenance and operation of which as an isolated school has been approved in the manner hereinafter provided in section 75-3617; and the term, "isolated high school," shall mean a high school having an ANB of twenty-four (24) or less pupils, the maintenance and operation of which as an isolated school has been approved in the manner hereinafter provided in section 75-3617.

The term, "nonisolated school," shall mean an elementary school having an ANB of less than ten (10) pupils, which has not been approved as an isolated school; and the term, "nonisolated high school," shall mean a high school having an ANB of twenty-four (24) or less pupils, which has not been approved as an isolated high school.

**History:** En. Sec. 2, Ch. 199, L. 1949; amd. Sec. 1, Ch. 107, L. 1951; amd. Sec. 1, Ch. 207, L. 1953; amd. Sec. 1, Ch. 104, L. 1961; amd. Sec. 4, Ch. 267, L. 1963; amd. Sec. 1, Ch. 118, L. 1967.

#### Amendments

The 1963 amendment increased the maximum size of isolated elementary schools, as defined in the next to last paragraph, from eight to nine pupils; increased the size of nonisolated elementary schools, as defined in the last paragraph, from less than nine to less than ten

pupils; and increased the size of nonisolated high schools, as defined in the last paragraph, from less than 20 to less than 24 pupils.

The 1967 amendment substituted "ten (10)" for "three (3)" before "consecutive school days," and "tenth" for "third" after "his absence after the" near the end of the first sentence.

#### Cross-Reference

Anticipated enrollment of new area vocational schools included in definition of ANB, sec. 75-4308.

**75-3612. Foundation program.** The moneys available for state equalization aid shall be distributed and apportioned to provide an annual minimum operating revenue for the elementary and high schools in each county, exclusive of revenues required for debt retirement, and for the payment of any and all costs and expense incurred in connection with any adult education program, kindergarten, recreation program, school lunch and cafeteria program, new buildings, new grounds, and transportation, in accordance with the following schedules:

#### Elementary Schools

The foundation program shall be eighty per cent (80%) of the maximum budget as set forth in section 75-1713.1, R. C. M. 1947, except for an elementary school having an ANB of nine (9) or fewer pupils which is not

approved as an isolated school; for such school the minimum general fund budget shall be eighty per cent (80%) of the maximum budget as set forth in section 75-1713.1, R. C. M. 1947, provided that the formula for apportioning county funds as provided in section 75-3618, R. C. M. 1947, and the formula for apportioning state equalization aid as provided in section 75-3619, R. C. M. 1947, shall apply only to one-half ( $\frac{1}{2}$ ) of such minimum budget of such school, and provided further that the remaining one-half ( $\frac{1}{2}$ ) of such minimum budget shall be financed by a tax levied on the property of the school district in which such school is located.

### High Schools

The foundation program shall be eighty per cent (80%) of the maximum budget as set forth in section 75-4518.1, R. C. M. 1947.

**History:** En. Sec. 3, Ch. 199, L. 1949; amd. Sec. 1, Ch. 244, L. 1953; amd. Sec. 1, Ch. 241, L. 1955; amd. Sec. 1, Ch. 251, L. 1957; amd. Sec. 1, Ch. 267, L. 1959; amd. Sec. 1, Ch. 230, L. 1961; amd. Sec. 52, Ch. 147, L. 1963; amd. Sec. 5, Ch. 267, L. 1963; amd. Sec. 1, Ch. 93, L. 1965; amd. Sec. 2, Ch. 317, L. 1967.

#### Amendments

Chapter 147, Laws 1963, substituted "available for state equalization aid" for "coming into said state public school equalization fund" after "The moneys" at the beginning of the section.

Chapter 267, Laws 1963, incorporated the change made by Ch. 147 and com-

pletely rewrote the material under the headings "Elementary Schools" and "High Schools." For previous text, see parent volume.

The 1965 amendment added the exception at the end of the paragraph designated "Elementary Schools."

The 1967 amendment increased the percentage applicable under this section from 75% to 80% wherever found.

#### Effective Date

Section 2 of Ch. 93, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved February 26, 1965.

**75-3612.1. Increase in foundation program in anticipation of unusual increase in enrollment—formulas for computation.** A school district or county high school which anticipates an unusual increase in enrollment in the ensuing year may increase its foundation program for the ensuing year in accordance with the following provisions:

(1) For the school district or county high school, the average number belonging approved for foundation program purposes for the current year and each of the immediately preceding three (3) years shall be used to compute the annual percentage increase in average number belonging of each of the years over the immediately preceding year. The three (3) increases shall be averaged to obtain the average annual percentage increase in average number belonging.

(2) On or about May 1 of the current year, the estimated average number belonging for the entire current school year shall be computed, based on pupil attendance and absence records through April 30, increased by the ratio that the total number of school days in the current term bears to the number of school days completed through April 30.

(3) On or about May 1, the board of trustees shall estimate the probable average number belonging to be attained in the ensuing school year, based on such factual information as may be available to the board. The board of trustees shall submit such estimated average number belonging to the county board of school budget supervisors on or before May 10,

for approval of the estimate as the probable average number belonging to be attained during the ensuing year. The estimate shall be accompanied by such data as the county board of budget supervisors may require. The county board of budget supervisors shall act to approve or disapprove the estimated average number belonging on or before May 25, and may adjust any estimate submitted. The county board of budget supervisors shall immediately notify the superintendent of public instruction of the action taken by the board, together with such facts and information as the superintendent of public instruction may deem necessary. The superintendent of public instruction shall approve, disapprove, or adjust the estimate and so notify the board of trustees.

(4) The percentage increase of the average number belonging estimated for the ensuing year approved as in (3) above, over the estimated average number belonging for the current year computed as in (2) above, shall be computed.

(5) Whenever the increase computed in (4) above is at least twice the average annual increase computed in (1) above, the school district or county high school, for the purpose of determining the amount of its foundation program for the ensuing year, may increase the actual average number belonging for the current year by a number to be computed as follows:

(a) Apply the average annual percentage increase as computed in (1) above to the actual average number belonging of the current year to determine the usual average number belonging which would be attained in the ensuing year under normal conditions;

(b) Deduct from the estimated average number belonging for the ensuing year approved as in (3) above, the usual average number belonging for the ensuing year as determined in (a) above. The difference shall be the maximum additional average number belonging which may be added to the actual average number belonging for the purpose of establishing the ensuing year's foundation program.

**History:** En. Sec. 1, Ch. 265, L. 1963.

#### **Title of Act**

An act providing for the allowance of an increase in average number belonging for budget purposes where a school dis-

trict or county high school anticipates an unusual increase in enrollment in the ensuing year; and providing the procedure for determining the average number belonging.

**75-3612.2. Minimum increase required for application of act.** The provisions of this act shall not apply to any district or high school in which the average annual percentage increase in average number belonging as computed in subsection (1) of section 1 [75-3612.1(1)] is less than three per cent (3%).

**History:** En. Sec. 2, Ch. 265, L. 1963.

**75-3612.3. Provisions supplemental.** The provisions of this act shall be in addition to, and not a limitation upon, the provisions of section 75-3611 with respect to anticipated increases in average number belonging.

**History:** En. Sec. 3, Ch. 265, L. 1963.

**75-3613. State equalization aid to public schools—enumeration of sources—definition.** There shall be paid into the earmarked revenue fund,



for state equalization aid to the public schools of the state, the present allocation equal to twenty-five per cent (25%) of all moneys received from the collection of income taxes under sections 84-4901 to 84-4935; and twenty-five per cent (25%) of all moneys received from the collection of corporation license taxes under sections 84-1501 to 84-1519, as provided in section 84-1901; and one-half ( $\frac{1}{2}$ ) of the funds received from the treasurer of the United States as the state's share of oil and gas royalties under the act of Congress of February 25, 1920. The term "state equalization aid" as used in the code includes moneys coming to the state from the sources referred to above, plus any legislative appropriation of moneys from other sources for distribution to the public schools.

**History:** En. Sec. 5, Ch. 199, L. 1949; amd. Sec. 53, Ch. 147, L. 1963.

Sec. 15, Ch. 260, L. 1955 and Secs. 2 and 4, Ch. 212, L. 1957.

**Compiler's Notes**

Sections 84-4916, 84-4918, 84-4923, 84-4925, and 84-4933 through 84-4935, included in the reference to sections 84-4901 to 84-4935 in this section, were repealed by

**Amendment**

The 1963 amendment substantially rewrote this section. For previous text, see parent volume.

**75-3614. State board of education to administer state public school equalization aid.** The state board of education shall administer and distribute state equalization aid in the manner and with the powers and duties provided in this act. Said board shall have the power to require such reports from the county superintendent of schools, county budget boards, county treasurers and school trustees as it may deem necessary, and shall provide rules and regulations for the purpose of carrying out the provisions of this act.

**History:** En. Sec. 6, Ch. 199, L. 1949; amd. Sec. 54, Ch. 147, L. 1963.

tion aid" in the first sentence for "is hereby declared to be the public school equalization board to administer and distribute said public school equalization fund."

**Amendment**

The 1963 amendment substituted "shall administer and distribute state equaliza-

**75-3615. State superintendent of public instruction to compile data and make reports concerning state equalization aid.** The state superintendent of public instruction shall keep in his office full and complete data concerning moneys available for state equalization aid and, in addition thereto, after July 1, 1949, the requirements of the various school districts of the state for aid from said funds to maintain the foundation financial program herein provided. The state superintendent of public instruction shall report to the state board of education at its meetings to be held in the months of July and December in each year the estimated amount which will be available for state equalization aid for the succeeding six months period, commencing January 1, and July 1. In any year when a session of the state legislative assembly convenes, the state superintendent of public instruction shall report to both branches of the assembly all figures and data available in his office concerning disbursements of state equalization aid during the preceding two years, the amount then available for state equalization aid, and apportionment made of the moneys available for state equalization aid but not yet paid out, and the latest estimate of accruals of moneys available for state equalization aid.

History: En. Sec. 7, Ch. 199, L. 1949; amd. Sec. 55, Ch. 147, L. 1963.

#### Amendment

The 1963 amendment substituted "moneys available for state equalization aid" in the first sentence for "accruals and credits to the state public school equalization fund"; substituted "available for state equalization aid" near the end of the second sentence for "in the state public

school equalization fund"; substituted "disbursements of state equalization aid" in the third sentence for "disbursements from said fund"; substituted "available for state equalization aid" in the third sentence for "standing to the credit of said fund" and for "of said fund"; and substituted "of moneys available for state equalization aid" at the end of the section for "to said fund."

**75-3616. Distribution of funds—reports required.** After July 1, 1949, the state board of education shall, in the months of December and April of each year, order disbursements of state equalization aid within the limitations hereinafter specified and upon the basis of reports made to the state superintendent of public instruction, to any county treasurer who controls the fund of any school district or joint school district which, as established by its budget duly approved for the current school year, will not have sufficient funds to maintain the foundation financial program after receipt by it of its apportioned share of interest and income moneys, if any, and from the basic county levies provided for by section 75-3706 and section 75-4516.1. The school district budgets approved and adopted according to law for the current school year, and so verified by the state superintendent of public instruction, shall be the basis for distributing state equalization aid, and the state board of education shall not increase or reduce the state equalization aid to which any school district or county high school is entitled for any school year on the basis of its budget, on account of any difference which may occur during the year between budgeted and actual receipts from any other source of school revenue.

Each order of the state board of education for disbursements of state equalization aid, shall be certified to the state auditor and state treasurer, whereupon the state auditor shall draw his warrants in accordance with such order and the state treasurer shall pay the same to the several county treasurers for credit to the school districts as provided in such order.

History: En. Sec. 8, Ch. 199, L. 1949; amd. Sec. 1, Ch. 60, L. 1961; amd. Sec. 56, Ch. 147, L. 1963; amd. Sec. 6, Ch. 267, L. 1963; amd. Sec. 2, Ch. 198, L. 1965; amd. Sec. 3, Ch. 317, L. 1967.

#### Amendments

Chapter 147, Laws 1963, substituted "of state equalization aid" for "from the state public school equalization fund" after "disbursements" near the beginning of the section; substituted "apportioned share of interest and income moneys" in the first paragraph for "apportioned share from the permanent school fund of the state, from other constitutional sources"; substituted "amount of state equalization aid apportioned to any school district" in the former proviso to the first paragraph for "amount apportioned to any school district from said state public school equalization fund"; substituted "amount of interest and income moneys apportioned to

such school district" in the former proviso to the first paragraph for "amount apportioned to such school district from the permanent school fund"; deleted "acting as the public school equalization board" which followed "state board of education" near the beginning of the second paragraph; and substituted "state equalization aid" for "funds from the state public school equalization fund" after "disbursements of" in the second paragraph.

Chapter 267, Laws 1963, incorporated the first change made by Ch. 147, Laws 1963; substituted "and from the basic county levies provided for by section 75-3706 and section 75-4516.1" at the end of the first paragraph for "from the district levy of five mills for the foundation program provided for by section 75-1723, the county levies provided for by this act, and from all other regular sources of revenue required to be used to finance

the foundation program as provided in sections 75-1723 and 75-4516.1"; deleted from the end of the first paragraph a proviso which (after amendment by Ch. 147, Laws 1963) read: "provided, however, that the amount of state equalization aid apportioned to any school district, when added to the amount of interest and income moneys apportioned to such school district, shall not exceed fifty per cent (50%) of the total foundation program of such district, computed at the rates and amounts set forth in section 75-3612"; and incorporated the changes made in the second paragraph by Ch. 147, Laws 1963.

The 1965 amendment adopted the changes made by both 1963 amendments; added the second sentence to the first paragraph; and added all of the material following the second paragraph.

The 1967 amendment deleted the last eight paragraphs which read, "Any undistributed state equalization aid remaining at the end of any fiscal year shall be distributed in accordance with the following provisions, for the purpose of reducing the amount of the basic county levy for high schools to be levied in the ensuing fiscal year.

"(1) The unexpended balance of the general fund appropriation for state equalization aid shall be added to the unexpended moneys in the earmarked revenue fund account designated for state equalization aid;

"(2) The sum obtained in paragraph (1) shall be divided by the statewide total average number belonging which was verified as the basis for all foundation programs for the year ended June 30 to obtain a per pupil payment amount;

"(3) For each county, the per pupil payment shall be multiplied by the verified ANB for all foundation programs in the county for the year ended June 30 to obtain a county payment amount;

"(4) For each county an amount equivalent to the county payment obtained in paragraph (3) shall be transmitted by the state treasurer to the county treasurer on or before July 20 of the immediately ensuing fiscal year, and the county superintendent of schools shall be notified of such amount by the state superintendent of public instruction. The county treasurer shall credit the payment to the account for the basic special tax for high schools as provided in section 75-3722.

"(5) The amount of revenue anticipated from the basic county levy for high schools as provided in section 75-4516.1 shall be computed from the number of mills required for such levy and the taxable valuation of all taxable property within the county.

"(6) The county payment amount obtained in paragraph (4) shall be deducted from the basic county levy amount obtained in paragraph (5), and the remainder shall be the amount of the basic county levy to be fixed for high schools for the ensuing year; the number of mills of such basic county levy for high schools shall be based on the amount so obtained, together with the taxable valuation of all taxable property within the county.

"In any year when application of the provisions of this section would result in a per pupil payment amount of less than one dollar (\$1.00), the provisions of this section shall not apply."

**75-3617. Application for approval as isolated schools—circumstances to be considered in acting upon application.** Before any elementary school having an ANB of nine (9) or less may be approved as an isolated school, and before any high school having an ANB of twenty-four (24) or less may be approved as an isolated high school, the board of trustees of the district wherein said school is located shall, on or before the first day of May in each year, make written application to the budget board for such approval. Such application shall be acted upon on or before the fifteenth day of June, and such application shall be granted if said budget board shall find and determine that transportation of the pupils of such school to another school is impractical by reason of the existence of obstacles to travel, such as mountains, rivers, poor roads, distance of pupils' homes from county roads or highways, or the distance of such isolated school from the nearest open school having room and facilities for the pupils of such isolated school; and an elementary school may also be approved as an isolated school upon a finding and determination by said budget board, approved by the county superintendent of schools and by the state superintendent of public instruction of the existence of conditions other than



obstacles to travel which would result in unusual hardship to the pupils of such isolated school if they were transported to another school, and if none of the above-mentioned circumstances exist, such application shall be denied.

**History:** En. Sec. 16, Ch. 199, L. 1949; amd. Sec. 2, Ch. 230, L. 1961; amd. Sec. 7, Ch. 267, L. 1963; amd. Sec. 1, Ch. 117, L. 1965.

#### Amendments

The 1963 amendment substituted "nine (9)" for "eight (8)" near the beginning of the section in the phrase pertaining to elementary schools; deleted "said budget board shall find and determine that" before "transportation of the pupils" near the beginning of the second sentence; and substituted "or other conditions resulting in unusual hardship to the pupils, such school shall be approved as an isolated school upon a finding and determination by said budget board, approved by the county superintendent of schools and by the state board of education" near the end of the section for "and an elementary school may also be approved as an isolated school upon a finding and determination by said budget board, approved by the county superintendent of schools and by the state superintendent of public instruction of the existence of conditions

other than obstacles to travel which would result in unusual hardship to the pupils of such isolated school if they were transported to another school."

The 1965 amendment restored the clauses "said budget board shall find and determine that" and "and an elementary school may also be approved as an isolated school upon a finding and determination by said budget board, approved by the county superintendent of schools and by the state superintendent of public instruction of the existence of conditions other than obstacles to travel which would result in unusual hardship to the pupils of such isolated school if they were transported to another school" which had been deleted by the 1963 amendment; and deleted the clauses which had been substituted near the end of the section by the 1963 amendment.

#### Effective Date

Section 2 of Ch. 117, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved March 1, 1965.

**75-3618. Distribution of money available to districts—formula for apportionment of county funds.** After the deduction of transportation reimbursements provided by law, the proceeds of the basic county twenty-five (25) mill common school levy as provided for in section 75-3706 and the proceeds of the basic special tax for high schools, as provided for in section 75-4516.1 shall each be separately distributed by the county superintendent to the respective districts in the county, and the county high school if there be one, in proportion to their needs under the foundation financial program. In all cases in which the proceeds of such basic county levy when added to interest and income moneys available to the respective districts, and other funds which must be used in support of the foundation financial program are insufficient to finance the foundation financial program, the proceeds of the basic county common school levy and the proceeds of the basic county special tax for high schools shall each be separately distributed in accordance with the following procedure; provided, however, that cash balances to the credit of the district at the end of the school year, after authorized reserves have been subtracted as well as outstanding warrants, shall be used by the district to reduce the levies on the district for the general fund after county and state equalization aid have been received:

1. Determine the ratio that the total funds available to all districts in the county in support of the foundation program (including proceeds of the basic county levy) bears to the total costs of the foundation program for all such districts.

2. Determine the ratio that the total funds available to each district in support of the foundation program (excluding all proceeds of the basic county levy) bears to the cost of the foundation program of each such district.

3. Districts in which the ratio as determined in (2) above exceeds the ratio in (1) above shall not be entitled to distribution of such county funds but shall be excluded from further consideration under this section.

4. After elimination of districts referred to in (3) above, determine the ratio that the total funds available to all remaining districts in the county in support of the foundation program (including proceeds of the basic county levy) bears to the total cost of the foundation program of all such remaining districts. Each remaining district shall then be entitled to distribution of funds from the basic county levy, which, when added to all other funds available to such district in support of the foundation program shall be sufficient to finance such proportionate part of its foundation program.

5. No district school shall be deprived of its needful share of either county levy by reason of it being nonaccredited.

6. No territory situated within the county shall be excluded from the distribution of the school funds of the county solely because such territory lies within the boundaries of a joint district.

**History:** En. Sec. 17, Ch. 199, L. 1949; amd. Sec. 1, Ch. 182, L. 1951; amd. Sec. 1, Ch. 272, L. 1955; amd. Sec. 4, Ch. 151, L. 1961; amd. Sec. 57, Ch. 147, L. 1963; amd. Sec. 8, Ch. 267, L. 1963; amd. Sec. 3, Ch. 198, L. 1965; amd. Sec. 4, Ch. 3, Ex. L. 1969.

#### Compiler's Note

This section was amended twice in 1963, once by Ch. 147 and once by Ch. 267. Neither amendatory act mentioned nor included the changes made by the other. Since the two amendments do not appear to conflict, however, the compiler has made a composite section incorporating both amendments.

#### Amendments

Chapter 147, Laws 1963, substituted "interest and income moneys available to the respective districts" in the second sentence of the first paragraph for "all other funds available to the respective districts from the permanent school fund."

Chapter 267, Laws 1963, substituted "the proceeds of the basic county twenty-two provided for in section 75-3706 and the

five (25) mill common school levy as proceeds of the basic special tax for high schools, as provided for in section 75-4516.1" near the beginning of the section for "the proceeds of the county ten (10) mill common school levy and the proceeds of the county ten (10) mill special tax for high schools"; inserted "basic" before "county levy" near the beginning of the second sentence, before "county common school levy" and before "county special tax" later in the second sentence, and before "county levy" in each of paragraphs 1 and 2 and two places in paragraph 4; deleted "and the five (5) mill tax for elementary schools provided for in section 75-1723" after "county levy" near the beginning of the second sentence; deleted "the uniform district levy and" before "county and state equalization aid" near the end of the preliminary paragraph; and inserted "such" before "county funds" in paragraph 3.

The 1965 amendment reduced the common school levy from 25 to 24 mills.

The 1969 amendment increased the common school levy from 24 to 25 mills.

**75-3619. Formula for distribution of state funds.** At any time when the total requirements of the several counties of the state for state equalization aid in support of the elementary school and high school foundation financial programs of the school districts within said counties shall exceed the funds available, the funds on hand shall, subject to the limitation hereinafter specified, be apportioned and paid out to the several county treasurers in accordance with the following procedure:

(1) Determine the ratio that the total funds available to all counties in the state in support of the foundation financial program (including the funds available for state equalization aid) bears to the total cost of the foundation financial program in all counties.

(2) Determine the ratio that the total funds available to each county in support of the foundation financial program (excluding any payment for state equalization aid) bears to the cost of the foundation financial program of all school districts of the county.

(3) Counties in which the ratio, as determined in (2) above, exceeds the ratio in (1) above, shall not be entitled to distribution of state equalization aid but shall be excluded from further consideration under this section.

(4) After elimination of counties referred to in (3) above, determine the ratio that the total funds available to all remaining counties in support of the foundation financial program (including the total amount available for state equalization aid), bears to the total cost of the foundation financial program of all such remaining counties. Each remaining county shall then be entitled to distribution of funds for state equalization aid, which, when added to all other funds available to such county in support of the foundation financial program, shall be sufficient to finance such proportionate part of the total foundation financial program of all school districts in the county.

The county superintendent of schools shall distribute the funds received by such county from the state for state equalization aid to the respective elementary districts and high schools in proportion to the needs of each respective elementary district and high school under the foundation financial program, such distribution to be made by applying to the receipts from the state for state equalization aid the formula provided in section 75-3618 for the distribution of the proceeds of basic county levies.

**History:** En. Sec. 18, Ch. 199, L. 1949; amd. Sec. 58, Ch. 147, L. 1963; amd. Sec. 9, Ch. 267, L. 1963; amd. Sec. 4, Ch. 198, L. 1965.

#### Amendments

Chapter 147, Laws 1963, substituted "state equalization aid" near the beginning of the section for "payment from the state public school equalization fund"; deleted "in said equalization fund" after "funds available" in the preliminary paragraph; substituted "for state equalization aid" for "in the equalization fund," "from the equalization fund," or "from the public school equalization fund" in paragraphs (1) and (2), twice in paragraph (4), and twice in the final paragraph; and substituted "of state equalization aid apportioned to any school district, when added to the amount of interest and income moneys apportioned to such school district" in the former proviso to paragraph (4) for "apportioned to any school district from said state public school equalization fund, when added to the amount

apportioned to such school district from the permanent school fund, shall."

Chapter 267, Laws 1963, incorporated the changes made by Ch. 147, Laws 1963; inserted the proviso constituting the proviso before the numbered paragraphs; deleted from the end of paragraph (4) a proviso which (after amendment by Ch. 147, Laws 1963) read, "provided, however, that the amount of state equalization aid apportioned to any school district, when added to the amount of interest and income moneys apportioned to such school district not exceed fifty per cent (50%) of the total foundation program of such district"; and inserted "basic" before "county levies" at the end of the section.

The 1965 amendment deleted a former second paragraph, preceding paragraph (1), which read: "Provided that seventy per cent (70%) of state equalization aid shall be set aside for the common schools and thirty per cent (30%) of state equalization aid shall be set aside for high schools, and provided further that such allocation shall not prevent a transfer of



funds if revenues for the common schools shall be in excess of the foundation program requirement for common schools" and substituted "aid" for "fund" after "state equalization" in paragraph (3).

**75-3620. State superintendent to give notice if state funds inadequate.** On or before June 1, 1949, if the requirements of the several school districts of the state for state equalization aid shall exceed the moneys available, as soon as such facts shall have been ascertained, the state superintendent of public instruction shall certify to each county superintendent of schools the amount which will be available for state equalization aid for the school districts of his county, and the estimated deficiency of funds for state aid in support of these foundation financial programs and transportation budgets. The county superintendent, upon receipt of such certificate shall notify each school district clerk in his county of the information contained therein.

**History:** En. Sec. 19, Ch. 199, L. 1949; amd. Sec. 59, Ch. 147, L. 1963.

first sentence for "for aid from the state public school equalization fund" and for "from said equalization fund"; and deleted "to said fund" after "exceed the moneys available" in the first sentence.

**Amendment**

The 1963 amendment substituted "for state equalization aid" in two places in the

**75-3621. Resolution to issue warrants—hearing.** After July 1, 1949, the boards of trustees of any school district which will have insufficient funds to meet its approved budget for operating expense; including transportation expense, because of a deficiency in state equalization aid, may, by majority vote, adopt a resolution authorizing the issuance of warrants in excess of funds on hand for payment of budgeted expenses which shall not exceed, in the aggregate, the deficiency in payments of state equalization aid.

Such resolutions must be adopted at a regular or special meeting of the board, and notice of the time and place of such meeting and the text of the proposed resolution shall be given ten (10) days prior to the meeting by posting copies of such notice at three (3) public places in the district and by one (1) publication of such notice in a newspaper generally circulated in the district not less than ten (10) days prior to said meeting.

Any taxpayer on property within the district, and any parent or guardian of a school child residing in the district, may attend such meeting and be heard in support of or in opposition to such resolution. The deficiency of state equalization aid, evidenced by the certificate of the state superintendent, as provided for in section 75-3620 shall be sufficient cause for adoption of the resolution.

**History:** En. Sec. 20, Ch. 199, L. 1949; amd. Sec. 60, Ch. 147, L. 1963.

equalization fund" after "deficiency" in the first paragraph, for "from said state fund" at the end of the first paragraph, and for "of the state public school equalization fund" in the second sentence in the third paragraph.

**Amendment**

The 1963 amendment substituted "in state equalization aid" or "of state equalization aid" for "in the state public school

**75-3624. State payments for children of employees residing at state institutions.** (1) As used in this act "employee" means an employee of a

public institution as defined in section 80-1203, R. C. M. 1947, who resides on the property of the public institution.

(2) A school district shall receive annually from moneys available for state equalization aid one hundred fifty dollars (\$150.00) for each elementary pupil, and two hundred fifty dollars (\$250.00) for each high school pupil, whose parents are employees of an institution located in the school district where the pupil attends school or in a school district which has a tuition agreement with the district where the pupil attends school.

(3) The school board of a school district which is eligible for such aid shall apply to the state superintendent of public instruction.

(4) Payments received under this act shall be deposited to the credit of the general fund of the school district. Such payments shall not be considered as part of normal state equalization aid.

History: En. Sec. 1, Ch. 101, L. 1965.

Title of Act

#### Compiler's Note

Section 80-1203, referred to in subsection (1) of this section, was repealed by Sec. 101, Ch. 199, Laws 1965. However, the same institutions are now listed in section 80-1403.

An act providing for payments by the state to school districts if children of a state employee who resides on the property of a state institution attend school in the district.

### CHAPTER 37—FINANCE

- |                  |   |
|------------------|---|
| Section 75-3701. | Public school fund.   |
| 75-3706.         | Common school levy.   |
| 75-3722.         | Duties of county treasurer.   |
| 75-3738.         | Financial administration of interlocal co-operative agreement.                          |
| 75-3739.         | Prime and co-operating agencies.  |
| 75-3740.         | School district as prime agency—special nonbudgeted fund.                               |
| 75-3741.         | School district as co-operating agency—transfer of financial support—source of support. |
| 75-3742.         | Title 75 applicable—exceptions.   |

**75-3701. (1201) Public school fund.** The principal of the public school fund shall be carried by the state treasurer as a subfund in the trust and legacy fund and shall remain irreducible and permanent. That said fund shall be derived from the following sources, to wit: Appropriations and donations by the state; donations and bequests by individuals to the state or common schools; the proceeds of land and other property which revert to the state by escheat and forfeiture; the proceeds of all property granted to the state, when the purpose of the grant is not specified or is uncertain; funds accumulated in the treasury of the state for the disbursement of which provision has not been made by law; the proceeds of the sale of timber, stone, materials, or other property from school lands other than those granted for specific purposes, and all moneys other than rental recovered from persons trespassing on said lands; five per centum (5%) of the proceeds of the sale of public lands lying within the state which shall be sold by the United States subsequent to the admission of the state into the Union as approved by section 15 of the Enabling Act; the principal of all funds arising from the sale of lands and other property which have been and may be hereafter granted

to the state for the support of common schools, and such other funds as may be provided by the legislative enactment.

History: Ap. p. Sec. 1940, Pol. C. 1895; amd. Sec. 11, p. 133, L. 1897; re-en. Sec. 993, Rev. C. 1907; re-en. Sec. 2000, Ch. 76, L. 1913; re-en. Sec. 1201, R. C. M. 1921; amd. Sec. 223, Ch. 147, L. 1963.

#### Amendment

The 1963 amendment rewrote the first sentence, which previously read: "The principal of the state school fund shall remain irreducible and permanent."

**75-3706. (1202) Common school levy.** In addition to the provisions for the support of the common schools, hereinbefore provided, it shall be the duty of the county commissioners of each county in the state to levy an annual basic tax of twenty-five (25) mills on the dollar of the taxable value of all taxable property within the county, which levy shall be made at the time and in the manner provided by law for the levying of taxes for county purposes, which tax shall be collected by the county treasurer at the same time and in the same manner as state and county taxes are collected; provided that if a basic levy of less than twenty-five (25) mills should be sufficient to meet the total of the approved budgets of all school districts within the county, then such lesser basic levy shall be made, but no school district within a county levying less than the basic twenty-five (25) mills shall receive any apportionment of state equalization aid; it shall be the duty of the board of county commissioners to levy, if necessary, an additional tax in such number of mills on the taxable value of all taxable property within the county as shall be required to provide the foundation program for all school districts within the county. The county superintendent shall apportion the proceeds of such additional tax levy to each school district within the county after apportionment of the basic county common school levy as provided in section 75-3618 and the state equalization aid as provided in section 75-3619.

For the further support of the common schools, there shall also be set apart by the county treasurer all moneys paid into the county treasury arising from all fines for violations of law, unless otherwise specified by law. Such moneys shall be forthwith paid into the county treasury by the officer receiving the same, and be added to the yearly school fund raised by taxation.

History: Ap. p. Sec. 44, p. 630, Cod. Stat. 1871; re-en. Sec. 43, p. 132, L. 1874; re-en. Sec. 1130, 5th Div. Rev. Stat. 1879; re-en. Sec. 1902, 5th Div. Comp. Stat. 1887; amd. Sec. 1940, Pol. C. 1895; amd. Sec. 1940a, p. 134, L. 1897; amd. Sec. 1, p. 12, L. 1901; amd. Sec. 1, Ch. 51, L. 1907; re-en. Sec. 994, Rev. C. 1907; amd. Sec. 2001, Ch. 76, L. 1913; amd. Sec. 31, Ch. 196, L. 1919; re-en. Sec. 1202, R. C. M. 1921; amd. Sec. 1, Ch. 123, L. 1929; amd. Sec. 1, Ch. 273, L. 1947; amd. Sec. 11, Ch. 199, L. 1949; amd. Sec. 10, Ch. 267, L. 1963; amd. Sec. 5, Ch. 198, L. 1965; amd. Sec. 3, Ch. 3, Ex. L. 1969.

#### Amendments

The 1963 amendment inserted "basic" before "tax" or "levy" in three places; increased the specified levy from ten to

twenty-five mills; made minor changes in phraseology; and added to the first paragraph the words "it shall be the duty of the board of county commissioners to levy, if necessary, an additional tax in such number of mills on the taxable value of all taxable property within each school district as shall be required to provide the foundation program for such school district."

The 1965 amendment reduced the specified levy from 25 to 24 mills; substituted "of state equalization aid" for "from the state public school equalization fund" after "apportionment"; substituted "the county" for "each school district" after "taxable property within" near the end of the first sentence; substituted "all school districts within the county" for "such school district" at the end of the



first sentence of the first paragraph; and added the second sentence to the first paragraph.

The 1969 amendment increased the specified levy from 24 to 25 mills.

### 75-3709. (1205) Purposes for which money may be used.

#### References

Wyatt v. School District No. 104, 148 M 83, 417 P 2d 221, 224.

**75-3722. (1213) Duties of county treasurer.** It shall be the duty of the county treasurer of each county:

1. To receive and hold all school moneys and to keep a separate account of their disbursements to the several school districts which shall be entitled to receive them according to the apportionment of the county superintendent. A separate account shall be maintained for each fund supported by a county-wide levy for a specific, authorized purpose, including (1) the basic county mill levy for elementary schools as provided in section 75-3706, (2) the basic special tax for high schools as provided in section 75-4516.1, (3) the county levy for high school transportation as provided in section 75-3414, (4) the county levy for the high school retirement systems as provided in sections 68-603 and 75-2709, and such other county levy as may be required.

2 to 8. \* \* \* [Same as parent volume.]

**History:** Ap. p. Sec. 1880, Pol. C. 1895; re-en. Sec. 941, Rev. C. 1907; amd. Sec. 2010, Ch. 76, L. 1913; re-en. Sec. 1213, R. C. M. 1921; amd. Sec. 1, Ch. 144, L. 1929; amd. Sec. 1, Ch. 62, L. 1961; amd. Sec. 11, Ch. 267, L. 1963.

(1) and (2) in the second sentence of paragraph 1 for clauses reading, "(1) the county ten-mill levy for elementary schools, (2) the county ten-mill levy for high schools"; and added the words "and such other county levy as may be required" at the end of paragraph 1.

#### Amendment

The 1963 amendment substituted clauses

### 75-3728. (1218.1) Preamble—acknowledgment of state's obligation, etc.

#### Compiler's Notes

Chapter 124 of the 1917 session laws, referred to in this section in the parent volume, has been repealed. Sections 1 to 9, and 13 to 18 of chapter 124 were repealed by Ch. 139, Laws 1933 and section

11 was repealed by Ch. 60, Laws 1927. Sections 10 and 12 were compiled as sections 81-1901 and 81-1902 in this code and were repealed by Sec. 8, Ch. 184, Laws 1961.

**75-3738. Financial administration of interlocal co-operative agreement.** School districts or school districts and other public agencies entering into an interlocal co-operative agreement under the provisions of chapter 49, Title 16, R. C. M. 1947, shall be subject to the provisions of this act for the purposes of the financial administration of such agreement.

**History:** En. Sec. 1, Ch. 313, L. 1969.

#### Title of Act

An act providing for the financial ad-

ministration of interlocal co-operative agreements under the provision of chapter 49, Title 16, R. C. M. 1947, that involve school districts.

**75-3739. Prime and co-operating agencies.** For the purposes of this act, the prime agency shall be the school district or other public agency vested with the financial administration of the interlocal co-operative agreement under the terms of such agreement and the co-operating agency

shall be any school district or public agency other than the prime agency who is a party to the contract creating the interlocal co-operative agreement.

**History:** En. Sec. 2, Ch. 313, L. 1969.

**75-3740. School district as prime agency—special nonbudgeted fund.** When the prime agency is a school district, it is hereby authorized and required to establish a special nonbudgeted fund as provided in section 75-3722, R. C. M. 1947, for the purpose of the financial administration of the interlocal co-operative agreement. All revenues received, including federal, state, or other types of grant payments in direct support of the agreement and the financial support provided by co-operating agencies, shall be deposited in such special nonbudgeted fund. All financial support of the agreement contributed by the school district, designated as the prime agency, shall be transferred to the special nonbudgeted fund from any fund maintained by such school district by resolution of the board of trustees; provided that the transfer shall be made from a fund to finance expenditures of the interlocal co-operative agreement that are comparable to the statutory provisions creating such fund and within the currently adopted budget; and provided further that no transfer shall be made from fund VIII, miscellaneous federal funds, as provided in section 75-3722, R. C. M. 1947, without the express approval of the state superintendent. All expenditures in support of the interlocal co-operative agreement shall be made from the special nonbudgeted fund established by the school district prime agency; provided that expenditures in support of such agreement may be made from fund VIII, miscellaneous federal funds when the express approval of the state superintendent is given.

**History:** En. Sec. 3, Ch. 313, L. 1969.

**75-3741. School district as co-operating agency—transfer of financial support—source of support.** When a school district is the co-operating agency, it is hereby authorized to transfer its financial support of the agreement under the interlocal co-operative contract to the prime agency by school district warrant. Such financial support may be provided from any fund maintained by the school district; provided that the fund utilized for the financial support shall finance only those expenditures of the interlocal co-operative agreement that are comparable to the statutory provisions creating such fund and within the currently adopted budget; and provided further that no financial support shall be financed from fund VIII, miscellaneous federal funds without the express approval of the state superintendent of public instruction.

**History:** En. Sec. 4, Ch. 313, L. 1969.

**75-3742. Title 75 applicable—exceptions.** The statutory provisions of Title 75, R. C. M. 1947, shall apply to any and all school districts who are parties to an interlocal co-operative contract unless the specific provisions of this act or chapter 49, Title 16, R. C. M. 1947, are applicable.

**History:** En. Sec. 5, Ch. 313, L. 1969.

## CHAPTER 38—EXTRA TAXATION FOR SCHOOL PURPOSES

Section 75-3801. District school taxes—election.  
75-3806. Building reserve fund—election.

**75-3801. (1219) District school taxes—election.** (1) Whenever the board of trustees of any school district shall deem it necessary to raise money by taxation in excess of the levy required to meet its maximum budgets as specified in section 75-1713.1, for the purpose of maintaining the schools of said district, or building, altering, repairing or enlarging any schoolhouse or houses of such district, for furnishing additional school facilities for said district, or for any other purpose necessary for the proper operation and maintenance of the schools of said district, said board of trustees shall determine and fix the amount necessary and required for such purpose or purposes in addition to the maximum budgets hereinbefore provided for, and it shall submit the question of an additional levy to raise said excess amount to the qualified electors residing within the district who are taxpayers and whose names appear upon the last completed assessment roll of the county for state, county and school taxes, either at the regular annual election held in said district, or at a special election called for that purpose by the board of trustees of said district. Such election shall be called by resolution in the same manner as provided for other school elections, and shall be held prior to August first.

(2) Whenever the board of trustees of any district or county high school shall deem it necessary to raise money by taxation in excess of the levy required to meet its maximum budgets as specified in section 75-4518.1 for the purpose of maintaining the high schools of said district or the county high school, or building, altering, repairing or enlarging any schoolhouse or houses of such district or county high school, for furnishing additional school facilities for said district, or county high school, or for any other purpose necessary for the proper operation and maintenance of the schools of said district, or county high school, said board of trustees shall determine and fix the amount necessary and required for such purpose or purposes in addition to any other legal levies on the district, including the approved addition to its foundation program hereinbefore provided for, and in the case of the district high school it shall submit the question of an additional levy to raise said amount to the qualified electors residing within the district who are taxpayers and whose names appear upon the last completed assessment roll of the county for state, county and school taxes, either at the regular annual election held in said district or at a special election called for that purpose by the board of trustees of said district. In the case of the county high school the board shall submit the question of an additional levy to raise said amount to the qualified electors residing within the county, exclusive of those residing within any district maintaining a district high school in the county, who are taxpayers and whose names appear upon the last completed assessment roll in the county for state, county and school taxes, either at the regular annual elections held in said districts, or special elections called for



that purpose by the board of trustees of said county high school. Such election shall be called by resolution in the same manner as provided for other school elections, and shall be held prior to August first; and provided, further, that the provisions of this act shall not prevent the voting of a special levy on a high school district as provided for in chapter 130, Laws of 1949 (75-4609).

**History:** En. Sec. 1, Ch. 93, L. 1917; re-en. Sec. 1219, R. C. M. 1921; amd. Sec. 1, Ch. 120, L. 1925; amd. Sec. 1, Ch. 144, L. 1935; amd. Sec. 12, Ch. 199, L. 1949; amd. Sec. 1, Ch. 210, L. 1951; amd. Sec. 2, Ch. 247, L. 1953; amd. Sec. 12, Ch. 267, L. 1963; amd. Sec. 1, Ch. 140, L. 1967; amd. Sec. 1, Ch. 168, L. 1969.

#### Amendments

The 1963 amendment substituted "its maximum budgets as specified in section 75-1713.1" near the beginning of subsection (1) for "its foundation program and approved additions thereto within the limitations of thirty per cent (30%) hereinbefore specified"; substituted "in addition to the maximum budgets" later in subsection (1) for "in addition to the five

(5) mill levy and the approved addition to its foundation program"; and substituted "its maximum budgets as specified in section 75-4518.1" near the beginning of subsection (2) for "its foundation program and approved additions thereto within the limitation hereinbefore specified."

The 1967 amendment inserted "registered" before "electors" throughout this section.

The 1969 amendment deleted "registered" before "electors" throughout the section.

#### Effective Date

Section 2 of Ch. 168, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved February 28, 1969.

**75-3806. Building reserve fund—election.** (1) The board of trustees of any school district may, whenever a majority thereof so decide, submit to the electors of the district the question whether the board shall be authorized to create a building reserve fund of a certain amount, to be raised within a specified number of years, for the purpose of the erection, equipping or enlargement of school buildings, teacherages, garages, or other buildings needed for school purposes. The reserve fund shall not exceed five (5) per cent of the value of the taxable property in the district. If created, the fund shall be held by the county treasurer and by him credited to the school district creating same, to be used for the purposes specified in this section and not for any other purpose. Whenever the county has under its control any moneys credited to the fund from taxation or from the sale of bonds by a school district for a building reserve fund for which there is no immediate demand, which in the judgment of the governing body of the school district it would be advantageous to invest in any interest-bearing deposits in a state or national bank insured by the F.D.I.C., or obligations of the United States of America, either short-term or long-term, such governing body may in its discretion direct the county treasurer to make such investments. Interest earned from such investments, except interest on the sale of bonds accrued in the period between the date of issue and the time of purchase which must be credited to the sinking fund, may be credited to the sinking fund of the school district or to the fund from which the money was withdrawn. The trustees may authorize expenditures from interest earned, except as provided above, for furnishing and equipping the buildings for which the bonds were sold.

(2) The election shall be held in the manner prescribed for election on the issuance of school bonds, except that the ballots must contain

the words "building reserve fund, yes" and "building reserve fund, no." If the majority of the votes at the election are "building reserve fund, yes," the clerk of the district shall immediately notify the board of county commissioners and the county treasurer, and the board of county commissioners shall thereafter levy annually the tax necessary to raise the funds for the number of years specified. The funds shall be kept in the custody of the county treasurer until sufficient funds have been raised to commence the building contemplated by the school district.

(3) At any time after the raising of a building reserve fund has been commenced by any school district, the board of school trustees may submit to the electors of the district, as provided by law, the question whether the board shall be authorized to issue bonds of the district for the balance of the building reserve fund. If both reserve funds and bond funds are needed for the purposes authorized herein, the reserve funds must be used prior to using funds for the issuance and sale of bonds. If the bonds are authorized, the annual building reserve fund levy shall be discontinued by the board of county commissioners when the levy is commenced for payment of the bonds.

**History:** En. Sec. 1, Ch. 85, L. 1967; amd. Sec. 3, Ch. 268, L. 1969.

#### **Title of Act**

An act authorizing elections in school districts for a school district building reserve fund not to exceed five per cent of taxable value of school district property to be used for buildings and equipment, providing for tax levy, requiring election for issuance of school bonds within limitation of law if required and allowing for investment of funds.

#### **Amendments**

The 1969 amendment, in the fifth sentence of subsection (1), inserted "except interest on the sale \* \* \* must be credited to the sinking fund" after "such investments," substituted "may be credited" for "shall be credited" before "to the sinking fund", substituted "or to the fund from which the money was withdrawn" for "notwithstanding the provisions of subsection (6) of section 16-2618" at the end and added the last sentence.

### **CHAPTER 39—BONDS**

- Section 75-3904. Limitation of term of bonds—interest—redemption.  
 75-3908. Petition and election required for bond issues for other purposes.  
 75-3914. Percentage of electors required to authorize bond issue.

#### **75-3901. (1224.1) Boards of trustees of school districts may issue coupon bonds, etc.**

##### **Combined Grade School and High School**

Board of trustees of high school district and common school district included therein had authority to build grade school and high school in one unit sharing common facilities and to issue bonds therefor. *Long v. School District No. 44*, 149 M 220, 425 P 2d 822.

Bond issue of joint common school district and high school district for purpose of building combined grade school and high school was not illegal for failure to state separately on ballot cost of land. *Elliot v. School District No. 64-JT, Musselshell-Rosebud County*, 149 M 299, 425 P 2d 826.

**75-3904. (1224.4) Limitation of term of bonds—interest—redemption.** No school district bonds shall be issued for a term longer than twenty (20) years, provided, however, that bonds issued to refund or redeem outstanding bonds shall not be issued for a longer term than ten (10) years, except when the unexpired term of the bonds to be refunded is in excess of ten (10) years, in which case the refunding bonds may be issued for

such unexpired term. All bonds issued for a longer term than five (5) years shall be redeemable at the option of the school district five (5) years from the date of issue and on any payment due date thereafter before maturity and shall be so stated on the face of the bonds. The interest shall not exceed six per centum (6%) and shall be payable semiannually.

**History:** En. Sec. 4, Ch. 147, L. 1927; amd. Sec. 1, Ch. 25, L. 1931; amd. Sec. 2, Ch. 178, L. 1939; amd. Sec. 1, Ch. 273, L. 1967.

has expired and on any interest due date thereafter prior to their maturity, and such redemption right must be stated on the face of each bond."

#### Amendments

The 1967 amendment substituted the second sentence for one which read "All bonds shall be redeemable when one-half of the term for which they were issued

#### Effective Date

Section 2 of Ch. 273, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved March 2, 1967.

**75-3908. (1224.8) Petition and election required for bond issues for other purposes.** School district bonds for any other purpose than those stated in sections 75-3906 and 75-3907, shall not be issued unless authorized at a duly called election at which the question of issuing such bonds was submitted to the electors of the school district; and no such election shall be called unless proceedings have been commenced by resolution upon the part of the board of trustees of the school district of its own motion and without any petition being filed therefor or unless there has been presented to the board of trustees a petition asking that such election be held and such question be submitted, signed by not less than twenty per centum (20%) of the qualified registered electors residing within the school district, who are taxpayers upon property therein and whose names appear on the last completed assessment roll for state, county and school district taxes.

**History:** En. Sec. 8, Ch. 147, L. 1927; amd. Sec. 1, Ch. 54, L. 1967.

#### Repealing Clause

Section 2 of Ch. 54, Laws 1967 repealed all acts and parts of acts in conflict therewith.

#### Amendments

The 1967 amendment inserted "proceedings \* \* \* being filed therefor or unless" after "shall be called unless."

**75-3910. (1224.10) Meeting of board of trustees to consider petition, etc.**

#### Bond Sale Resolution

School bond election was not invalid for failure of clerk to set out in full in minute books of board of trustees resolution authorizing sale of bonds, in absence of showing that resolution itself was defec-

tive since statute does not require that minute books reflect exact contents of resolution. Elliot v. School District No. 64-JT, Musselshell-Rosebud County, 149 M 299, 425 P 2d 826.

**75-3911. (1224.11) Preparation of ballots—form.**

#### Form of Ballot

Use of words "For" and "Against" on ballot in school bond election was substantial compliance with statute requiring

words "Yes" and "No." Elliot v. School District No. 64-JT, Musselshell-Rosebud County, 149 M 299, 425 P 2d 826.

**75-3914. (1224.14) Percentage of electors required to authorize bond issue.** Whenever the question of issuing bonds for any purpose



is submitted to the qualified electors of a school district at either a general or special school election if forty (40) per centum of the qualified electors entitled to vote on such question at such election vote thereon and a majority of such votes shall be cast in favor of such proposition then said proposition shall be deemed to have been approved and adopted; provided, moreover, that if less than forty (40) per centum, but more than thirty (30) per centum of such qualified electors vote on such question at such election and sixty (60) per centum or more of such votes shall be cast in favor of such proposition, then such proposition shall be deemed to have been approved and adopted, otherwise such question shall be deemed to have been rejected.

**History:** En. Sec. 14, Ch. 147, L. 1927; amd. Sec. 1, Ch. 40, L. 1935; amd. Sec. 1, Ch. 7, L. 1937; amd. Sec. 1, Ch. 103, L. 1969.

qualified electors entitled to vote on the question do so. For previous text, see parent volume.

#### Amendments

The 1969 amendment rewrote this section to permit approval of bond question even if less than forty per cent of the

#### Effective Date

Section 2 of Ch. 103, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved February 24, 1969.

### 75-3915. (1224.15) Meeting of board of trustees, etc.

#### Mandamus To Compel Issuance of Bonds

Court would not compel board to issue bonds for construction of school where board was making good faith effort to solve financial aspects of building pro-

posed school; litigation which was instituted to test validity of bond election suspended running of sixty-day period in statute. State ex rel. Tilzey v. School District No. 44, 149 M 509, 428 P 2d 974.

### 75-3917. (1224.17) Publication of notice of sale.

#### Failure To Advertise

Failure to cause notice of sale of bonds to be published in New York City newspaper as required by statute was no rea-

son for invalidating bond election and subsequent bond issue. Elliot v. School District No. 64-JT, Musselshell-Rosebud County, 149 M 299, 425 P 2d 826.

## CHAPTER 41—HIGH SCHOOLS—COUNTY—JUNIOR AND DISTRICT—JOINT SCHOOL SYSTEMS

Section 75-4120. Authority to abolish or to unify.

75-4120.1. Procedure for unification of county high school.

75-4120.2. Appointment and terms of additional trustees after unification—county as high school district.

75-4120.3. Adoption of budget after unification.

75-4121. Petition to abolish county high school to be filed.

75-4122. Commissioners to submit question.

75-4123. Publication of notice and preparation of pollbooks.

75-4124. Further notice required—manner of holding election—ballots.

75-4125. Action by board of county commissioners when election favors abolishing county high school.

75-4126. When election favors retaining high school.

75-4127. Disposition of unexpended funds of county high school after abolishment or unification.

75-4128. Disposition of property of county high school when abolished or unified—inventory—appraisal—compensation of appraisers.

75-4130. Board of county commissioners to sell—manner of sale—execution of deeds.

- 75-4133. Disposition of taxes levied for county high school but unpaid before abolishment or unification.  
75-4134. Liquidation of bonded indebtedness of county high school upon abolishment or unification.  
75-4138. School districts may establish high schools and county high schools a branch—transportation.  
75-4139. Approval of superintendent of public instruction—how secured.  
75-4146. Expenditure of money for transportation of high school pupils.

**75-4120. (1262.19) Authority to abolish or to unify.** Any county in which a county high school has been established may abolish such county high school or unify it with and make it a part of the public school system of the school district in which it is located and dispose of all property belonging thereto in the manner provided in this chapter.

**History:** En. Sec. 19, Ch. 148, L. 1931; it with and make it a part of the public  
amd. Sec. 1, Ch. 261, L. 1963. school system of the school district in  
which it is located."

**Amendment**

The 1963 amendment inserted "or unify

**75-4120.1. Procedure for unification of county high school.** A county high school may be unified with and made a part of the school district in which the county high school is located in the following manner: If the board of trustees of the county high school and the board of trustees of the school district in which the county high school is located shall each pass a resolution requesting unification and an election thereon and shall each file copies of the respective resolutions with the county superintendent of schools, or if a petition signed by ten per cent (10 %) of the qualified electors of the high school district where the county high school is located, or of the county if it is not divided into high school districts, is filed with the county superintendent requesting that an election on the question of unification be held, the county superintendent within not less than twenty (20) nor more than thirty (30) days shall cause notice of election to be given by posting and publication. The question shall be submitted to the qualified electors of the high school district where the county high school is located or to the qualified electors of the county if it is not divided into high school districts. The notice shall be posted in three (3) public places in each school district of the high school district, or of the county if it is not divided into high school districts, and at least one (1) voting place shall be provided in each such school district. The notice shall also be published once in a newspaper published in the county and having general circulation therein. The notice shall specify the voting places, the time when the polls shall be open and that the question to be submitted is FOR or AGAINST unification.

If a majority of the votes cast at such election shall be FOR unification the county superintendent shall make an order that unification shall be effective the following July 1.

If a majority of the votes cast at such election shall be AGAINST unification the county superintendent shall so declare.

Persons qualified to vote for school trustees shall be eligible to vote at the election provided for herein and as far as applicable the statutes relating to the election of school trustees shall govern such election.

**History:** En. Sec. 1, Ch. 37, L. 1965.

**Title of Act**

An act changing the procedure for unifying a county high school with the school

district in which the county high school is located; amending sections 75-1421, 75-4122, 75-4123, 75-4124, 75-4125, and 75-4126, R. C. M. 1947.

**75-4120.2. Appointment and terms of additional trustees after unification—county as high school district.** If unification is accomplished, immediately after the effective date the county superintendent of schools in those counties which have been divided into high school districts shall appoint additional board of trustee members in the manner provided by section 75-4601, R. C. M. 1947, if the majority of the school districts lying within the high school district so request. If the county has not been divided into high school districts, the county shall immediately upon unification, become a high school district in its entirety in the same manner as if action had been taken under section 75-4602, R. C. M. 1947. Members appointed by the county superintendent of schools shall hold office until the next annual school election when there shall be elected a trustee to replace each appointed member.

**History:** En. Sec. 2, Ch. 37, L. 1965.

**75-4120.3. Adoption of budget after unification.** If unification is accomplished, the board of trustees of the district which was unified with the county high school shall adopt a high school budget for the next fiscal year on the fourth Monday in June preceding the effective date of unification.

**History:** En. Sec. 3, Ch. 37, L. 1965.

**75-4121. (1262.20) Petition to abolish county high school to be filed.** Between the first day of July and the first day of September in any year in which a general election is held in the state of Montana twenty per centum (20 %) or more, of the qualified registered electors of any county maintaining a county high school who are also assessed in their own names on the assessment books of the county for that year upon real or personal property may file their written petition with the county clerk of the county praying that the county high school be abolished.

**History:** En. Sec. 20, Ch. 148, L. 1931; amd. Sec. 2, Ch. 261, L. 1963; amd. Sec. 4, Ch. 37, L. 1965.

**Amendments**

The 1963 amendment inserted "registered" between "qualified" and "electors"; and added "or praying that the county

high school be unified with and made a part of the public school system of the school district in which said county high school is located" at the end of the section.

The 1965 amendment deleted the words that had been added at the end of the section by the 1963 amendment.

**75-4122. (1262.21) Commissioners to submit question.** At the first regular monthly meeting of the board of county commissioners of the county immediately following such filing the petition shall be called to the attention of the board by the county clerk; and the board shall immediately direct the submission to the registered voters of the county at the ensuing general election for that year of the question whether the county high school of the county should be abolished.



History: En. Sec. 21, Ch. 148, L. 1931; amd. Sec. 3, Ch. 261, L. 1963; amd. Sec. 5, Ch. 37, L. 1965.

#### Amendments

The 1963 amendment inserted "of the question appearing in the petition" after "submission"; and deleted from the end

of the section the words "of the question whether the county high school of the county should be abolished."

The 1965 amendment deleted the words inserted by the 1963 amendment and restored the words deleted by the 1963 amendment.

**75-4123. (1262.22) Publication of notice and preparation of pollbooks.** The county clerk of the county shall publish a notice of the filing and purpose of the said petition, which notice shall contain the question of abolishing the county high school. The notice shall also state that the said question will be submitted at the ensuing general election. The notice shall be published at least once a week for four successive weeks in some newspaper of general circulation published in the county, and, if there be none, in such newspaper as the board of county commissioners may designate, the first publication of such notice to be made between September 1 and September 15 of the said year. The county clerk of said county shall prepare suitable pollbooks containing the names of all registered electors at the expense of the county.

History: En. Sec. 22, Ch. 148, L. 1931; amd. Sec. 4, Ch. 261, L. 1963; amd. Sec. 6, Ch. 37, L. 1965.

#### Amendments

The 1963 amendment divided the former text into three sentences; inserted "which notice shall contain the question of either abolishing the county high school or of unifying the county high school with and making it a part of the public school system of the school district in which it is located" at the end of the first sentence; substituted the second sentence for "and

that the question of abolishing the county high school in the county will be submitted at the ensuing general election"; inserted "The notice shall be published" at the beginning of the third sentence; and added the fourth sentence.

The 1965 amendment substituted "abolishing the county high school" at the end of the first sentence for "either abolishing the county high school or of unifying the county high school with and making it a part of the public school system of the school district in which it is located."

**75-4124. (1262.23) Further notice required—manner of holding election—ballots.** Further notice of the submission of the question shall be given, and such question shall be submitted to the registered voters of the county at the ensuing general election in November, and the votes cast thereon canvassed and returns thereof made in the manner provided by law for the election of county officers at that election, subject, however, to the following special requirements:

The votes for or against abolishment of the county high school shall be cast by ballot in substantially the following form.

Abolishment of county high school.

- ☐ For the abolishment of the county high school.
- ☐ Against the abolishment of the county high school.

An elector may vote for the question submitted to him for consideration by placing an "X" in the square immediately before the words "For the abolishment of the county high school"; and a ballot so marked and cast shall be counted in favor of abolishing the county high school. An elector may vote against the question submitted to him for consideration by placing an "X" in the square immediately preceding the words "Against

the abolishment of the county high school"; and a ballot so marked and cast shall be counted against abolishing the county high school.

**History:** En. Sec. 23, Ch. 148, L. 1931; amd. Sec. 5, Ch. 261, L. 1963; amd. Sec. 7, Ch. 37, L. 1965.

#### Amendments

The 1963 amendment substituted for the second paragraph a paragraph reading, "If the question is to abolish the county high school, the votes for or against abolishment of the county high school shall be cast by ballot in substantially the following form under A. But if the question is to unify the county high school and make it a part of the public school system of the school district in which the county high school is located, then a ballot similar to form B shall be used"; inserted, with a designation "A", the caption for the ballot form on abolishment of the county high school; in-

serted a ballot form B on the question of unification of the county high school; substituted "the question submitted to him for consideration" in the final paragraph for "abolishing the county high school" and "the abolishment of the county high school"; and inserted "(or unification)" or "(or unifying)" after "abolishment" or "abolishing" in four places in the final paragraph.

The 1965 amendment restored the second paragraph to substantially its original form; deleted "A" from the caption for the ballot form on abolishment of the county high school; deleted ballot form B on unification of the county high school; and deleted from the final paragraph the words "(or unification)" and "(or unifying)" that had been inserted by the 1963 amendment.

**75-4125. (1262.24) Action by board of county commissioners when election favors abolishing county high school.** If a majority of all votes cast at such general election upon the question of the abolishment of the county high school shall be in favor of abolishing the same the board of county commissioners of the county at its first regular meeting in December following the election shall make and enter at large upon its minutes an abstract of the votes so cast and a resolution that in accordance therewith on and after July 1st of the year immediately following the county high school of the county shall be, and is thereby abolished.

**History:** En. Sec. 24, Ch. 148, L. 1931; amd. Sec. 6, Ch. 261, L. 1963; amd. Sec. 8, Ch. 37, L. 1965.

#### Amendments

The 1963 amendment substituted "question of the abolishment or the unification of the county high school with and making it a part of the public school system of the school district in which the county high school is located shall be in favor of abolishing or unifying the same" in the first part of the section for "question of the abolishment of the county high school shall be in favor of abolishing the same"; added at the end of the section the words "or, in case of unification, that the county high school shall be and is thereby unified with and made a part of

the public school system of the school district in which the county high school is located, and that the board of trustees of said county high school shall be and is thereby dissolved, and that its powers and duties shall be and are thereby assigned to the board of trustees of the school district with which the county high school was unified, provided, that the board of trustees of said school district shall have, and is hereby given the power and authority to prepare and adopt the preliminary high school budget for the ensuing fiscal year beginning on said July 1st"; and made a minor change in phraseology.

The 1965 amendment restored the section to its original form except for a minor change in phraseology.

**75-4126. (1262.25) When election favors retaining high school.** But if a majority of all votes cast at such election shall be against the abolishment of the county high school a similar abstract of the votes shall in like manner be entered by the board of county commissioners at large upon their minutes at its December meeting aforesaid; and no further submission of the question of abolishing the county high school shall be had

in that county for at least two (2) years thereafter, provided that if an election against the abolishment of the county high school has been had within any county within two years prior to the enactment of this statute, that the question shall not again be resubmitted for at least two (2) years after the date that this act becomes effective.

**History:** En. Sec. 25, Ch. 148, L. 1931; amd. Sec. 7, Ch. 261, L. 1963; amd. Sec. 9, Ch. 37, L. 1965.

The 1965 amendment deleted the phrases "or the unification" and "or unifying" that had been inserted by the 1963 amendment.

#### Amendments

The 1963 amendment inserted "or the unification" and "or unifying" after "abolishment" and "abolishing"; and reduced the waiting period for a new election from four to two years from the previous election or from the effective date of the act.

#### Effective Date

Section 10 of Ch. 37, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved February 22, 1965.

**75-4127. (1262.26) Disposition of unexpended funds of county high school after abolishment or unification.** When any county high school is abolished pursuant to law all unexpended moneys belonging to such high school shall be applied and paid as follows:

1. To the payment of outstanding warrants issued by the board of trustees of the county high school.

2. To the payment of the interest and principal of outstanding bonds issued for county high school purposes.

3. To the credit of the funds of the school districts of the county which maintain and conduct accredited high school classes, the apportionment among such districts to be made according to the average daily attendance as determined by the county superintendent of schools at such accredited high school classes for the school year immediately next preceding the effective date of the abolishment of the county high school. But if the school district in which the county high school was located shall establish an approved high school, or approved high school classes, for the school year immediately following upon the effective date of the abolishment of the county high school such school district shall share in the distribution of any unexpended balance of the funds of the county high school upon the basis of the average daily attendance at the county high school in approved high school classes during the last school year of its existence. When any county high school is unified pursuant to the provisions of this chapter, all unexpended moneys belonging to such high school, other than funds that were raised for the purpose of paying the interest and principal of outstanding bonds issued for county high school purposes, shall be paid in the following manner:

1. To the payment of the outstanding warrants and current invoices for material and services purchased by the board of trustees of the county high school.

2. Any remainder shall be deposited to the credit of the school district in which the county high school was located to be used in the budget for the operation of the district high school.



**History:** En. Sec. 26, Ch. 148, L. 1931;      **Amendment**  
amd. Sec. 8, Ch. 261, L. 1963.

The 1963 amendment added the final sentence and the two numbered clauses subsidiary thereto.

**75-4128. (1262.27) Disposition of property of county high school when abolished or unified—inventory—appraisal—compensation of appraisers.** When any county high school is abolished all its real and personal property, other than its moneys, shall be disposed of in the following manner: The district court of the county in which such high school was located on application of the board of county commissioners shall appoint three competent persons, residents of the county, to inventory and appraise all such real and personal property of the said county high school. In making such appraisement the appraisers shall take into account ordinary depreciation, and the adaptability or lack of adaptability of the buildings, grounds, and other real estate, and of the various articles of personal property to any special use for which such property may be sold. The appraisers shall be allowed their necessary expenses, including mileage at the rate of ten (10) cents per mile from their respective residences to the place where the property of the county high school is found, and return, expenses and mileage to be paid out of any moneys belonging to the county high school, or, if none, out of the general fund of the county, upon the order of the district court. When any county high school is unified with and made a part of the public school system of the school district in which it is located according to this chapter, all its real and personal property, including all appurtenances and hereditaments, except as otherwise provided for in this chapter, shall become and remain the property of the school district with which it was unified without an inventory and appraisement.

**History:** En. Sec. 27, Ch. 148, L. 1931;      **Amendment**  
amd. Sec. 9, Ch. 261, L. 1963.

The 1963 amendment added the final sentence.

**75-4130. (1262.29) Board of county commissioners to sell—manner of sale—execution of deeds.** Upon the adoption or approval of the appraisement the board of county commissioners of the county shall proceed to sell all of such property after notice and in the manner provided by law for the sale by the board of other county property; and upon any such sale of all or any portion of such property pursuant to law and the payment to the county treasurer of the purchase price the said board shall be fully authorized and empowered to make and execute in the name of the county all necessary and appropriate deeds, bills of sale and other instruments for the conveyance of title to the purchaser or purchasers; provided, that if the county high school was unified with and made a part of the public school system of the school district in which it was located pursuant to the provisions of this chapter, the board of county commissioners of the county shall make and execute in the name of the county all necessary and appropriate deeds, bills of sale and other instruments for the conveyance of title to the school district with which the county high school was unified.

**History:** En. Sec. 29, Ch. 148, L. 1931;  
amd. Sec. 10, Ch. 261, L. 1963.

**Amendment**

The 1963 amendment added the proviso at the end of the section.

**75-4133. (1262.32) Disposition of taxes levied for county high school but unpaid before abolishment or unification.** All taxes levied for the support of any county high school which is thereafter abolished before such taxes are collected shall, when collected, be paid over into the fund created by the special high school tax levied in the county, and apportioned and disbursed as a part of such fund, and, if there be no such fund, then into the general school fund of the county, provided, however, that if any county high school is unified, all taxes levied for the county high school shall be paid to the school district for the support of the district high school established by the unification.

**History:** En. Sec. 32, Ch. 148, L. 1931;  
amd. Sec. 11, Ch. 261, L. 1963.

**Amendment**

The 1963 amendment added the proviso at the end of the section.

**75-4134. (1262.33) Liquidation of bonded indebtedness of county high school upon abolishment or unification.** If the funds of any county high school which has been abolished, and the proceeds of the sale of all its property according to law, are not sufficient to pay all the outstanding warrants, bonds and other legal obligations of the said high school, it shall be the duty of the county commissioners and of the board of trustees of the said high school annually to ascertain the amount of such warrants, bonds and other outstanding indebtedness and to make such annual tax levies according to law as may be necessary to pay and retire such warrants, bonds and/or other outstanding obligations, all in the same manner and by the same means as though the said county high school had not been abolished; and for such purpose and until such indebtedness be fully paid and discharged the board of trustees of the said county high school shall be continued in existence and shall function, and together with the board of commissioners of the county shall exercise and have the same powers for retiring and paying such indebtedness as though the said county high school were still functioning and in existence. When a county high school is unified with and made a part of the public school system of the school district in which it is located, all outstanding bonds shall remain the liability of the county or that portion of the county against which the bonds were originally issued. It shall be the duty of the county commissioners and the board of trustees of the school district with which the county high school was unified to ascertain annually the amount of such bonds and to make such annual tax levies according to law as may be necessary to pay and retire such bonds in full, all in the same manner and by the same means as though the said county high school had not been unified.

**History:** En. Sec. 33, Ch. 148, L. 1931;  
amd. Sec. 12, Ch. 261, L. 1963.

**Amendment**

The 1963 amendment added the second and third sentences.

**75-4138. (1262.37) School districts may establish high schools and county high schools a branch—transportation.** Whenever the interests

of any school district or a county high school require it, the board of trustees of the district or the board of trustees of the county high school, with the approval of the superintendent of public instruction, may establish a high school for the district or a branch of the county high school and make the provisions for its quarters, equipment, and teaching force in the manner provided for in section 75-4139, provided, if any school district acquires the real and all other property of a former county high school by means of unification pursuant to this chapter, the board of trustees of such school district shall have the authority by resolution to establish a district high school using therefor the real and other property of the former county high school without further action or any approval and the high school established shall be the high school of the high school district in which located, if the county has been divided into high school districts.

**History:** En. Sec. 37, Ch. 148, L. 1931; amd. Sec. 1, Ch. 159, L. 1939; amd. Sec. 1, Ch. 152, L. 1963; amd. Sec. 13, Ch. 261, L. 1963.

#### Compiler's Note

This section was amended twice in 1963, once by Ch. 152 and once by Ch. 261. Neither amendatory act mentioned nor included the changes made by the other. Since the two amendments do not appear to conflict, however, the compiler has made a composite section incorporating the changes made by both.

#### Amendments

Chapter 152, Laws 1963, inserted "or a county high school," "or the board of trustees of the county high school," and

"for the district or a branch of the county high school" in the first part of the section; and made a minor change in phraseology.

Chapter 261, Laws 1963, substituted the proviso for two former provisos, for text of which see parent volume.

#### Repealing Clause

Section 14 of Ch. 261, Laws 1963 repealed all acts and parts of acts in conflict therewith.

#### Effective Date

Section 15 of Ch. 261, Laws 1963 provided the act should be in effect from and after its passage and approval. Approved March 13, 1963.

**75-4139. (1262.38) Approval of superintendent of public instruction—how secured.** When the board of trustees of any school district desires to establish a high school, or a county high school desires to establish a branch of the county high school, it shall petition the superintendent of public instruction, prior to June first of the current year for the permission to do so, setting forth in writing the facts regarding the enrollment in the elementary grades, the distance to other high schools, the road conditions, the taxable valuation of the district, the building facilities and such other information as the state superintendent may require. An investigation shall be made thereafter by a designated representative of the superintendent of public instruction and his report on the petition filed with it before the petition is acted upon. The superintendent of public instruction must have passed favorably on any such petition before the high school or branch of the county high school proposed may be established by the district.

When the establishment of a high school or a branch of the county high school has been approved in accordance with the provisions of this section, the county superintendent of schools shall immediately investigate to find the number of students who will probably attend such newly established high school or branch of the county high school. This



number of students shall be used as a basis for making out the budget for the first year of operation. He shall then assist the board of trustees of the school district establishing such high school or the trustees of a county high school establishing a branch, in preparing and submitting a budget for the maintenance of such high school or branch of the county high school. Said budget shall, otherwise than specified above, be prepared, submitted, approved and distributed in the same manner as other high school budgets are prepared, submitted, approved and distributed.

**History:** En. Sec. 38, Ch. 148, L. 1931; amd. Sec. 1, Ch. 9, L. 1933; amd. Sec. 2, Ch. 152, L. 1963.

#### Amendment

The 1963 amendment inserted "or a county high school desires to establish a branch of the county high school" in the first sentence of the section; inserted "or branch of the county high school" or "or a branch of the county high school" in the

last sentence of the first paragraph and in three places in the second paragraph; and inserted "or the trustees of a county high school establishing a branch" in the third sentence of the second paragraph.

#### Effective Date

Section 3 of Ch. 152, Laws 1963 provided the act should be in effect from and after its passage and approval. Approved March 5, 1963.

**75-4146. (1262.44-A) Expenditure of money for transportation of high school pupils.** Whenever any eligible high school pupil has been authorized to attend a high school situated in a county in another state and which county adjoins the state of Montana, as provided in section 75-4230, the board of trustees of the county high school, if there be a county high school for the county in which the pupil resides, or if there be no such county high school then the board of trustees of the school district in which such pupil resides, may expend any moneys belonging to the county high school, or school district, as the case may be, for the purpose of either paying for transportation of such pupil from the home of such pupil to the high school in the other state which is to be attended, or for board, rent or tuition for such pupil while actually attending such school, in the same manner and to the same extent as such money might be expended for transportation, board, rent or tuition of such pupil if permission were given for attending a high school in another district in the county in which the pupil resides in accordance with the provisions of law.

**History:** En. Sec. 3, Ch. 217, L. 1939; amd. Sec. 1, Ch. 21, L. 1963.

#### Amendment

The 1963 amendment substituted "the state of Montana" for "the county in

which such high school pupil resides" after "adjoins" near the beginning of the section; and, at the end of the section, substituted "provisions of law" for "provisions of section 75-4145."

### CHAPTER 42—HIGH SCHOOLS—COUNTY—JUNIOR AND DISTRICT—JOINT SCHOOL SYSTEMS CONTINUED—VOCATIONAL EDUCATION

- Section 75-4202. Establishment in districts where county high school is located.  
 75-4230. Attendance outside of county of pupil's residence—transfer of apportionment.  
 75-4241. Acceptance of acts of Congress for promotion of vocational education.  
 75-4246. Apportionment of funds for vocational education.

**75-4202. (1262.53) Establishment in districts where county high school is located.** A junior high school or junior high schools may be established by the school district in which any county high school is located in the manner provided in section 75-4201, provided that the board of trustees of the county high school already located in the district shall by resolution consent thereto. A junior high school, or junior high schools, may also, in like manner, be established by the county high school, provided that the board of trustees of the school district, in which the county high school is located, shall by resolution consent thereto. In no event, however, shall a junior high school be established unless the question has been submitted to the qualified electors of the district involved, and a majority of the electors vote in favor thereof.

**History:** En. Sec. 53, Ch. 148, L. 1931;  
amd. Sec. 1, Ch. 89, L. 1949; amd. Sec. 1,  
Ch. 262, L. 1965.

**Amendment**

The 1965 amendment added the last sentence.

**75-4230. Attendance outside of county of pupil's residence—transfer of apportionment.** The attendance of any eligible high school pupil at an accredited high school outside of the county of his residence, either within or without the state, must be authorized by the county superintendent of schools of the county of his residence when a pupil lives closer to a high school of another county than to any high school located in the county of his residence, or when due to road or geographical conditions it is impractical to attend the high school of his own district, and when proper application has been made to the county superintendent of schools by the parent or guardian of the pupil for whom such transfer is desired; provided, that the county superintendent of schools may at his discretion require a pupil obtaining such transfer to attend the high school nearest his residence.

In all other cases the county superintendent of schools may authorize at his discretion any eligible pupil to attend a high school in a county outside of his residence.

No payment shall be made for attendance in another state except where such attendance is in a high school in a county adjacent to the state of Montana.

Application for permission to attend a high school outside the county of residence shall be made to the county superintendent of the county of the pupil's residence before July 1, previous to the year of attendance, except in those cases where circumstances make this impossible. The county superintendent must then approve or disapprove these applications and notify the individuals concerned, and the high school to be attended, and the county superintendent of the county where the pupil will attend school. At the end of the school year attended and before July 15, the clerk of the school district operating the high school attended shall send to his county superintendent the name of all pupils from outside of the county attending his school, together with such pupils' home addresses and the number of days such pupils actually attended his high school, who in turn will transmit this information to the county superintendent of the pupils' residence.

Tuition for the year attended is hereby made an obligation of the county of residence for the following year. Before August 1 each year, the county superintendent of the county of residence of the pupils concerned shall make out a high school transfer budget. The total of such transfer budget shall be determined by multiplying the number of pupils attending high school outside of his county by three hundred dollars (\$300) in the case of attendance at a high school with an average number belonging up to one hundred (100) pupils; two hundred seventy-five dollars (\$275) in case of attendance at a high school with an average number belonging from one hundred one (101) to four hundred (400); and two hundred fifty dollars (\$250) in case of attendance at a high school with an average number belonging over four hundred (400); provided further, that the pupil has attended at least forty (40) days.

The total of the transfer budget shall be subtracted from the receipts from the basic special tax for high schools as provided for in section 75-4516.1 before the remainder of such receipts is distributed to the high schools of the county. Such total of the transfer budget shall be held in a transfer fund separate and apart from other school funds and shall be allocated by the county treasurer upon instructions from the county superintendent.

In December of each year the county superintendent of the county of the pupil's residence shall notify his county treasurer of the amount to be transferred to each high school educating the pupil concerned, and the said county treasurer shall forthwith remit said amounts to the county treasurer of the county in which such high schools are located. The county treasurer receiving such transfers of money shall place the amount to the credit of the general fund of the high school concerned. Receipts by any high school for tuition are to be used against the needs of the budget after county and state aid have been received.

Whenever pupils are inmates of the Montana children's center at Twin Bridges and attend the public high school in Twin Bridges, the latter school shall receive from moneys available for state equalization aid four hundred dollars (\$400.00) for each such pupil; provided, however, that this amount of tuition is not considered as a part of regular state equalization aid. Application for this tuition from the state is to be made in the same manner and at the same time as for regular state equalization aid.

Whenever pupils residing in Montana are approved for attendance in a high school in an adjoining state, and whenever pupils in an adjoining state are approved for attendance in a high school in Montana, the above schedule of tuition payments may be waived, and payments arrived at on the reciprocal basis with the state involved. The state superintendent of public instruction is hereby authorized to negotiate with the state superintendent of public instruction of each state involved in arriving at tuition payments, which may either be on a per pupil basis of a flat amount or on an actual cost basis.

History: En. Sec. 81, Ch. 148, L. 1931; amd. Sec. 4, Ch. 217, L. 1939; amd. Sec. 1, Ch. 219, L. 1943; amd. Sec. 1, Ch. 146, L. 1949; amd. Sec. 3, Ch. 106, L. 1951; amd. Sec. 1, Ch. 22, L. 1953; amd. Sec. 1,

Ch. 70, L. 1959; amd. Sec. 2, Ch. 21, L. 1963; amd. Sec. 1, Ch. 162, L. 1963; amd. Sec. 13, Ch. 267, L. 1963; amd. Sec. 2, Ch. 127, L. 1965.



**Compiler's Note**

This section was amended three times in 1963, once by Ch. 21, once by Ch. 162, and once by Ch. 267. Chapter 267 included one of the changes made by Ch. 162, but otherwise none of the amendatory acts mentioned nor included the changes made by either of the others. Since the amendments do not appear to conflict, however, the compiler has made a composite section incorporating the changes made by all three amendments.

**Amendments**

Chapter 21, Laws 1963, substituted "another county" for "an adjoining county" after "lives closer to a high school of" near the middle of the first paragraph; and substituted "the state of Montana" for "the county of the student's residence" at the end of the third paragraph.

Chapter 162, Laws 1963, substituted "children's center" for "state orphans'

home" in the eighth paragraph; and increased the reimbursement specified in the eighth paragraph from \$250 to \$400 per pupil.

Chapter 267, Laws 1963, substituted "the basic special tax for high schools as provided for in section 75-4516.1" near the beginning of the sixth paragraph for "the county ten (10) mill levy for high schools"; incorporated in the eighth paragraph the change in the reimbursement rate made by Ch. 162, Laws 1963; substituted "shall receive from moneys available for state equalization aid" in the eighth paragraph for "shall be reimbursed from the state public school equalization fund at the rate of"; and inserted "regular" in the proviso to the first sentence in the eighth paragraph.

The 1965 amendment increased tuition by \$50 in each of the three classes of schools mentioned in the fifth paragraph.

**75-4241. (1262.93) Acceptance of acts of Congress for promotion of vocational education.** The state of Montana hereby reaffirms the acceptance of and assents to the terms and provisions of the act of Congress entitled "The Vocational Education Act of 1963" and the "Vocational Education Amendments of 1968," and further hereby accepts and assents to the terms and provisions of all acts of the Congress amendatory of the act foregoing, and to the terms and provisions of all other acts of Congress which provide funds for the benefit of vocational education in Montana.

**History:** En. Sec. 103, Ch. 148, L. 1931; amd. Sec. 1, Ch. 317, L. 1969.

**Compiler's Notes**

The Vocational Education Act of 1963, referred to in this section, is compiled in the United States Code as Tit. 20, sec. 35 et seq.

The Vocational Education Amendments

of 1968 (act Oct. 16, 1968) are P. L. 90-576.

**Amendments**

The 1969 amendment deleted the references to obsolete statutes and substituted references to current vocational education statutes and substituted "all other acts of Congress \* \* \* in Montana" for the title of another repealed act.

**75-4243. (1262.95) Repealed.**

**Repeal**

Section 75-4243 (Sec. 105, Ch. 148, L. 1931), relating to the appointment of a

vocational education advisory committee by state board of education, was repealed by Sec. 1, Ch. 318, Laws 1969.

**75-4246. (1262.98) Apportionment of funds for vocational education.** The state board for vocational education shall apportion all moneys appropriated by the legislature for vocational education in accordance with the intent of the legislature as reflected in the terms of the appropriation, and the said state board shall apportion all money received by the state of Montana for vocational education from the federal government under the acts of Congress mentioned in section 75-4241 in accordance with the requirements of said acts.

**History:** En. Sec. 108, Ch. 148, L. 1931; amd. Sec. 1, Ch. 254, L. 1967; amd. Sec. 1, Ch. 315, L. 1969.

#### Amendments

The 1967 amendment added a former last sentence reading, "Funds for area

vocational-technical education shall be apportioned to area vocational-technical schools meeting the requirements for eligibility for such funds."

The 1969 amendment rewrote this section. For previous text, see parent volume and 1967 amendment.

### CHAPTER 43—POST-SECONDARY VOCATIONAL-TECHNICAL EDUCATION

- Section 75-4309. Post-secondary vocational-technical education program.  
 75-4310. Definitions.  
 75-4311. Provisions for orderly development of program in state plan for vocational education.  
 75-4312. Centers to be designated only upon direction of legislature—applications for designation—legislative designation of certain centers.  
 75-4313. Local administration—state board sole authority for program and budget approval.  
 75-4314. Fees for equipment and material authorized.  
 75-4315. Admission—residents given priority where enrollment limited.  
 75-4316. No tuition for residents—nonresidents' tuition—determination of resident status.  
 75-4317. Program and construction budget approval—financing.  
 75-4318. Available funding.  
 75-4319. Treasurer custodian of program's funds—disbursement—deposit.  
 75-4320. Act controlling over conflicting provisions.  
 75-4321. Effective date—exception.  
 75-4322. Lease of vocational education land and buildings to school districts—consideration.  
 75-4323. Transfer of title to buildings and/or lands to school districts.

#### 75-4301 to 75-4308. Repealed.

##### Repeal

Sections 75-4301 to 75-4308 (Secs. 1 to 7, Ch. 160, L. 1939; Secs. 1, 2, Ch. 77, L. 1963; Sec. 1, Ch. 211, L. 1967; Secs. 2 to

8, Ch. 254, L. 1967), relating to the designation of high schools as vocational training centers, were repealed by Sec. 14, Ch. 250, Laws 1969.

#### 75-4309. Post-secondary vocational-technical education program.

This act will enable the development of a system of post-secondary vocational-technical education, adaptable to changing needs—controlled to prevent unnecessary duplication—and funded to insure growth and quality programming. It will place program and program budget approval under the state board for vocational education and will stabilize expansion by leaving center designation by the state board dependent upon legislative direction.

**History:** En. Sec. 1, Ch. 250, L. 1969.

##### Title of Act

An act to provide for support, co-ordi-

nation and over-all state growth and development of post-secondary vocational-technical education; repealing sections 75-4301 through 75-4308.

**75-4310. Definitions.** (1) The term "post-secondary vocational-technical education" means vocational or technical training or retraining which is given in schools or classes (including field or laboratory work and remedial or related academic and technical instruction incident thereto) under public supervision and control or under contract with the state board for vocational education or local school districts and is conducted as part of a program designed to prepare individuals (not regularly enrolled in an elementary or secondary school program) for

gainful employment as semiskilled or skilled workers or technicians or subprofessionals in recognized occupations and in new and emerging occupations or to prepare individuals for enrollment in advanced technical education programs, but excluding any program generally considered professional or which requires a baccalaureate or higher degree; and such term includes vocational guidance and counseling; instruction related to occupation or occupations for which the students are in training or instruction necessary for students to benefit from such training; job placement; travel of students and vocational education personnel while engaged in a training program; the acquisition, maintenance, and repair of instructional supplies, teaching aids and equipment; and the rental of necessary emergency facilities but such term does not include the construction, acquisition, or initial equipment of buildings or the acquisition or rental of land. Post-secondary vocational-technical education shall include the 13th and/or 14th year of any segment thereof and beyond but will not include work toward a baccalaureate degree.

(2) A "post-secondary vocational-technical education student" is a person who has completed or left school, is at least 16 years of age, and is available for study in preparation for entering the labor market, for re-entering the labor market, for employment stability or advancement in employment.

(3) A "post-secondary vocational-technical center" is a school used principally for the provision of post-secondary vocational-technical education to persons who qualify as post-secondary vocational-technical education students. These centers are designated by the state board for vocational education upon direction by the legislature. All other public or private schools are hereby prohibited from using this title.

(4) "Construction." The term "construction" includes construction of new buildings and acquisition, expansion, remodeling, and alteration of existing buildings, and includes site grading, improvement, architectural fees, and purchase of initial equipment.

(5) "Ancillary and supportive services" shall include services and activities to assure quality in all vocational education programs, such as teacher training and supervision, program evaluation, special demonstration and experimental programs, development of instructional materials and curriculum, and improved state administration and leadership, including periodic evaluation of state and local vocational education programs and services in light of information regarding current and projected manpower needs and job opportunities.

**History:** En. Sec. 2, Ch. 250, L. 1969.

**75-4311. Provisions for orderly development of program in state plan for vocational education.** The state board for vocational education shall include in the state plan for vocational education provisions for the orderly development of post-secondary vocational-technical education programs.

**History:** En. Sec. 3, Ch. 250, L. 1969.



**75-4312. Centers to be designated only upon direction of legislature—applications for designation—legislative designation of certain centers.** Post-secondary vocational-technical education centers shall be designated by the state board for vocational education only upon direction by both houses of the state legislature. Applications for designation must be made in accordance with the following procedure:

(1) The governing board of any district high school, county high school, high school district, junior college or community college, or any unit of the Montana university system may submit an application, at such time and in such form as the state board for vocational education may require, requesting the legislature to direct the state board to designate an educational institution operated by the said governing board, to be a post-secondary vocational-technical education center, however, said application may not be submitted unless the county in which the proposed school district post-secondary vocational-technical education center is to be located has a taxable valuation equal to, or in excess of forty-five million dollars (\$45,000,000).

(2) Applications are to be presented to the state superintendent of public instruction acting in his capacity as secretary of the state board for vocational education. The state superintendent shall review the application and present it to the state board along with his recommendations. The state board shall then examine the application and recommendation of the state superintendent and either adopt the recommendation of the superintendent or draft its own recommendation. The application, together with all recommendations shall be presented to the legislature by the state board at the next following legislative session.

Upon the date this act takes effect, the state board for vocational education is directed to designate a vocational-technical school to be operated by the respective boards of trustees of school district number 1 of Silver Bow county, school district number 1 of Lewis and Clark county, school district number 1 of Cascade county, Missoula County High School, and school district number 2 of Yellowstone county as post-secondary vocational-technical education centers.

**History:** En. Sec. 4, Ch. 250, L. 1969. **Compiler's Notes**

For effective date of this act, see sec. 75-4321.

**75-4313. Local administration—state board sole authority for program and budget approval.** The local administration of all post-secondary vocational-technical education programs shall remain with the appropriate board of trustees or regents, but the state board shall retain sole authority for program and budget approval and shall develop and publish criteria for approval.

**History:** En. Sec. 5, Ch. 250, L. 1969.

**75-4314. Fees for equipment and material authorized.** Fees for the use of equipment and material used in training may be charged by the governing board of the post-secondary vocational-technical education center.

**History:** En. Sec. 6, Ch. 250, L. 1969.

**75-4315. Admission—residents given priority where enrollment limited.** Any person who qualifies as a post-secondary vocational-technical student as defined in this act shall be admitted to the post-secondary vocational-technical training center of his or her choice except that students who qualify as residents of the state of Montana as hereafter defined shall be given priority in case enrollment limitations are caused by resource limitation.

**History:** En. Sec. 7, Ch. 250, L. 1969.

**75-4316. No tuition for residents—nonresidents' tuition—determination of resident status.** Tuition shall not be charged to any resident of the state of Montana by the governing board of any post-secondary vocational-technical education center established pursuant to the provisions of this act. However, nonresidents may be charged tuition at rates to be determined by the state board for vocational education. For the purposes of this act the eligibility of a student for resident status shall be determined in the same manner as prescribed in sections 75-506.2 through 75-506.7, R. C. M. 1947, except that reference to "units of the Montana university system" shall, for the purposes of this act be considered to refer to post-secondary vocational-technical education centers and reference to "high school graduates" or "graduation from high school" shall be considered, for the purposes of this act, to refer to a person who has attended school or who was in attendance at a school.

**History:** En. Sec. 8, Ch. 250, L. 1969.

**75-4317. Program and construction budget approval—financing.** Post-secondary vocational-technical education centers are to submit program and construction budgets at such time and in such form as may be specified by the state board for approval by the said state board, but such budgets shall not be required to conform to the 180 day school calendar so that courses shorter or longer than full-year terms may be offered subject to approval by the said state board. The total of the approved budgets submitted by the post-secondary vocational-technical education centers together with the budget for the administration of the act by the state board shall constitute the total maximum approved budget which shall be financed as follows:

(1) The primary source of financing is to be those funds specifically designated by legislative enactment or referendum by the people for financing post-secondary vocational-technical education in Montana. The state treasurer will distribute these funds on the basis of the budgets which constitute the total maximum approved budget for post-secondary vocational education programs and construction which have been approved by the state board.

(2) The county commissioners of each county in which a designated post-secondary vocational-technical education center is located is hereby authorized to levy a tax of not to exceed one (1) mill on the dollar of all taxable property, real and personal, within the county for support and maintenance of the post-secondary vocational-technical education center located within the said county.

(3) Designated post-secondary vocational-technical education centers shall be eligible to receive such funds from the federal government as the state board for vocational education may provide pursuant to applicable acts of Congress.

(4) If the aggregate fund provided by the above sources of revenue do not provide one hundred per cent (100%) financing of the maximum approved budget hereinbefore specified, the remaining deficiency shall be financed from any state funds appropriated by the legislature for post-secondary vocational-technical education.

**History:** En. Sec. 9, Ch. 250, L. 1969.

**75-4318. Available funding.** The state board for vocational-technical education shall determine the amount of funding available under this act. The state board may approve budgets for programs, construction, and ancillary services but the aggregate amount of the budgets so approved by the state board under this act shall not exceed the moneys determined to be available under section IX (1), (2), (3) and (4) [75-4317 (1), (2), (3) and (4)] of this act.

**History:** En. Sec. 10, Ch. 250, L. 1969.

**75-4319. Treasurer custodian of program's funds — disbursement — deposit.** The treasurer of the state of Montana is hereby designated as the custodian of all federal or state funds designated, appropriated or apportioned for post-secondary vocational-technical education. At the direction of the state board for vocational education he shall disburse all moneys as appropriated. All funds received from any federal or state source for the establishment, support, maintenance or furtherance of post-secondary vocational education in the state shall be deposited with the state treasurer.

**History:** En. Sec. 11, Ch. 250, L. 1969.

**75-4320. Act controlling over conflicting provisions.** Any school district, county high school or other institution and/or their governing boards which receives designation by the state board, upon direction by the legislature, as a post-secondary vocational-technical education center shall be governed exclusively by the provisions of the act with regard to the conduct of all post-secondary vocational-technical education programs. This act shall be authoritative in any circumstance in which it would appear to conflict with the provisions of any other chapter of the Revised Codes of Montana.

**History:** En. Sec. 12, Ch. 250, L. 1969.

**75-4321. Effective date—exception.** The provisions of this act shall take effect immediately following provision by the legislature or the people for the primary source of financial support specified in section IX (1) [75-4317 (1)] hereof, except that, from the date of the passage of this act, the state board for vocational education will not be authorized to designate additional institutions as post-secondary vocational-technical education centers pursuant to the provisions of section 2, chapter 254, Laws of 1967 [Repealed].



**History:** En. Sec. 13, Ch. 250, L. 1969.

**Compiler's Notes**

This act was approved March 6, 1969.  
Section 2, Chapter 254, Laws 1967, referred to in this section, compiled as sec-

tion 75-4301, was repealed by Sec. 14, Ch. 250, Laws 1969.

**Repealing Clause**

Section 14 of Ch. 250, Laws 1969 read "Sections 75-4301 through 75-4308, R. C. M. 1947, are hereby repealed."

**75-4322. Lease of vocational education land and buildings to school districts—consideration.** The state of Montana, as to certain lands or buildings owned by it, acting by and through the state board of vocational education, is hereby empowered and authorized to enter into a lease agreement for a term not to exceed forty (40) years, in order to lease to a school district any building and/or lands financed in whole or in part by an appropriation made by the legislature of the state of Montana for the purpose of supporting post-secondary vocational-technical education. The consideration necessary to support such a lease may be nominal.

**History:** En. Sec. 1, Ch. 224, L. 1969.

**Title of Act**

An act to authorize the state board for vocational education to lease buildings

and/or lands financed in whole or in part by the state to school districts to be used for post-secondary vocational-technical education.

**75-4323. Transfer of title to buildings and/or lands to school districts.** The state board for vocational education is hereby authorized to transfer, or direct transfer of, title held by the state of Montana in buildings and/or lands financed in whole or in part by an appropriation by the state legislature, to a school district at any time the said state board deems such transfer to be in the best interests of both the state and the school district involved, provided that this authorization extends only to buildings and/or lands which are to be used by the school district for post-secondary vocational-technical education.

**History:** En. Sec. 1, Ch. 357, L. 1969.

**Title of Act**

An act to authorize the state board for

vocational education to transfer title to buildings and/or lands to school districts for use for post-secondary vocational-technical education.

## CHAPTER 44—COMMUNITY COLLEGE DISTRICTS

- Section 75-4413. Property and population requirements for district—corporate powers—exemption from school district law.
- 75-4414. Supervision by state board of education.
- 75-4415. Boundaries of district—additional to other districts.
- 75-4416. Petition for organization of district—election—order establishing district.
- 75-4417. Election of trustees—districts from which elected—terms of office.
- 75-4418. Notice of organization election—conduct of election.
- 75-4419. Trustees' oath of office—officers of board—quorum—vacancies—seal.
- 75-4420. Trustee elections after organization.
- 75-4421. Meetings of board—notice—mileage allowance for trustees.
- 75-4422. Trustees not to have pecuniary interest in district contracts—advertising for bids.
- 75-4423. Courses of instruction provided—tuition fees.
- 75-4424. Employment of personnel—retirement of employees and trustees.
- 75-4425. Participation in foundation program and equalization fund—budgeting—special tax levy.
- 75-4426. Building construction and repairs—acquisition of land—tax levy—federal and state aid.

- 75-4427. Acceptance of donations.  
 75-4428. Disposition of surplus property—contracts for co-operation with school districts.  
 75-4429. Junior colleges authorized to continue—conversion to community college.  
 75-4430. Annexation of school districts to junior college or community college district—election.

**75-4401 to 75-4412. Repealed.**

**Repeal**

These sections (Secs. 1 to 12, Ch. 158, L. 1939; Sec. 1, Ch. 173, L. 1953), relating

to junior colleges, were repealed by Sec. 20, Ch. 274, Laws 1965.

**75-4413. Property and population requirements for district—corporate powers—exemption from school district law.** The voters in any area of the state may form a community college district where the area to be formed into such district has an assessed valuation of not less than thirty million dollars (\$30,000,000) and has a total of not less than seven hundred (700) pupils regularly enrolled in public and private high schools. The district may consist of a county, two or more contiguous counties, or contiguous parts of two or more counties in this state. When such a district is organized, it shall be a body corporate and a subdivision of the state of Montana and shall be known as "The Community College District of \_\_\_\_\_, Montana" and, in that name, may sue and be sued, levy and collect taxes within the limitations of this act, and possess the same corporate powers as common school and high school districts in this state, except as herein otherwise provided. Sections 75-1801 to 75-1834, Revised Codes of Montana, 1947, as amended, shall not apply to community college districts organized under the provisions of this act except as provided herein.

**History:** En. Sec. 1, Ch. 274, L. 1965.

**Title of Act**

An act providing for the creation and establishment of community college districts; directing state board of education to supervise community colleges and junior colleges; providing for elections to create community college districts; providing for governing board of community college districts and for the election, terms and qualifications of its trustees; providing for powers of board of trustees and powers of community college districts; providing authority for, and financing of, maintenance and operations

and capital improvements of community college districts; providing for instruction to be offered by community and junior colleges; authorizing negotiations with school districts for property and providing for adult education courses and exchange of teachers; providing that present junior colleges may be established as community colleges and community college districts; and providing for annexation of additional areas to community college districts; repealing sections 75-4401, 75-4402, 75-4403, 75-4404, 75-4405, 75-4406, 75-4407, 75-4408, 75-4409, 75-4410, 75-4411, 75-4412, R. C. M. 1947.

**75-4414. Supervision by state board of education.** (1) Junior college departments or districts formed prior to the effective date of this act and those community college districts formed under the provisions of this act shall be under the supervision of the state board of education.

(2) It shall be the duty of the state board of education to:

(a) Establish the role of the two-year college in the state;

(b) Set up a survey form to be used for local surveys of need and potential for two-year colleges and provide supervision in the conducting of surveys;

(c) Supervise the community college districts formed under the provisions of this act and the junior colleges now in existence and formed prior to the effective date of this act;

(d) Formulate and put into effect, uniform policies as to budgeting, record keeping and student accounting;

(e) Establish uniform minimum entrance requirements and uniform curricular offerings for all community and junior colleges;

(f) Make a continuing study of the junior and community college education in the state; and

(g) Be responsible for the accreditation of each junior college and community college under its supervision. Accreditation shall be conducted annually or as often as deemed advisable and made in a manner consistent with the rules and regulations established and applied uniformly to all junior and community college districts in the state. Standards for accreditation of junior and community colleges shall be formulated with due consideration given to curriculum offerings and entrance requirements of the Montana university system.

History: En. Sec. 2, Ch. 274, L. 1965.

**75-4415. Boundaries of district—additional to other districts.** The boundaries of any community college district organized under this act shall coincide with the then-existing boundaries of the contiguous common school districts proposed to be included, and such community college district shall be in addition to any other school districts existing in any portion of such area.

History: En. Sec. 3, Ch. 274, L. 1965.

**75-4416. Petition for organization of district—election—order establishing district.** Whenever there is presented to the state board of education a petition, signed by not less than twenty per centum (20 %) of the qualified registered electors residing within each county or part of county within a proposed community college district area, praying that a community college district be organized for the purpose of offering community college (13th and 14th year) courses, the state board of education shall order an election held within the proposed district of the qualified electors therein to vote on the proposal and to elect trustees, at the next following annual school election. At such election, the proposition shall be in substantially the following form:

#### PROPOSITION

Shall there be organized within the area comprising the School Districts of \_\_\_\_\_, State of Montana, a community college district for the offering of 13th and 14th year courses, to be known as the Community College District of \_\_\_\_\_, Montana, under the provisions of Chapter (giving the number of this act [274]), Laws of 1965, as prayed in the petition filed with the State Board of Education at Helena, Montana, on the \_\_\_\_\_ day of \_\_\_\_\_, 19—?

- ☐ For organization
- ☐ Against organization



The election shall be conducted in the manner provided for the election of trustees in a common school district of the second or third class. Within fifteen (15) days after such election, the results shall be transmitted by those receiving the same under law in each component district to the state board of education, by certificates attesting to the total number of votes cast within each such district on said proposition, the votes cast for and against said proposition and the votes cast for each candidate for trustee, together with the tally sheets attested to by the judges and clerks of election at each polling place within each such district. The proposal to organize the community college district, to carry, must receive a majority of the total number of votes cast thereon and the state superintendent of public instruction, from the results so certified and attested, shall determine whether the proposal has received the majority of the votes cast thereon for each county or part of a county within the proposed district and shall certify the results to the state board of education. Should the state superintendent of public instruction certificate show that the proposition to organize such community college district has received a majority of the votes cast thereon in each county or part of a county within the proposed district, the state board of education shall make an order declaring the community college district organized and cause a copy thereof to be recorded in the office of county clerk and recorder in each county in which a portion of such new district is situated. If the proposition carries in some county or counties and/or parts of counties but not in all portions of area sought to be included within the district, the board shall determine whether the area in which the proposition carried by a majority vote meets the requirements of section 1 [75-4413] of this act, and if so shall establish the boundaries. If the proposition carries, the board shall also determine which candidates have been elected trustees under section 5 [75-4417] of this act. Should the proposition to organize the district fail to receive a majority of the votes cast thereon above provided, no tabulation shall be made to determine the candidates elected trustees.

History: En. Sec. 4, Ch. 274, L. 1965.

**75-4417. Election of trustees—districts from which elected—terms of office.** In the organization election seven (7) trustees shall be elected at large, except, that should there be in such proposed community college district one or more high school districts or part of a high school district within the community college district with more than forty-three per cent (43 %) and not more than fifty per cent (50 %) of the total school census of the proposed district, as determined by the last school census, then each such district or part of district shall elect three (3) trustees and the remaining trustees shall be elected at large from the remainder of the proposed college district. Should any such high school district or such part of a high school district have more than fifty per cent (50%) of the total school census of the proposed district then four (4) trustees shall be elected at large from such high school district or such part of high school district and three (3) trustees at large from the remainder of the proposed college district. If the trustees are elected at large throughout the entire proposed district, the one receiving the greatest number of votes

shall be elected for a term of seven (7) years, the one receiving the next greatest number of votes, for a term of six (6) years, the one receiving the next greatest number of votes, for a term of five (5) years, the one receiving the next greatest number of votes for a term of four (4) years, the one receiving the next greatest number of votes for a term of three (3) years, the one receiving the next greatest number of votes for a term of two (2) years and the elected one receiving the least number of votes for a term of one (1) year. If the trustees are elected in any manner other than at large throughout the entire proposed district, then the trustees elected shall determine by lot the one who shall serve for seven (7) years, the one who shall serve for six (6) years, the one who shall serve for five (5) years, the one who shall serve for four (4) years, the one who shall serve for three (3) years, the one who shall serve for two (2) years and the one who shall serve for one (1) year. Thereafter, all trustees elected shall serve for terms of seven (7) years each.

**History:** En. Sec. 5, Ch. 274, L. 1965.

**75-4418. Notice of organization election—conduct of election.** Notice of the organization election shall be given by the state board of education by publication in at least one (1) newspaper of general circulation in each county including any portion of the proposed community college district, once a week for three (3) consecutive weeks, the last insertion to be no longer than one (1) week prior to the date of election. The election shall be conducted in the same manner, at the same polling places and by the same election officials who are conducting elections on that day in each component school district.

**History:** En. Sec. 6, Ch. 274, L. 1965.

**75-4419. Trustees' oath of office—officers of board—quorum—vacancies—seal.** Newly elected members of the board of trustees shall be qualified by taking the oath of office prescribed by article XIX, section 1, of the constitution of Montana. The board shall be organized by the election of a president and vice-president and a secretary, said secretary may be or may not be a member of the board. The treasurer of the community college district shall be the county treasurer of the county in which the community college is situated. A majority of the board shall constitute a quorum for the transaction of business, but no contract shall be let, teacher employed or dismissed, or bill approved unless a majority of the whole board shall vote therefor. Any vacancy occurring in the board shall be filled by appointment by the remaining members of the board, and the persons appointed shall hold office until the next election held by such community college district when a trustee shall be elected for the unexpired term. The board shall keep a common seal with which to attest its official acts.

**History:** En. Sec. 7, Ch. 274, L. 1965.

**75-4420. Trustee elections after organization.** After organization, the qualified voters of the community college district shall vote for trustees on the first Saturday in April, and such elections shall be held in the same

manner and with elections being held in the component common school districts within the boundaries of such community college district. All costs incident to such community college trustee elections shall be borne by the community college district. Notice of all such elections shall be given by the board of trustees by publication in at least one (1) newspaper of general circulation within each county, at least once a week for two (2) consecutive weeks, the last insertion to be no longer than one (1) week prior to the date of election. Should trustees be elected other than at large throughout the entire district, then only those qualified voters within the district from which the trustee or trustees are to be elected shall cast their ballots for the trustee or trustees from that district. All candidates for the office of trustee shall file their declarations or [of] candidacy with the secretary of the board of trustees at least thirty (30) days prior to the date of election. If voting machines are not used in a common school district or districts which are within such community college district, then the board of trustees shall cause ballots to be printed and distributed for the polling places in such component districts at the expense of the community college district, but in all other respects said elections shall be held at the same time, in the same places and shall be conducted by the same officials for elections being held in such common school districts. The community college district shall reimburse to the common school district one-half ( $\frac{1}{2}$ ) of the costs of the common school district of the compensation actually paid by said common school district to the judges of such elections. The judges of election in each component school district, shall certify to the board of trustees of the community college district the total number of votes cast for each candidate and the votes cast on all questions submitted within fifteen (15) days after any election. Within forty-eight (48) hours thereafter, at least a majority of the then qualified members of the board of trustees of such community college district shall jointly tabulate the results so received, shall declare and certify the candidates receiving the greatest number of votes for terms of seven (7) years each and until their successor shall have been elected and qualified and shall declare and certify the results of the votes cast on any question presented at such election. "Qualified voters," under the provisions of this act, shall mean those voters qualified to vote in the school election of the component common school district.

History: En. Sec. 8, Ch. 274, L. 1965.

**75-4421. Meetings of board—notice—mileage allowance for trustees.** The board of trustees shall hold monthly meetings within the community college district on the third Tuesday of each month or such other day of the month the board might set and may hold special meetings at any time and place which it may direct. The president and secretary of the board may also call special meetings of said board at any time and place, if in their judgment necessity requires it. The secretary of the board shall notify the members of all regular and special meetings. The members of the board shall receive ten cents (10¢) per mile for the distance necessarily traveled in going to and returning from the place of the meeting and his place of residence each day that such trip is actually made.

History: En. Sec. 9, Ch. 274, L. 1965.



**75-4422. Trustees not to have pecuniary interest in district contracts—advertising for bids.** It shall be unlawful for any community college district trustee to have any pecuniary interest, either directly or indirectly, in the erection of any school building, or for furnishing or repairing the same, or be in any manner connected with the furnishing of supplies for the maintenance of the college, or to receive or to accept any compensation or reward for services rendered as trustee, except as herein provided. No board of trustees shall let any contract (except if the amount involved is less than two thousand dollars (\$2,000)[]) for building, furnishing, repairing or other work or supplies for the benefit of the district, without first advertising in a newspaper published in each county wherein the area of the district lies for at least two (2) weeks, call for bids to perform such work or furnish such supplies. In all cases where advertising is required, the board shall award the contract to the lowest responsible bidder; provided, however, that the board of trustees shall have the right to reject any and all bids.

**History:** En. Sec. 10, Ch. 274, L. 1965.

**75-4423. Courses of instruction provided—tuition fees.** A community college district organized under this act shall provide instruction, classes, school or schools for student residents within the community college district, in academic, occupational and adult education, subject to the approval of the state board of education. The board of trustees of such district may in their discretion determine the per capita cost of such courses, file the same with the state board of education and upon approval thereof by the state board of education, shall require of all non-district residents who are accepted as pupils, a tuition fee in such sum as may be necessary for maintenance of such course or courses. A different tuition may be established as between nondistrict residents residing within the state of Montana and those residing outside the state of Montana. In addition thereto, such board of trustees may charge resident students such amounts as it deems necessary to maintain such courses, taking into consideration such other funds as may be available under law for the support of such courses.

**History:** En. Sec. 11, Ch. 274, L. 1965; amd. Sec. 1, Ch. 229, L. 1969.

#### **Amendments**

The 1969 amendment substituted "in academic, occupational and adult education, subject to the approval of the state board of education" for "and subject to

the approval of the state board of education provide instruction, courses and classes for vocational training within the district in the trades and industries and commercial branches and for adult education" after "community college district" in the first sentence.

**75-4424. Employment of personnel—retirement of employees and trustees.** The board of trustees shall appoint the employees of the community college, define and assign their powers and duties and fix their compensation.

The board of trustees and teachers of a community college district shall be subject to and receive the benefits of chapter 27 of Title 75 of the Revised Codes of Montana, as amended, and hereafter amended.

**History:** En. Sec. 12, Ch. 274, L. 1965.

**75-4425. Participation in foundation program and equalization fund—budgeting—special tax levy.** A community college under this act shall be considered a free public school for budgeting and financial purposes under chapter 36, Title 75 of the Revised Codes of Montana, 1947, as amended, and as hereafter amended. The term “average number belonging” for community colleges shall be determined by dividing the total number of eligible credits taken by eligible students by thirty (30). Eligible students for average number belonging calculation purposes shall be: (1) students who are under twenty-one (21) years of age for one-half or more of the quarter; (2) students who are not concurrently enrolled in an elementary or high school; (3) students enrolled in the summer quarter of the community college. Eligible credits for average number belonging calculation purposes shall be: (1) credits taken by an eligible student; (2) credits taken in courses of instruction approved by the state board of education. Eligible credits for average number belonging calculation purposes shall not include: (1) credits taken in adult education courses; (2) credits dropped by the eligible student before the mid-point in the quarter; (3) credits taken in resident extension courses of the Montana university system.

The moneys coming into the state public school equalization fund shall be distributed and apportioned to provide an annual minimum operating revenue for the community college in accordance with the schedules provided for high schools under chapter 36, Title 75 of the Revised Codes of Montana, 1947, as amended and as hereafter amended.

The community college district shall be subject to the budgeting laws of a joint high school district or a joint common school district maintaining a high school, in so far as they are applicable, provided, however, the budget of a community college district shall be complete and separate.

Whenever the board of trustees of a community college district shall deem it necessary to raise money for college purposes in addition to its revenues from county and state apportionments, they may proceed in so far as applicable under sections 75-4609 and 75-4610 of the Revised Codes of Montana, 1947, as amended. A community college under this act shall be considered a school district for the purposes of section 75-1633, R. C. M. 1947.

**History:** En. Sec. 13, Ch. 274, L. 1965; amd. Sec. 1, Ch. 325, L. 1969.

#### **Amendments**

The 1969 amendment rewrote the method of computing the “average number belonging” as defined in the second through the fifth sentences of the first paragraph. Prior to amendment they read, “The term ‘average number belonging’ for community colleges shall mean those students enrolled and in attendance, in a community college for a period of not less than thirty (30) days, and carrying a course of study of not less than ten (10) class hours in courses, including vocational courses meeting standards prescribed by the state

board of education, during each calendar week. A class hour shall mean not less than fifty (50) minutes of instruction or supervised laboratory training. Each student, enrolled for a period of more than thirty (30) days in any one (1) quarter or semester but less than two (2) complete semesters or three (3) complete quarters, shall entitle the college district to receive proportionate credit based upon the number of weeks the student is enrolled and in attendance bears to the total weeks in the two (2) complete semesters or three (3) quarters. Such calculations shall exclude weeks of regular vacation time.” The amendment also added the second sentence in the fourth paragraph.

**75-4426. Building construction and repairs—acquisition of land—tax levy—federal and state aid.** The board of trustees of any community college district is hereby vested with the power and authority to build, enlarge, alter, repair or acquire by purchase school buildings and dormitories; furnishing and equipping the same, and purchasing the necessary lands therefor and the board of trustees of any community college district is hereby authorized to levy an additional tax not exceeding ten (10) mills on the dollar of the taxable value of all taxable property within the district for these purposes; provided they shall first be authorized to do so by an election held of the qualified electors of the district who are taxpayers upon property within the community college district, called, noticed and conducted in so far as applicable by sections 75-4609 and 75-4610 of the Revised Codes of Montana, 1947, as amended. The board of trustees of any community college district is further vested with the power and authority to borrow moneys from the United States or any of its agencies for the purpose of this section. The board of trustees of any community college district is hereby authorized to accept funds from the United States or the state of Montana, their instrumentalities or any of their agencies in aid of any one or more of such purposes or in maintaining and operating the college.

**History:** En. Sec. 14, Ch. 274, L. 1965;      **Amendments**  
amd. Sec. 1, Ch. 235, L. 1969.

The 1969 amendment inserted the second sentence.

**75-4427. Acceptance of donations.** All community college districts and its boards of trustees thereof on behalf of such districts are hereby authorized and empowered to accept gifts, legacies and devises, subject to the conditions imposed by the deed of the dower, or will of testator, or without any conditions imposed.

**History:** En. Sec. 15, Ch. 274, L. 1965.

**75-4428. Disposition of surplus property—contracts for co-operation with school districts.** Whenever there is within any school district any school property that is not required for the use of the school district and such property could be used for purposes of offering education beyond grade twelve or vocational and adult education by community college district, the boards of trustees of any school district is hereby authorized to lease or sell and convey the same to such community college district by negotiation. Any school district within or without the community college district is authorized to contract with a community college district to provide adult education courses for such school district and to exchange teachers.

**History:** En. Sec. 16, Ch. 274, L. 1965.

**75-4429. Junior colleges authorized to continue—conversion to community college.** All junior colleges established prior to the effective date of this act shall be under the supervision of the state board of education and shall conform to the scholastic standards established by the board, but no such district may be dissolved except as now provided by law and in no instance because it does not meet the standards for organization established by section 1 [75-4413] of this act. The governing board of any



such institution may, by resolution and by transmitting a copy of such resolution to the state superintendent of public instruction, establish a community college district under this act, and name the same without compliance with sections 1 and 4 [75-4413 and 75-4416] of this act.

If such governing board establishes a community college district it shall act as the board of trustees of the community college district until the next general school election held on the first Saturday in April as provided in section 8 [75-4420] herein when all community college district trustees shall be elected as provided in section 5 [75-4417] except that it will not in any way be considered an organization election.

History: En. Sec. 17, Ch. 274, L. 1965.

**75-4430. Annexation of school districts to junior college or community college district—election.** Whenever the junior or community college district board of trustees shall so resolve or whenever ten per cent (10 %) of the qualified electors of the common school district or districts situate within one (1) county sought to be annexed indicate by a petition, filed with the secretary of the board of trustees of such junior college or community college district, requesting the annexation of a common school district or districts situate within one (1) county to the said district, the board of trustees shall call an election on such annexation within not less than twenty-five (25) days nor more than sixty (60) days from the passage of such resolution or the filing of said petition as the case may be. Notice of such election shall be given in the same manner as an election held to organize a community college district under this act. The election shall be conducted in the same manner, and those eligible to vote shall be the same as an election to organize junior college districts under this act. The board of trustees shall establish such polling places as it may deem fit within the area sought to be annexed.

The question on the ballot shall be as follows:

"Shall school districts \_\_\_\_\_ be annexed to and become a part of the community college district of \_\_\_\_\_, Montana?"

☐ For Annexation

☐ Against Annexation"

The proposal to annex to carry, must receive a majority of the total votes cast thereon. The judges of the election shall within five (5) days after said election transmit the pollbooks, ballots and tally lists to the board of trustees of said community college district who shall canvass the vote and declare the results of the election and shall cause, if the annexation question carried, a certified copy of their canvassing resolution to be filed in the office of the county clerk and recorder of the county containing area to be annexed and upon such filing the area to be annexed shall then become a part of the community college district.

History: En. Sec. 18, Ch. 274, L. 1965. the validity of the remaining portions of this act."

#### Separability Clause

Section 19 of Ch. 274, Laws 1965 read "If any section, sentence, clause or phrase of this act is for any reason held unconstitutional, such decision shall not affect

#### Repealing Clause

Section 20 of Ch. 274, Laws 1965 read "Sections 75-4401 through 75-4412, R. C. M. 1947, are repealed."

## CHAPTER 45—HIGH SCHOOL BUDGET ACT

Section 75-4516.1. **Levy of taxes.**

75-4518.1. Reduction in budget by budget board—allowance of additional expenses over foundation program.

75-4521. High school budgets.

75-4524. Emergency warrants.

75-4525. Tax levy to pay emergency warrants.

**75-4507 to 75-4510. Repealed.****Repeal**

These sections (Secs. 1 to 4, Ch. 133, L. 1945), constituting temporary and ob-

solete authority for special increases in high school budgets, were repealed by Sec. 16, Ch. 267, Laws 1963.

**75-4516.1. Levy of taxes.** (1) Basic high school levy. It shall be the duty of the county commissioners of each county in the state to levy an annual basic special tax for high schools of fifteen (15) mills on the dollar of the taxable value of all taxable property within the county, which levy shall be made at the time and in the manner provided by law for the levying of taxes for county purposes and which tax shall be collected by the county treasurer at the same time and in the same manner as state and county taxes are collected; provided that if a basic levy of less than fifteen (15) mills should be sufficient to meet the total of the approved budgets of all school districts and county high schools within the county, then such lesser basic levy shall be made.

No county levying less than the adjusted basic high school levy shall receive any apportionment of state equalization aid.

(2) Additional high school levy. The county commissioners shall, if necessary, levy an additional tax in such number of mills on the taxable value of all taxable property within the county as shall be required to provide the foundation program for all school districts and county high schools within the county. The county superintendent shall apportion the proceeds of such additional tax levy to each school district and county high school within the county after apportionment of the basic special tax for high schools as provided in section 75-3618 and the state equalization aid as provided in section 75-3619.

(3) Permissive high school levy. If the revenues for the operation and maintenance of any high school, including the amount apportionable from said basic special tax for high schools and the amount, if any, produced by said additional high school tax, shall be less than the foundation program of such high school and the approved additions thereto included in its budget, within the limitations hereinbefore specified, it shall be the further duty of the board of county commissioners to fix and levy a tax, in such number of mills as will produce the amount shown by the final budget to be raised by tax levy plus federal reimbursements in lieu of taxes, which tax shall, in the case of a county high school not located within a building district, be levied upon all property in the county, excepting the property of any district supporting a district high school, and shall, in the case of a county high school located within a high school building district, be levied upon all property in such building district and which tax shall, in the case of a district high school not located within a building district, be levied upon all property within the school dis-

trict, and shall, in the case of a district high school located within a building district, be levied upon all property in such building district, provided, however, that such last mentioned additional tax shall not, in any event, be used to raise funds in excess of the maximum budgets as specified in section 75-4518.1 when considered with all other sources of revenues, unless approved by a vote of the taxpaying electors.

**History:** En. Sec. 15, Ch. 199, L. 1949; amd. Sec. 4, Ch. 208, L. 1951; amd. Sec. 1, Ch. 202, L. 1953; amd. Sec. 1, Ch. 246, L. 1961; amd. Sec. 14, Ch. 267, L. 1963; amd. Sec. 6, Ch. 198, L. 1965; amd. Sec. 5, Ch. 3, Ex. L. 1969.

#### Amendments

The 1963 amendment completely rewrote this section. For previous text, see parent volume.

The 1965 amendment substituted the first paragraph of subsection (1) for paragraphs reading, "On or before the first day of August in each year, the state superintendent of public instruction shall compute and determine the sum of money which, when added to the moneys available for the state equalization aid shall provide seventy-five per cent (75%) of the maximum high school budgets for all high schools as set forth in sections 75-4518.1 and 75-3612, plus the amount of high school tuition. Such information shall be given to the state board of equalization who shall compute and determine the number of mills of a tax (herein called the basic high school tax) on the taxable value of all property within all the counties of the state which is calculated to produce the aforesaid sum of money. If a levy of less than the number of mills so determined is sufficient to provide the total foundation programs from the general fund budgets of all school districts within one or more counties, the state board of equalization shall recompute the basic high school tax to be levied in the remaining counties, excluding in the computations the amount of the foundation programs in the county or counties requiring a lesser levy, thus determining as the adjusted basic high school tax the number of mills required to produce the sum of money which, when added to all the moneys available for state equalization aid to be distributed to all high schools except those which as hereinafter

provided are not entitled to apportionment of state equalization aid, shall equal the total of the foundation programs of all high schools except those not entitled to apportionment of state equalization aid. In no event shall the adjusted basic high school tax exceed fifteen (15) mills. In addition to the provisions for the support of the high schools hereinbefore provided, it shall be the duty of the board of county commissioners of each county in the state to levy on the taxable valuation of all taxable property in the county the number of mills determined by the board of equalization as the adjusted basic high school tax, except that the board in any county in which a levy of less than the number of mills so determined is sufficient to provide the total foundation programs from the general fund budgets for all high schools within the county shall levy such lesser number of mills. The levy in each county shall be made at the time and in the manner provided by law for the levying of taxes for county purposes, and the tax shall be collected by the county treasurer at the same time and in the same manner as state and county taxes are collected"; and substituted "state equalization aid" for "state public school equalization funds" near the end of subsection (2).

The 1969 amendment increased the basic high school levy in the first paragraph by substituting "fifteen (15) mills" for "fourteen (14) mills."

#### Repealing Clause

Section 6 of Ch. 3, Ex. Laws 1969 repealed all acts and parts of acts in conflict therewith.

#### Effective Date

Section 7 of Ch. 3, Ex. Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 19, 1969.

**75-4518.1. Reduction in budget by budget board—allowance of additional expenses over foundation program.** If the total amount of the proposed general fund expenses in the preliminary budget of any district or county high school shall exceed the foundation program thereof, the budget board shall, in the manner provided by section 75-4518, reduce such proposed general fund expenses to a total equal to said foundation program unless the board of trustees of said district or county high school



shall establish to the satisfaction of the budget board that special circumstances exist which justify such additional expenses, and in such event a statement of the reasons for the allowance of such additional expenses shall be attached to said budget and signed by the chairman of the budget board, but the allowance of such excess expense over the foundation program shall not in any manner increase the amounts of state equalization aid to be apportioned hereunder; and provided that, except in the case of the existence of the emergencies specified in section 75-4521, the entire amount of such additional expense over the foundation program to be included in any high school budget including any reserve fund, not to exceed thirty-five per cent (35%) of the amount appropriated in the final and approved budget for the then current school year, for the purpose of maintaining the elementary and high school of the district from July 1 to November 30 of the next succeeding year, plus the foundation program shall not be greater than the maximum amounts in accordance with the following schedules, provided that nothing herein contained shall be construed as preventing the voting of an additional levy in accordance with the general school laws pertaining to the voting of additional levies.

### High Schools

(1) For each high school having an ANB of twenty-four (24) or fewer pupils, the maximum shall be thirty-five thousand four hundred forty dollars (\$35,440).

(2) For a secondary school having an ANB of more than twenty-four (24) pupils, the maximum fourteen hundred seventy-six dollars and thirty-five cents (\$1,476.35) shall be decreased at the rate of nine dollars and seventy-five cents (\$9.75) for each additional pupil until the ANB shall have reached a total of forty (40) such pupils. For a school having an ANB of more than forty (40) pupils, the maximum of thirteen hundred twenty dollars and thirty-five cents (\$1,320.35) shall be decreased at the rate of six dollars and sixty cents (\$6.60) for each additional pupil until the ANB shall have reached one hundred (100) pupils. For a school having an ANB of more than one hundred (100) pupils, a maximum of nine hundred twenty-three dollars and seventy-five cents (\$923.75) shall be decreased at the rate of two dollars and fifteen cents (\$2.15) for each additional pupil until the ANB shall have reached two hundred (200) pupils. For a school having an ANB of more than two hundred (200) pupils, the maximum of seven hundred eight dollars and seventy-five cents (\$708.75) shall be decreased by forty-nine cents (\$.49) for each additional pupil until the ANB shall have reached three hundred (300) pupils. For a school having an ANB of more than three hundred (300) pupils, the maximum of six hundred sixty dollars (\$660) shall be decreased at the rate of twelve and one-half cents (\$.125) until the ANB shall have reached six hundred (600) pupils. For a school having an ANB over six hundred (600) pupils, the maximum shall not exceed six hundred twenty-two dollars and fifty cents (\$622.50) per pupil.

The maximum per pupil for all pupils (ANB) and for all schools shall be computed on the basis of the amount allowed herein on account of the last eligible pupil, ANB.

In computing the amount for the foundation program and the maximum program only junior high schools which have been approved and accredited by the state board of education shall be considered a part of the secondary enrollment.

**History:** En. Sec. 14, Ch. 199, L. 1949; amd. Sec. 3, Ch. 208, L. 1951; amd. Sec. 15, Ch. 267, L. 1963; amd. Sec. 7, Ch. 198, L. 1965; amd. Sec. 4, Ch. 317, L. 1967; amd. Sec. 2, Ch. 3, Ex. L. 1969.

#### Amendments

The 1963 amendment substituted "of state equalization aid to be apportioned hereunder" for "to be apportioned hereunder from the state public school equalization fund" immediately before the first proviso; inserted "plus the foundation program" after "July 1 to November 30 of the next succeeding year" near the end of the first paragraph; substituted "the maximum amounts in accordance with the following schedules" near the end of the first paragraph for "thirty per cent (30%) of the foundation program of any high school, having an ANB of 100 or less pupils, and shall not be greater than twenty-five per cent (25%) of the foundation program of any high school having an ANB of more than 100 pupils"; added the final proviso to the first paragraph; and added everything after the first paragraph.

The 1965 amendment increased the maximums specified in paragraph (1) from \$25,500 to \$27,030, in the first sentence of paragraph (2) from \$1,062 to \$1,126, in the second sentence of paragraph (2) from \$950 to \$1,007, in the third sentence of paragraph (2) from \$665 to \$704.90, in the fourth sentence of paragraph (2) from \$510 to \$540.60, in the fifth sentence of paragraph (2) from \$475 to \$503.50, and in the sixth sentence of paragraph (2) from \$448 to \$474.88; increased the rates of decrease specified in paragraph (2) from \$7.00 to \$7.42 in the first sentence, from \$4.75 to \$5.03 in the second sentence, from \$1.55 to \$1.64 in the third sentence, from 35c to 37c in the fourth sentence, and from 9c to 10c in the fifth sentence; and deleted a former concluding paragraph which read: "On or before January 1 of odd-numbered years, the state superintendent of public instruction shall transmit to the legislative assembly of the state of Montana a revised schedule for secondary schools in accordance with classifications by size as set forth in this section. This revised schedule will be based on the median general fund budgeted expenditures for the current year, by ascertaining the median of the general fund budgets for each classification of secondary schools, and the total number of pupils (ANB) for all schools in each

classification, and by computing the revised schedule therefrom."

The 1967 amendment increased the maximums specified in paragraph (1) from \$27,030 to \$31,085, in the first sentence of paragraph (2) from \$1,126 to \$1,295, in the second sentence of paragraph (2) from \$1,007 to \$1,158, in the third sentence of paragraph (2) from \$704.90 to \$810.65, in the fourth sentence of paragraph (2) from \$540.60 to \$621.70, and in the fifth sentence of paragraph (2) from \$503.50 to \$579; increased the rates of decrease specified in paragraph (2) from \$7.42 to \$8.55 in the first sentence, from \$5.03 to \$5.79 in the second sentence, from \$1.64 to \$1.89 in the third sentence, from 37¢ to 43¢ in the fourth sentence, and from 10¢ to 11¢ in the fifth sentence; substituted "five hundred forty-six dollars (\$546) per pupil" for "six hundred (600) pupils" at the end of the fifth sentence of paragraph (2); and deleted a sixth sentence of paragraph (2) which read: "Schools having an ANB in excess of six hundred (600) pupils shall receive four hundred seventy-four dollars and eighty-eight cents (\$474.88) per pupil."

The 1969 amendment increased the maximums specified in paragraph (1) from \$31,085 to \$35,440, in the first sentence of paragraph (2) from \$1,295 to \$1,476.35, in the second sentence of paragraph (2) from \$1,158 to \$1,320.35, in the third sentence of paragraph (2) from \$810.65 to \$923.75, in the fourth sentence of paragraph (2) from \$621.70 to \$708.75, in the fifth sentence of paragraph (2) from \$579 to \$660; increased the rates of decrease specified in paragraph (2) from \$8.55 to \$9.75 in the first sentence; from \$5.79 to \$6.60 in the second sentence, from \$1.89 to \$2.15 in the third sentence, from 43¢ to 49¢ in the fourth sentence and from 11¢ to 12½¢ in the fifth sentence; substituted "six hundred (600) pupils" for "five hundred forty-six dollars (\$546) per pupil" at the end of the fifth sentence and added the sixth sentence to paragraph (2).

#### Repealing Clauses

Section 16 of Ch. 267, Laws 1963 read "Sections 75-4507, 75-4508, 75-4509, and 75-4510 are repealed."

Section 17 of Ch. 267, Laws 1963 and Sec. 8 of Ch. 198, Laws 1965 repealed all acts and parts of acts in conflict therewith.

Section 5 of Ch. 317, Laws 1967 re-

pealed all acts and parts of acts in conflict therewith.

#### Effective Dates

Section 18 of Ch. 267, Laws 1963 read "This act shall be in full force and effect from and after the fifteenth day of March, 1963."

Section 9 of Ch. 198, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved March 6, 1965.

Section 6 of Ch. 317, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved March 3, 1967.

**75-4521. (1263.16) High school budgets.** (1) Whenever the board of trustees of a county high school or the board of trustees of a school district maintaining a district high school or schools, at any time after December 31st of any school year, shall deem that an emergency exists by reason of an increase in the enrollment and attendance over that of the immediately preceding school year over and beyond the extent which such increase might reasonably have been anticipated at the time of the adoption of the budget for the then current school year, and that because of such increase in enrollment and attendance the budget approved and adopted for any or all of the regularly budgeted funds of the high school for the then current school year does not provide sufficient funds to properly maintain and support such school or schools during the whole of the then current school year; or shall, at any time during a school year, deem that an emergency exists because of the destruction of any school property necessary to the maintenance of school, or its impairment by fire, flood, storm, riot, insurrection, or other act of God, to such an extent as to render it unfit or prevent its use for the school purposes for which theretofore used; or because of the entering by a court of competent jurisdiction of a judgment for damages against the district, or the enactment of legislation, after the adoption of the final budget, requiring expenditures not contemplated therein, such board of trustees by unanimous vote of all members of the board present at any meeting, the time and place of holding which all of the trustees shall have had reasonable notice, may adopt and enter upon their minutes a resolution, stating the facts constituting the emergency, the estimated amount of money required to meet such emergency, and the time and place when the board will meet for the purpose of considering and adopting an emergency budget for such current school year.

Whenever such board of trustees shall deem that an emergency exists for any reason other than those reasons specified above, such board may petition the state superintendent of public instruction for permission to adopt a resolution of emergency. Such petition shall set forth in writing the reasons for the request, the high school budget or budgets affected by the emergency, the estimated amount of money required to meet such emergency for each affected budget, the anticipated source or sources of financing for the emergency expenditures, and such other information as may be required by the superintendent of public instruction. Such petition shall be signed by all of the members of the board of trustees.

The state superintendent of public instruction shall have the power to approve or disapprove such petition. If such petition be approved, the board of trustees may proceed to adopt a resolution of emergency, and may subsequently take all other steps prescribed for meeting an emergency situation due to any of the causes specified above. Approval of such



petition by the superintendent of public instruction shall merely authorize the board of trustees to initiate emergency budget proceedings by resolution and shall not relieve such board of trustees of the necessity of complying with the requirements for proceeding according to the provisions of this section and all other laws pertaining to emergency budgets. Approval of such petition shall not be construed as approval of any subsequent application for increased state aid on account of such emergency.

(2) to (4). \* \* \* [Same as parent volume.]

(5) The board of trustees may adopt an emergency budget for any or all of the budgeted funds of the high school, for which fund or funds a regular budget has been approved and adopted for the current year in accordance with the provisions of section 75-4517.

(6) Whenever the board of trustees shall prepare an emergency budget for the transportation fund, such emergency budget shall be so itemized as to show the amount appropriated therein, separately for bus transportation and for payments to parents or guardians in lieu of bus transportation. The board of trustees shall attach to such emergency transportation budget a copy of each transportation contract connected with the emergency, such contracts to be prepared and executed in accordance with the provisions of section 75-3405.

(7) Whenever the board of trustees shall prepare an emergency budget for the general fund or the transportation fund, or both, due to increased enrollment, such board of trustees may make application to the state superintendent of public instruction for increased payment from the state public school equalization fund for the foundation program, or for state transportation reimbursement, or both. The state superintendent of public instruction shall prepare and publish rules and regulations for such application. The state superintendent of public instruction shall consider all applications for increased state aid made in accordance with the provisions of this act, and shall determine the amount of increase, if any, which shall be made in the payment of funds from the state public school equalization fund for the foundation program, or for state transportation reimbursement, or both, on account of any emergency budget due to increased enrollment. The superintendent of public instruction shall notify the board of trustees of the approval or disapproval of any application for increase in payment of state funds, and in the event of approval the budget or budgets to which such increased payment shall be applied, and the amount or amounts thereof. The board of trustees shall attach a copy of such notice of approval or disapproval to the preliminary emergency budget.

(8) Three copies of the emergency budget shall be furnished the county superintendent of schools and such county superintendent must lay one copy thereof before the board of county commissioners, which constitutes the board of school budget supervisors for the county, at the next regular meeting of such board. Such board shall have the power to make such changes in such budget, if any, as it may deem proper and necessary, and shall then approve such budget, either as adopted by the board of school trustees, or as changed by the board of county commissioners.

**History:** En. Sec. 16, Ch. 178, L. 1933; amd. Sec. 1, Ch. 192, L. 1943; amd. Sec. 1, Ch. 135, L. 1945; amd. Sec. 4, Ch. 147, L. 1965.

**Amendment**

The 1965 amendment inserted "for any or all of the regularly budgeted funds of the high school" after "the budget ap-

proved and adopted" in the first clause of the first paragraph of subsection (1); added the second and third paragraphs to subsection (1); inserted new subsections (5), (6), and (7); redesignated former subsection (5) as subsection (8); and substituted "changed" for "changes" near the end of said subsection (8).

**75-4524. Emergency warrants.** After the approval of such emergency budgets, if the budget is to provide additional funds for the maintenance and support of the high school or schools, whenever the amount appropriated for any such item in the annual high school budget for such current school year has been fully used and such appropriation is exhausted, expenditures made thereafter shall be made by emergency warrants against the amount appropriated in the emergency budget, which emergency warrants shall be issued in the same manner and form and subject to the same conditions and provisions as set out in section 75-4531, except that on each thereof shall be distinctly endorsed "COUNTY HIGH SCHOOL EMERGENCY WARRANT" or "HIGH SCHOOL WARRANT SCHOOL DISTRICT NO. \_\_\_\_\_." After deducting from the amount of money standing to the credit of the fund of the high school for which the emergency budget was adopted the amount required to meet and take care of all unexpended appropriations in the annual budget for that fund for the current school year and after deducting the amount required for reserve, if any, provided in such budget for the following school year, if any balance remains in that fund the same shall be used to pay such emergency warrants issued against that fund, in the order in which the same are presented for payment.

**History:** En. Sec. 4, Ch. 135, L. 1945; amd. Sec. 5, Ch. 147, L. 1965.

**Amendment**

The 1965 amendment substituted "the fund of the high school for which the emergency budget was adopted" for "the general fund of the county high school or the general fund of the district high school as the case may be" near the beginning of the final sentence; inserted "for that fund"

after "all unexpended appropriations in the annual budget" in the final sentence; substituted "after deducting the amount required for reserve, if any" in the final sentence for "reserve"; inserted "in that fund" after "if any balance remains" in the final sentence; and inserted "issued against that fund" after "used to pay such emergency warrants" in the final sentence.

**75-4525. Tax levy to pay emergency warrants.** The county treasurer shall, not later than the first Monday in August of the following school year, make out a statement for such county high school or school district showing the total amount of such emergency warrants issued then outstanding against any fund or funds, and the amount of money, if any, on hand in the said fund or funds of the high school applicable to the payment thereof, and the amount or amounts for the payment of which a special tax levy or tax levies should be made, and deliver the same to the board of county commissioners. For each fund of the emergency budget for which an emergency levy is required as determined herein, the board of county commissioners shall, on the second Monday in August, make and fix a levy against the taxable property designated for the sup-

port of the high school which will raise sufficient funds to pay such outstanding emergency warrants, with interest thereon, and the county treasurer shall, when collected, place the proceeds of each levy in a special fund and use the same to pay such outstanding emergency warrants with interest thereon as may be obligations against such fund. If after all such emergency warrants have been paid any amount remains in any such special fund it shall be, by such county treasurer, transferred to the comparable regular fund of the county high school or district high school.

**History:** En. Sec. 5, Ch. 135, L. 1945; amd. Sec. 6, Ch. 147, L. 1965.

#### Amendment

The 1965 amendment substituted "against any fund or funds" for "and unpaid" after "emergency warrants then outstanding" in the first sentence; inserted "in the said fund or funds of the high school" before "applicable to the payment thereof" in the first sentence; inserted "or amounts" after "amount" and "or tax levies" after "special tax levy" in the latter part of the first sentence; substituted "For each fund of the emergency budget for which an emergency levy is required as determined herein, the board of county commissioners shall" at the beginning of the second sentence for "Such board shall"; substituted "designated for the support of the high school"

for "of the county in the case of a county high school, or against the taxable property in the school district if a district high school" after "taxable property" in the second sentence; substituted "the proceeds of each levy" for "the same" in the latter part of the second sentence; inserted "any" before "such special fund" in the first part of the third sentence; and substituted "the comparable regular fund of the county high school or district high school" at the end of the section for "the general fund of the county high school or to the high school fund of the district high school."

#### Repealing Clause

Section 7 of Ch. 147, Laws 1965 repealed all acts and parts of acts in conflict therewith.

### CHAPTER 46—HIGH SCHOOL DISTRICTS—PUBLIC WORKS

- Section 75-4601. High school trustees may undertake public works program—additional trustees—division of taxable valuation—commencement of proceedings—temporary relocation of schoolhouse.
- 75-4607. Alteration of boundaries—redivision—limitation.
- 75-4612. Joint districts authorized—procedure for establishment.
- 75-4613. General laws governing joint districts.
- 75-4614. Bonded indebtedness of territory incorporated into joint district.

**75-4601. High school trustees may undertake public works program—additional trustees—division of taxable valuation—commencement of proceedings—temporary relocation of schoolhouse.** In any county having a high school the board of trustees of the county high school, if there be one, and the boards of trustees of any school districts maintaining district high schools, are hereby designated as the boards of trustees of the respective high school districts established under this act, provided that additional members may be elected to the board of trustees of districts maintaining district high schools in the number and manner as follows: When a majority of the boards of the common school districts in the high school district so request, such requests shall be directed to the county superintendent of schools, who shall proceed as directed in this act.

The taxable valuation of the district in which the high school is located shall be divided by the number of trustees on the high school board. In the case of a first class district this number shall be seven (7), for a second class district five (5), and for a third class district three (3).



This figure obtained shall then be divided into the remaining valuation of the high school district, and the resulting number, to the closest whole number, shall be the number of additional board members to be elected; provided, that the number of these additional board members shall not exceed four (4) in districts of the first and second class. The additional board members in school districts of the third class shall not exceed two (2) except when two-thirds ( $\frac{2}{3}$ ) or more of the high school enrollment in the high school district resides in the common school districts not maintaining the high school and such common school districts also contain at least two-thirds ( $\frac{2}{3}$ ) of the taxable valuation of the high school district when three (3) additional trustees shall be elected from the common school districts not maintaining the high school and one (1) additional trustee shall be elected at large in the high school district.

(a) Following the determination of the number of additional board members to be elected, excluding the trustee at large, the county superintendent of schools shall district the territory of the high school district, excluding the common school district wherein the high school is located, into a number of trustee nominating districts equal to the number of additional board members to be elected, and each trustee nominating district so established shall be entitled to one (1) member on the board of trustees of the high school.

The additional trustee to be elected at large shall be placed in a trustee nominating district encompassing the entire high school district including the common school district wherein the high school district is located. Such trustee at large nominating district shall not preclude the creation of other additional trustee nominating districts as herein provided.

The election of the additional trustees shall be held on the first Saturday in April of every year to fill the expired terms of such additional trustees, and the term of office of such additional trustees after the first election of such trustees shall be for three (3) years. The term of office of the trustee at large shall be three (3) years.

The additional trustees so elected shall be residents of the respective trustee nominating districts established by the county superintendent of schools, and shall meet the general qualifications for school district trustees provided by section 75-1601, Revised Codes of Montana, 1947.

At the first election the additional trustees elected from the trustee nominating districts established by the county superintendent of schools, if there be more than one (1), shall cast lots to determine the length of time each shall hold office. If there is one (1) additional trustee, he shall hold office for three (3) years. If there are two (2) additional trustees, one (1) shall hold office for three (3) years and one (1) for two (2) years. If there are three (3) additional trustees, one (1) shall hold office for three (3) years, one (1) for two (2) years and one (1) for one (1) year. If there are four (4) additional trustees, two (2) shall hold office for three (3) years, one (1) for two (2) years and one (1) for one (1) year.

The procedure for calling and holding elections, and for the assumption of office, for the school district wherein the high school is located shall govern the election of the additional trustees herein provided for.

At least twenty (20) days preceding the election, any ten (10)

electors of a trustee nominating district established as provided for in this act, who are qualified to vote in the election for such additional trustee, shall file with the district clerk of the school district wherein the high school is located the nomination of any qualified person to be a candidate for such trustee from such nominating district. Ballots for the election of such additional trustees shall be prepared in the same form and manner as ballots are prepared for other trustees, providing that such ballots for additional trustees shall show clearly the trustee nominating district from which each nominee is a candidate.

Any qualified elector of a nominating district, excluding the district where the high school is located, may vote for the additional trustees so nominated, at the time and place of the annual election of school trustees in the common school district in which he is entitled to vote, provided that each elector may vote only for such additional trustee from the trustee nominating district in which he is a qualified elector.

A vacancy in the office of additional trustee shall be filled by appointment by the county superintendent of schools; provided, that such appointment shall be subject to confirmation by a majority of the remaining members of the high school district board including the additional members. The trustee so appointed shall hold office until the next annual election, at which election there shall be elected a trustee from the same nominating district for the unexpired term.

(b). \* \* \* [Same as parent volume.]

(c) When the board of trustees of a high school district, who have qualified for their positions as such board of trustees under the provisions herein provided, shall find it necessary to temporarily move the site of the schoolhouse to another common school district within the high school district due to the destruction of the school building by fire, flood, storm, riot, insurrection or other act of God, such board of trustees shall continue to hold office for one (1) year after such schoolhouse relocation unless the schoolhouse is moved back to the common school district where it was originally located.

**History:** En. Sec. 1, Ch. 275, L. 1947; amd. Sec. 1, Ch. 188, L. 1951; amd. Sec. 1, Ch. 67, L. 1957; amd. Sec. 1, Ch. 167, L. 1959; amd. Sec. 1, Ch. 222, L. 1963; amd. Sec. 1, Ch. 166, L. 1965; amd. Sec. 1, Ch. 214, L. 1965; amd. Sec. 1, Ch. 311, L. 1967.

#### Compiler's Note

This section was amended twice in 1965, once by Ch. 166 and once by Ch. 214. Since the two amendments do not appear to conflict, the compiler has made a composite section incorporating the changes made by both amendatory acts.

#### Amendments

The 1963 amendment made a minor change in punctuation in the first paragraph; and completely rewrote subdivision (a), for previous text of which see parent volume.

Chapter 166, Laws of 1965, added subdivision (c).

Chapter 214, Laws of 1965, substituted "a" for "any" before "trustee nominating district" near the beginning of the sixth paragraph of subdivision (a) and again before "nominating district" near the beginning of the seventh paragraph of subdivision (a); and substituted "only for such additional trustee from the trustee nominating district in which he is a qualified elector" for "for no more than one such additional trustee from each trustee nominating district" at the end of the seventh paragraph of subdivision (a).

The 1967 amendment substituted the last sentence in the second paragraph for "or two (2) in districts of the third class"; inserted "excluding the trustee at large" after "to be elected" in the first paragraph of subdivision (a) of the second paragraph; added the second paragraph of

subdivision (a); and added the last sentence of the third paragraph.

#### Repealing Clause

Section 2 of Ch. 222, Laws 1963 repealed all acts and parts of acts in conflict therewith.

#### Effective Date

Section 2 of Ch. 166, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved March 4, 1965.

**75-4607. Alteration of boundaries — redivision — limitation.** In any county which has been divided into high school building districts, at the request of any high school board of trustees, the commission, provided for in section 75-4602, may, in accord with the procedure provided in said section, alter the boundaries of said districts or redivide the county into a different number of high school districts, provided that such alteration or redivision may not be done within one (1) year from the original division or the last alteration of boundaries and last redivision.

**History:** En. Sec. 1, Ch. 130, L. 1949; amd. Sec. 1, Ch. 120, L. 1953; amd. Sec. 1, Ch. 140, L. 1965.

#### Amendment

The 1965 amendment reduced the pe-

#### Effective Date

riod set forth in the proviso at the end of the section from three years to one year. "This act is effective April 1, 1965."

**75-4612. Joint districts authorized—procedure for establishment.** In addition to the provisions for the formation of high school districts authorized by section 75-4602, R. C. M. 1947, a high school joint district may be formed in accordance with the provisions of this act.

(a) Definitions. For the purposes of this act:

(1) An elementary joint district is a school district consisting of territory lying partly in one county and partly in another;

(2) A high school district is territory lying wholly within one county, created in accordance with the provisions of section 75-4602, R. C. M. 1947;

(3) A high school joint district is territory lying partly in one county and partly in another, designated a high school joint district in accordance with the provisions of this act;

(4) County L is a county in which the school operated by an elementary joint district is located;

(5) County NL is a county in which the school operated by an elementary joint district is not located.

(b) Procedure for formation of high school joint district:

(1) The action to form a high school joint district may be initiated by a majority of the resident taxpayers who are registered electors and whose names appear upon the last completed assessment roll for state, county and school district taxes, residing in an elementary joint district in the whole of the territory of such joint district lying in County NL. Such majority shall present a petition, in writing, to the county superintendent of schools of County NL, asking that the whole of the territory of the elementary joint district in which they reside in County NL be joined to that high school district in County L which includes the territory of the same elementary joint district lying in County L, to form a high school joint district.



(2) The petition shall describe the territory in County NL proposed to be joined to the high school district in County L, and shall also state the reason for desiring such change, and the number of children of high school age, if any, residing in such territory.

(3) The county superintendent of schools of County NL shall file said petition in his office immediately on receipt thereof, and shall give notice to the parties interested by posting notices at least ten (10) days prior to the time appointed for considering said petition, one (1) of which shall be in a public place in the territory in County NL proposed to be joined to the high school district in County L, and one (1) on the door of each high school in County NL which would be affected by the proposed change by reason of reduction of the territory designated for the support of such high school. At the time stated in said notice for the consideration of such petition, which shall not be less than ten (10) days nor more than thirty (30) days after the date of filing such petition, the county superintendent shall proceed to hear such petition.

(4) The county superintendent shall either grant or deny such petition based on evidence received. If such petition is granted, the county superintendent shall make an order fixing the boundaries of the high school joint district so formed. Subject to the provisions of paragraph (5) of this section, such order shall be final, unless an appeal be taken to the board of county commissioners of County NL within thirty (30) days thereafter, and upon hearing thereof the decision of said board shall be final, provided however that the right of appeal to the district court is reserved. No petition shall be granted when an operating high school exists in County NL within three (3) miles of any point of the territory described in the petition. No petition shall be denied solely because the territory described in the petition lies within the boundaries of a high school district in County NL, provided, however that if the removal of such territory from such high school district would reduce the taxable valuation of such high school district to less than seven hundred fifty thousand dollars (\$750,000) the petition shall be denied.

(5) Copies of the order fixing the boundaries of the high school joint district shall be transmitted by the county superintendent of County NL to the county superintendent of County L and to the board of trustees of the affected high school district in County L, who within thirty (30) days from the receipt thereof shall act to approve or disapprove such order. Before the order will become effective, approval must be given by such county superintendent and by such board of trustees.

**History:** En. Sec. 1, Ch. 211, L. 1965.

**Title of Act**

An act providing for formation and

control of high school joint districts in adjacent counties, and providing procedures for creation thereof.

**75-4613. General laws governing joint districts.** High school joint districts created hereunder shall be governed by the general school laws of the state.

**History:** En. Sec. 2, Ch. 211, L. 1965.

**75-4614. Bonded indebtedness of territory incorporated into joint district.** Bonded indebtedness of any territory affected by the provisions of

this act shall remain the indebtedness and obligation of the original territory against which such bonds were issued and shall be paid for out of levies made against said original territory.

**History:** En. Sec. 3, Ch. 211, L. 1965.

**Effective Date**

Section 4 of Ch. 211, Laws 1965 read  
"This act is effective April 1, 1965."

## CHAPTER 48—SCHOOL LUNCH AND CHILD NUTRITION PROGRAM

Section 75-4802. Expenditure of federal funds.

75-4803. Administration of program.

75-4805. Authority of school board.

75-4806. Accounts, records, reports and operations.

**75-4802. Expenditure of federal funds.** The superintendent of public instruction is hereby authorized to accept and direct the disbursement of funds appropriated by act of Congress and apportioned to the state for use in connection with school lunch programs, under the "National School Lunch Act," approved June 4, 1946 (Public Law 396, 79th Congress, Chapter 281, 2nd Session), and any amendments thereto. The superintendent of public instruction may also accept and disburse funds provided by any other acts of Congress providing for the feeding of children through the facilities of educational agencies, including the Child Nutrition Act of 1966 (Public Law 642, 89th Congress). The superintendent of public instruction shall deposit all such funds received from the federal government in a special account with the treasurer of the state who shall deposit them in the federal and private grant clearance fund and make disbursements therefrom upon the direction of the superintendent of public instruction.

**History:** En. Sec. 2, Ch. 282, L. 1947; amd. Sec. 65, Ch. 147, L. 1963; amd. Sec. 1, Ch. 123, L. 1967.

fund and" after "of the state who shall" in the second sentence (now the third sentence).

The 1967 amendment added the present second sentence of this section, and inserted "in a special account" after "federal government" in the present third sentence.

### Amendments

The 1963 amendment deleted "in a special account" after "from the federal government"; and inserted "deposit them in the federal and private grant clearance

**75-4803. Administration of program.** The superintendent of public instruction may enter into such agreements with any agency of the federal government, with any school board, or with any other agency or person, prescribe such regulations, employ such personnel, and take such other action, as he may deem necessary to provide for the establishment, maintenance, operation, and expansion of any school lunch program, and to direct the disbursement of federal and state funds in accordance with any applicable provisions of federal or state law. The superintendent of public instruction may give technical advice and assistance to any school board in connection with the establishment and operation of any school lunch program and may assist in training personnel engaged in the operation of such program. The superintendent of public instruction and any school board may accept any gift for use in connection with any school lunch program. Any or all of the foregoing powers also may be exercised

in connection with any child nutrition program which may be carried on by educational agencies.

**History:** En. Sec. 3, Ch. 282, L. 1947;  
amd. Sec. 2, Ch. 123, L. 1967.

**Amendments**

The 1967 amendment added the last sentence.

**75-4805. Authority of school board.** Any school board of any school is authorized to enter into contracts with the superintendent of public instruction for the purpose of obtaining funds, supplies and equipment, and facilities necessary to the establishment, operation and maintenance of a school lunch or child nutrition program in such school, and to operate or provide for the operation of school lunch or child nutrition programs in schools under their jurisdiction by using therefor funds disbursed to them under the provisions of this act, gifts and other funds received from sale of food under such programs, all in accordance with regulations prescribed by the superintendent of public instruction.

**History:** En. Sec. 5, Ch. 282, L. 1947;  
amd. Sec. 3, Ch. 123, L. 1967.

**Amendments**

The 1967 amendment inserted "or child nutrition" after "lunch" throughout this section, and substituted "food" for "lunches" before "under such programs."

**75-4806. Accounts, records, reports and operations.** The superintendent of public instruction shall prescribe regulations for the keeping of accounts and records and the making of reports by or under the supervision of school boards. Such accounts and records shall at all times be available for inspection and audit by authorized officials and shall be preserved for such period of time, not in excess of five (5) years, as the superintendent of public instruction may lawfully prescribe. The superintendent of public instruction shall conduct or cause to be conducted such audits, inspections, and administrative reviews of accounts, records, and operations with respect to school lunch and child nutrition programs as may be necessary to determine whether its agreements with school boards and regulations made pursuant to this act are being complied with, and to insure that school lunch and child nutrition programs are effectively administered.

**History:** En. Sec. 6, Ch. 282, L. 1947;  
amd. Sec. 4, Ch. 123, L. 1967.

**Repealing Clause**

Section 5 of Ch. 123, Laws 1967 repealed all acts and parts of acts in conflict therewith.

**Amendments**

The 1967 amendment inserted "and child nutrition" after "lunch" throughout this section.

**Effective Date**

Section 6 of Ch. 123, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved February 23, 1967.

## CHAPTER 50—EDUCATION CLASSES FOR MENTALLY RETARDED AND PHYSICALLY HANDICAPPED CHILDREN

Section 75-5001. Special education—mentally retarded children—physically handicapped children.

75-5003. Local boards of trustees—powers—determination of children requiring special education and the type of education responsibility of state superintendent—reimbursement by state—computation.

75-5005. Petition of parents for establishment of special teaching program.



**75-5001. Special education—mentally retarded children—physically handicapped children.** (1) Within the meaning of this act special education is that type of education requiring special facilities or instruction because of physical or mental deviation from the average on the part of some children. These handicapped are defined as follows:

(a) Mentally retarded children are children who are not capable of profiting from the general educational program of the public schools. These children may be considered in three (3) groups as follows: (i) Educable mentally retarded. Those children who, at maturity, cannot be expected to attain a level of intellectual functioning greater than that commonly expected from an eleven-year-old, but not less than that of a seven-year-old. (ii) Trainable mentally retarded. Those children who, at maturity, cannot be expected to attain a level of intellectual functioning greater than that commonly expected of a seven-year-old and who, for entrance into a training program, are capable of walking, of clean bodily habits, and of obedience to simple commands. (iii) Custodial mentally retarded. Those children who do not show a likelihood of attaining clean bodily habits, responsiveness to directions, or means of intelligible communication. The public schools are to assume responsibility for the educable group, and may assume responsibility for the trainable group.

(b) Physically handicapped children are those children who are capable of profiting from the general education program of the public schools, but who need special equipment, special services, and transportation to compensate for such physical handicaps as cardiac, cerebral palsy, or other physical handicaps including inadequate speech, hearing and vision, which makes them unable to profit from the normal education processes without some special provision. Nothing herein shall be construed to interfere with the purpose and function of the school for the deaf and blind in Great Falls.

(2) The board of trustees responsible for the operation of any public school may establish special education programs for educable mentally retarded children and physically handicapped children under the age of six (6) years when the superintendent of public instruction has determined that such programs will

(a) enable a child to achieve levels of competence that will enable him to profit from the general educational program of the public schools when he could not so profit without a special education program,

(b) permit the conservation or early acquisition of skills which will tend to provide the child with an equal opportunity to take his place with normal children in the general educational program of the public schools, or

(c) provide other demonstrated educational advantages which will materially benefit the child.

All special education programs established for mentally retarded or physically handicapped children under the age of six (6) years approved by the state superintendent of public instruction shall be eligible for reimbursements on the part of the state as provided in section 75-5003,

R. C. M. 1947, and for transportation aid as provided in section 75-3409, R. C. M. 1947.

**History:** En. Sec. 1, Ch. 206, L. 1955; amd. Sec. 1, Ch. 243, L. 1963; amd. Sec. 1, Ch. 164, L. 1967.

#### Amendments

The 1963 amendment substituted "mentally retarded" for "mentally handicapped" throughout former paragraph (1); deleted "handicapped" after "educable" in the final sentence of former paragraph (1); and added the words "and may assume re-

sponsibility for the trainable group" at the end of former paragraph (1).

The 1967 amendment inserted "(1)" before "Within the meaning" at the beginning of this section; relettered prior subdivision (1) as (a) and subdivision (2) as (b); and in new subdivision (a), renumbered subparagraphs (a), (b) and (c) as (i), (ii) and (iii); in new subdivision (b), inserted "speech" after "inadequate"; and added new subsection (2) as well as the last paragraph.

**75-5003. Local boards of trustees—powers—determination of children requiring special education and the type of education responsibility of state superintendent—reimbursement by state—computation.** (1) The board of trustees responsible for the operation of any school district may establish special education classes when it appears there are not less than four (4) educable mentally retarded or not less than four (4) physically handicapped children in the district.

(2) The board of trustees, responsible for the operation of any public school when it appears that there are not less than ten (10) educable mentally retarded or not less than ten (10) physically handicapped children in the district must maintain at least one special class for educable mentally retarded children or at least one special class for physically handicapped children, (and may provide classes for the trainable mentally retarded children).

(3) In lieu of providing such special classes the board of trustees may arrange to use the services of such approved mentally retarded or physically handicapped children's classes as may exist and may provide transportation services from home to school and return for all handicapped children enrolled in a state-approved special education program of such ages as it deems wise; provided, that the local board has the right to exclude persons of severe delinquent behavior. The determination of the children requiring special education and the type of special education needed by these handicapped children shall not be the responsibility of local boards of trustees but shall be the responsibility of the state superintendent of public instruction in co-operation with appropriate medical, psychiatric and psychological advice. Two (2) or more districts may combine to provide such educational facilities.

(4) Reimbursements on the part of the state for in-school classes of seven (7) or more students approved by the state superintendent of public instruction shall be computed on the basis of forty-five (45) in average number belonging. For a class of less than seven (7) students the ANB shall be computed on the basis of the number of students at a rate not to exceed six (6) ANB per student, provided that no class of less than four (4) students shall be approved. For other special education programs approved by the state superintendent of public instruction, including speech and hearing therapy, home or hospital tutoring, school-to-home telephone communication, or other individual programs, the

ANB shall be computed according to a schedule prepared by the state superintendent of public instruction on the basis of the time required and the degree of special education provided; in such cases the ANB shall not exceed six (6) for each exceptional child enrolled in such program. Transportation reimbursements shall be made on a schedule arrived at by the state superintendent of public instruction, and such expenditures shall be added to the transportation budget of the district; provided, that said reimbursement shall not exceed the expense of transportation to similar facilities within the state of Montana. The state shall reimburse two-thirds ( $\frac{2}{3}$ ) of such approved transportation and the county shall reimburse the remainder of such approved transportation according to said schedule.

(5) Whenever a new special education class or program, to be offered for the first time in the ensuing year, has been approved by the state superintendent of public instruction prior to the adoption of the preliminary budget, the board of trustees may include in the ANB for the budget a number anticipated to be the ANB eligible for special education computation in the ensuing year, subject to the approval of the state superintendent of public instruction.

(6) Any child who is mentally retarded, or physically handicapped, or both, who is enrolled in a state-approved special education program which is maintained by an elementary school district other than the district in which such child resides, shall be included in the computation of average number belonging to the district maintaining the special education program, according to the provisions herein. The district in which such child resides shall pay to the district where such child attends an amount of tuition based on two (2) times the tuition rates established in section 75-1630, and such payment shall be made in the manner prescribed by section 75-1630. Where the child is attending an out-of-state program, the school district may transfer tuition payments to the agency providing the special training, notwithstanding section 75-1630.

(7) Any such child who is enrolled in a state-approved high school special education program which is maintained by a high school located in a county other than the county in which such child resides, shall be included in the computation of the average number belonging to the high school maintaining the special education program, according to the provisions herein. The county in which such child resides shall pay to the high school where such child attends an amount of tuition based on two (2) times the tuition rates established in section 75-4230, and such payment shall be made in the manner prescribed by section 75-4230. Where the child is attending an out-of-state program, the school district may transfer tuition payments to the agency providing the special training, notwithstanding section 75-4230.

(8) When children are sent to an institution supported solely by funds of the state of Montana the home district or county will not be required to pay tuition for such child.

History: En. Sec. 3, Ch. 206, L. 1955; amd. Sec. 1, Ch. 142, L. 1965; amd. Sec. 1, Ch. 108, L. 1959; amd. Sec. Ch. 163, L. 1967; amd. Sec. 2, Ch. 183, L. 1969.  
L. 1963; amd. Sec. 1, Ch. 96, L. 1965;



### Compiler's Note

This section was amended twice in 1965, once by Ch. 96 and once by Ch. 142. Since the two amendments do not appear in conflict, the compiler has made a composite section incorporating the changes made by both amendatory acts.

### Amendments

The 1963 amendment inserted "(and may provide classes for the trainable mentally retarded children,)" in the first sentence of the first paragraph.

Chapter 96, Laws of 1965, substituted "The board of trustees, responsible for the operation of any public school" at the beginning of the section for "The board of trustees in each school district"; inserted "not less than (10)" before "physically handicapped children" in the first sentence of the former first paragraph; substituted "at least one special class" for "special classes" before "for educable mentally retarded children" in the first sentence of the former first paragraph; inserted "at least one special class" before "for physically handicapped children" near the end of the first sentence of the former first paragraph; divided the former first sentence of the first paragraph into two sentences; inserted "In lieu of providing such special classes the board of trustees" at the beginning of the second sentence of the former first paragraph; deleted "within the state" after "as may exist" in the second sentence of the former first paragraph; substituted "and" for "or" before "may provide transportation services" in the second sentence of the former first paragraph; deleted "low intelligence or" before "severe delinquent behavior" in the proviso to the second sentence of the former first paragraph; deleted "listed above" at the end of the third sentence of the former first paragraph; substituted the first two sentences of the second paragraph for "Reimbursements on the part of the state for such programs shall be com-

puted on the basis of counting each such mentally retarded child in such special classes as three (3) in average number belonging, and each physically handicapped child according to a schedule to be prepared by the state superintendent of public instruction, but in no case shall it be over three (3) average number belonging for each such child, prorated according to time and number in these special classes, or in home tutoring"; and inserted the former third paragraph.

Chapter 142, Laws of 1965, inserted "two times" before "the tuition rate" in the last sentence of the former fourth paragraph and in the last sentence of the former fifth paragraph.

The 1967 amendment added subsection (1); numbered the paragraphs in the prior section as (2) through (8); and in newly numbered subsection (4), substituted "classes of seven (7) or more students" for "programs" in the first sentence, added the second sentence; inserted "and hearing" before "therapy" and substituted "six (6)" for "three (3)" before "for each exceptional child" in the third sentence; and deleted "elementary school" before "special education program," and substituted "by an elementary school district" for "by a district" before "other than the district" in the first sentence of newly numbered subsection (6).

The 1969 amendment added the proviso to the fourth sentence of subsection (4), added the last sentence of subsection (6), and added the last sentence of subsection (7).

### Effective Dates

Section 3 of Ch. 243, Laws 1963 provided the act should be in effect from and after its passage and approval. Approved March 11, 1963.

Section 2 of Ch. 96, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved February 27, 1965.

**75-5005. Petition of parents for establishment of special teaching program.** The parents or guardians of four (4) or more educable mentally retarded or four (4) or more physically handicapped children of one (1) type, living in one (1) town or in neighboring towns, which children can be taught together, may petition the district board or boards of trustees for the establishment of a special teaching program. The district board or boards of trustees shall request the state board of education for such advice and assistance as the state board of education considers appropriate in the organization of such a program.

**History:** En. Sec. 5, Ch. 206, L. 1955; amd. Sec. 2, Ch. 163, L. 1967.

### Amendments

The 1967 amendment substituted "four

(4) or more educable mentally retarded or four (4) or more physically" for "seven (7) or more mentally" before "handicapped children" in the second sentence.

## CHAPTER 51—FEDERAL AID

Section 75-5101. Federal funds—authority to accept—expenditure of funds.

**75-5101. Federal funds—authority to accept—expenditure of funds.** The governor of the state of Montana and the superintendent of public instruction of the state of Montana are hereby authorized on behalf of the state of Montana to request and accept such funds as are now or will be made available under any act of Congress of the United States, or otherwise, for purposes of public school building construction and/or for any other purposes of public schools and public education as permitted under the laws of the state of Montana and as authorized by the grants from the federal government. Said moneys shall be deposited by the governor and superintendent of public instruction with the treasurer of the state of Montana, and are hereby appropriated and made available to the superintendent of public instruction. All said moneys shall be expended for the purpose of public school building construction and/or for any other purposes of public schools and public education as permitted under the laws of the state of Montana and as authorized by the grants from the federal government. Such expenditures shall be made under the supervision and discretion of the superintendent of public instruction. Any balance in the account in which said moneys are maintained shall not lapse at any time, but shall be continuously available to the superintendent of public instruction for the expenditure consistent with this act and acts of the federal government.

**History:** En. Sec. 1, Ch. 173, L. 1957; amd. Sec. 67, Ch. 147, L. 1963; amd. Sec. 1, Ch. 282, L. 1965.

#### Amendments

The 1963 amendment deleted "in a special fund hereinafter created" after "superintendent of public instruction" in the last sentence.

The 1965 amendment substituted "of public schools and public education" for "in the operation and maintenance of public schools" near the end of the first sentence; added "and are hereby appropriated and made available to the super-

intendent of public instruction" at the end of the second sentence; and added the third, fourth, and fifth sentences.

#### Repealing Clause

Section 2 of Ch. 282, Laws 1965 repealed all acts and parts of acts in conflict therewith.

#### Effective Date

Section 3 of Ch. 282, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved March 18, 1965.

### 75-5102. Repealed.

#### Repeal

This section (Sec. 2, Ch. 173, L. 1957), relating to the federal aid to education

fund and expenditures therefrom, was repealed by Sec. 242, Ch. 147, Laws 1963.

## CHAPTER 52—LAW ENFORCEMENT ACADEMY

Section 75-5203. Establishment of Montana law enforcement academy.

75-5205. Advisory board.

75-5206. Powers and duties of the Montana law enforcement academy advisory board.

75-5208. Expenditure of funds.

**75-5203. Establishment of Montana law enforcement academy.** There is hereby established a Montana law enforcement academy to be located at one of the units of the university of Montana, which unit shall be

selected in the manner hereinafter provided. This academy shall be in session for a period to be annually determined by the advisory board.

History: En. Sec. 3, Ch. 7, L. 1959;      Amendments  
amd. Sec. 1, Ch. 233, L. 1967.

The 1967 amendment substituted "to be annually determined by the advisory board" for "not to exceed three weeks in any one year" in the last sentence.

**75-5205. Advisory board.** The Montana law enforcement academy shall be governed by an advisory board composed of one representative of each of the following organizations or departments to be appointed by the president, chief executive or officer in charge of each of the following departments or organizations: The Montana sheriffs and peace officers association, the Montana chiefs of police association, the county attorneys association, the attorney general's office, the Montana municipal league, the Montana county commissioners association, the Federal Bureau of Investigation, the Montana police protective association, the Montana highway patrol, the Montana fish and game commission, the Montana livestock commission, the tribal police of one of the Indian reservations located in Montana, and that unit of the university of Montana selected as a site for the academy. The representative appointed by the Montana livestock commission shall be a duly appointed stock inspector or detective. The tribal policeman serving on the advisory board each year will be a member of the reservation that is designated for representation by a majority of the advisory board. The representative of the university unit shall be selected after the site has been determined by the other members of the Montana law enforcement academy advisory board. The members of the advisory board shall be appointed for a term of one year and shall serve without compensation.

History: En. Sec. 5, Ch. 7, L. 1959;  
amd. Sec. 1, Ch. 28, L. 1961; amd. Sec. 1,  
Ch. 88, L. 1969.

#### Amendments

The 1969 amendment inserted "the

Montana highway patrol, \* \* \* reservations located in Montana" after "the Montana police protective association" in the first sentence and inserted the present second and third sentences.

**75-5206. Powers and duties of the Montana law enforcement academy advisory board.** The Montana law enforcement academy advisory board shall have the power and it shall be its duty to:

1. to 11. \* \* \* [Same as parent volume.]

12. Accept and expend grants from federal, state, county and city governments or private persons, associations or corporations.

History: En. Sec. 6, Ch. 7, L. 1959;      Amendments  
amd. Sec. 2, Ch. 233, L. 1967.

The 1967 amendment added subparagraph 12.

**75-5208. Expenditure of funds.** The expenditure of funds by any city, town, municipality or county for the board, room and travel expenses of the officers attending the academy shall be a lawful expenditure.

History: En. Sec. 8, Ch. 7, L. 1959;  
amd. Sec. 3, Ch. 233, L. 1967.

#### Amendments

The 1967 amendment deleted the second sentence which read, "All counties of

the state of Montana shall be allowed to expend an amount of money not to exceed ninety dollars (\$90.00) for the board and room of the officers attending the academy."



## CHAPTER 53—DRIVER EDUCATION

- Section 75-5310. Purpose of act.  
 75-5311. Definitions.  
 75-5312. Superintendent of public instruction to administer program—boards may establish course.  
 75-5313. Driver education account established—portion of fines credited to account—license proceeds credited to account.  
 75-5314. Portion of forfeited bail credited to account.  
 75-5315. Transmittal of proceeds from fines.  
 75-5316. Transmittal of gross proceeds by courts.  
 75-5317. Allocation and disbursement of driver education account—administrative expense.

## 75-5301 to 75-5309. Repealed.

## Repeal

Sections 75-5301 to 75-5309 (Secs. 1 to 9, Ch. 226, L. 1965), relating to driver

education, were repealed by Sec. 12, Ch. 214, Laws 1969.

**75-5310. Purpose of act.** It is the purpose of this act to provide the financial assistance necessary to enable the board of trustees of any county high school or any district maintaining a secondary school which includes grades ten (10) to twelve (12) inclusive to offer a course in driver education and by that means to develop in the youth of this state a knowledge of the motor vehicle laws, an acceptance of personal responsibility on the public highways, and an understanding of the causes and consequences of traffic accidents. The course in driver education shall further provide to the youthful drivers of this state training in the skills necessary for the safe operation of motor vehicles.

**History:** En. Sec. 1, Ch. 214, L. 1969.

## Title of Act

An act to provide financial assistance to enable secondary schools to offer a course in driving education by earmarking a percentage of fines assessed in all offenses involving a violation of a state statute or a city ordinance relating to the operation of a motor vehicle to the automobile driver education account in the earmarked revenue fund by requiring the state of Montana to annually contribute to this fund

five per cent (5%) of all moneys received from the collection of motor vehicle driver's license fees; providing that a percentage of the fine specified in this act collected from persons arrested by highway patrolmen be allocated to the automobile driver education account in the earmarked revenue fund; amending sections 31-114, 32-1131, and 94-801-2, R. C. M. 1947; and repealing sections 75-5301 through 75-5309, R. C. M. 1947; and providing an effective date.

**75-5311. Definitions.** As used in this act, unless the context indicates otherwise:

(1) "Superintendent" or "state superintendent" means the superintendent of public instruction.

(2) "Driver education course" means an accredited course of instruction in driver education which shall meet basic course requirements established by the superintendent of public instruction and each part of said course, both classroom instruction, and behind-the-wheel instruction, shall be taught by a qualified teacher of driver education.

Any or all portions of the course may be taught after regular school hours or on Saturdays as well as on regular school days or as a summer school course, at the option of the local board of trustees. High schools may co-operate in the presentation of such a course.

(3) "Qualified teacher of driver education" means an instructor certified by the superintendent of public instruction to teach both the classroom instruction and the behind-the-wheel instruction of the driver education course, under rules adopted by the state superintendent.

**History:** En. Sec. 2, Ch. 214, L. 1969.

**75-5312. Superintendent of public instruction to administer program—boards may establish course.** (1) The superintendent shall administer, supervise, and develop the driver education program and shall assist local districts in the conduct of their driver education program.

(2) The board of trustees of any county high school or any district maintaining a secondary school which includes grades ten (10) to twelve (12) inclusive, may establish and maintain a driver education course for pupils enrolled in the secondary schools in the district or county high schools provided that any student enrolled in the course will have reached his fifteenth (15th) birthday within six (6) months of course completion.

**History:** En. Sec. 3, Ch. 214, L. 1969.

**75-5313. Driver education account established—portion of fines credited to account—license proceeds credited to account.** (1) There is hereby established an automobile driver education account in the earmarked revenue fund. There shall be paid into this account a portion of the fines assessed on all offenses involving a violation of a state statute or a city ordinance relating to the operation or use of motor vehicles, except offenses relating to parking of vehicles, in the following amounts:

(a) where a fine is imposed, four dollars (\$4) of every twenty dollars (\$20) of fine imposed or twenty per cent (20%) of the fine, whichever is greater;

(b) where multiple offenses are involved, twenty per cent (20%) of the total sum of all fines imposed.

Where a fine is suspended, in whole or in part, the portion paid to the automobile driver education account in the earmarked revenue fund shall be in accordance with the fine actually imposed.

(2) The state of Montana shall annually contribute to the account five per cent (5%) of all moneys received by the state of Montana from the collection of the motor vehicle driver's license fee provided for under the laws of the state of Montana. It shall be paid to the state treasurer of Montana and credited to the automobile driver education account in the earmarked revenue fund.

**History:** En. Sec. 4, Ch. 214, L. 1969.

#### DECISIONS UNDER FORMER LAW

##### Constitutionality

Former statute providing penalty assessments, in addition to fines and bail forfeitures, to be paid into driver education account was void as violating constitutional provision that laws for punishment of crime should be founded on principles

of reformation and prevention and as indirectly enlarging jurisdiction of justice and police courts as prescribed in statutes defining jurisdiction of such courts in terms of maximum fine which may be imposed for the offense charged; statute was revenue measure and, as such, vio-

lated constitutional provision that no bill shall be passed containing more than one subject which shall be clearly expressed

in its title. State ex rel. Sanders v. City of Butte, 151 M 171, 441 P 2d 190.

**75-5314. Portion of forfeited bail credited to account.** When any deposit of bail is made for an offense to which section 4 [75-5313] of this act applies and the bail is forfeited, the same portion of the forfeited bail shall be deposited in the earmarked fund for driver education as would be deposited for the imposition of a fine.

**History:** En. Sec. 5, Ch. 214, L. 1969.

#### DECISIONS UNDER FORMER LAW

##### **Constitutionality**

Former statute providing for a penalty assessment on bail with resultant revenue to be paid into driver education account violated constitutional provision that no person shall be deprived of life, liberty or

property without due process of law in that penalty assessment on bail amounted to tax on right to bail. State ex rel. Sanders v. City of Butte, 151 M 171, 441 P 2d 190.

**75-5315. Transmittal of proceeds from fines.** The portion of the proceeds from fines specified in section 4 [75-5313] of this act shall be transmitted to the city or county treasurer, as the case may be, by the court collecting the same, in the manner and at the times that fines and bail forfeitures are transmitted to such treasurers under law. The city and county treasurers shall transmit to the state treasurer monthly, and without deduction, the portion of such fines received which are to be credited to the automobile driver education account in the earmarked revenue fund.

**History:** En. Sec. 6, Ch. 214, L. 1969.

**75-5316. Transmittal of gross proceeds by courts.** When a court is required under law to transmit fees, fines and forfeitures directly to the state treasurer of Montana, the gross proceeds including the portion of the fines to be credited to the automobile driver education account in the earmarked revenue fund shall likewise be so transmitted and credited to the driver education account in the earmarked revenue fund by the state treasurer.

**History:** En. Sec. 7, Ch. 214, L. 1969.

**75-5317. Allocation and disbursement of driver education account—administrative expense.** (1) All moneys in the automobile driver education account shall be disbursed annually by the superintendent to school districts and county high schools providing driver education in accordance with the standards prescribed for such program and in accordance with such rules as may be promulgated by the superintendent for the administration of this act; provided that reimbursements to schools shall be based on the number of pupils completing the driver education program including both classroom instruction and practice driving (behind-the-wheel driving) between July 1 and June 30 of any fiscal year.



(2) Before such fund is allocated to the qualifying schools there shall be deducted therefrom such amount as may be necessary for the administration of this act including development, printing, and distribution of essential materials; preparation of teachers qualified in driver education; supervision of the program; and any and all other purposes deemed necessary by the superintendent; such amount not to exceed twenty-four thousand dollars (\$24,000) annually. Such state reimbursement for driver education and all other nontax receipts for driver education shall be deposited by the county treasurer to the credit of the school district or county high school in a special nonbudgeted fund as provided in section 75-3722, R. C. M. 1947, and may be expended for the purposes provided by this act.

**History:** En. Sec. 8, Ch. 214, L. 1969.

#### CHAPTER 54—SCHOOL SAFETY PATROLS

- Section 75-5401. School safety patrols—establishment.  
 75-5402. Appointment of members.  
 75-5403. Liability not to attach.  
 75-5404. Identity and operation.  
 75-5405. Training of school safety patrol members.

**75-5401. School safety patrols—establishment.** In the exercise of authorized control and supervision over pupils attending schools and other educational institutions, both public and private, the governing board or other directing authority of any such school or institution is empowered to authorize the organization and supervision of school safety patrols for the purpose of influencing and encouraging other pupils to refrain from crossing public highways at points other than regular crossings and for the purpose of directing pupils when and where to cross highways.

**History:** En. Sec. 1, Ch. 170, L. 1965.

##### **Title of Act**

An act to establish school safety patrols; empowering the governing board or other directing authority of any school and other educational institutions, both public and private, to authorize the organization and supervision of school safety patrols for the purpose of influencing and encouraging other pupils to refrain from crossing public highways at points other than regular crossings, and for the

purpose of directing pupils when and where to cross highways; providing for the qualification and appointment of members of school safety patrols; providing that no liability shall attach to the establishment of school safety patrols; providing for identification and operation of school safety patrols; providing for the training of school safety patrol members; repealing all acts and parts of acts in conflict herewith; and providing for an effective date.

**75-5402. Appointment of members.** If the parents or guardians of a pupil consent in writing to the school authorities to the appointment of the pupil on a school safety patrol, it is lawful for any pupil over nine years of age to be appointed and designated as a member thereof; provided that in any school in which there are no pupils who have attained such age, any pupil in the highest grade therein may be so appointed and designated.

**History:** En. Sec. 2, Ch. 170, L. 1965.

**75-5403. Liability not to attach.** No liability shall attach either to the school, educational institution, governing board, directing authority, or parent or guardian, or any individual director, board member, superintendent, principal, teacher or other school authority by virtue of the organization, maintenance or operation of such school safety patrol because of injuries sustained by any pupil, whether a member of the patrol or otherwise by reason of the operation and maintenance thereof.

**History:** En. Sec. 3, Ch. 170, L. 1965.

**75-5404. Identity and operation.** Identification and operation of school safety patrols shall be uniform throughout the state and the method of identification and signals to be used shall be as prescribed by the department of public instruction in co-operation with the Montana highway patrol.

**History:** En. Sec. 4, Ch. 170, L. 1965.

**75-5405. Training of school safety patrol members.** Any municipality, city or town of this state may provide for the training of members of the school safety patrol at any authorized school patrol camp located in this state and may pay the expense necessarily incurred in providing such training, out of any funds available for said purpose.

**History:** En. Sec. 5, Ch. 170, L. 1965.

#### Effective Date

Section 7 of Ch. 170, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved March 4, 1965.

#### Repealing Clause

Section 6 of Ch. 170, Laws 1965 repealed all acts and parts of acts in conflict therewith.

## CHAPTER 55—SCHOOL DISTRICTS FOR NONSECTARIAN CHILD CARE INSTITUTIONS

Section 75-5501. Definition.

75-5502. Creation of new school district.

75-5503. Application for creation of district—plan of operation—area to be included—approval or disapproval—review.

75-5504. Hearing on application—time and place—notice—open to public—record of proceedings.

75-5505. Conduct of hearing—evidence supporting application—opposition.

75-5506. Action by board of trustees of existing district—order of county superintendent—review.

75-5507. Order creating district—description of boundaries—district number—beginning of existence—trustees—laws governing.

75-5508. Acquisition of contiguous land—boundaries of new district extended—children in area to attend school at child care institution.

**75-5501. Definition.** A licensed nonsectarian child care institution for the purpose of this act shall mean a nonsectarian institution licensed annually and regulated by the state of Montana.

**History:** En. Sec. 1, Ch. 105, L. 1965.

#### Title of Act

An act to provide for the creation of a school district within an existing school district by a licensed nonsectarian child institution for the education of children if said procedure is acceptable to the existing school district; providing for the

creation and acceptance and the operation of the newly created school district; defining licensed nonsectarian child care institution; providing for the expansion of said school district and the attendance of pupils and designating students who shall be part of newly created school district; and providing for an effective date.

**75-5502. Creation of new school district.** Notwithstanding any other statutes of Montana relating to the creation, consolidation, annexation or abandonment of school districts, there may be created within any existing school district a new school district by a duly licensed child care institution operating facilities within said existing school district in the manner set forth herein.

**History:** En. Sec. 2, Ch. 105, L. 1965.

**75-5503. Application for creation of district—plan of operation—area to be included—approval or disapproval—review.** The county superintendent or superintendents of a school district shall create a separate school district for the education of children attending a duly licensed child care institution;

(1) When an application of a duly licensed child care institution is submitted to him or them; or

(2) When the petition of twenty per cent (20%) of the resident freeholders residing within a school district where such a child care institution is operating is submitted to him or them.

The child care institution within the new district shall submit a plan of operation including details of financing to the county superintendent or superintendents. The plan must be approved by him or them before the institution may operate under it. And be it further approved that all such money as has accrued shall remain to the credit of the parent school district. The application of the duly licensed child care institution or when petition is made shall specifically describe the area proposed to be included within said new school district, the estimated number of qualified electors and of pupils in said district and the estimated assessed valuation and taxable valuation of the property within such area as shown by the last completed assessment roll district. The clerk of the school district shall forthwith advise the county superintendent of the action of the board and the county superintendent of schools shall within ten (10) days after receiving such advice make an order in accordance therewith, provided that if the county superintendent shall conclude that the creating, existence and operation of such a new school district is not practical or feasible he shall have the authority to disapprove the same. The action taken by the county superintendent shall be subject to review by the state superintendent of public instruction whose decision shall be final.

**History:** En. Sec. 3, Ch. 105, L. 1965.

**75-5504. Hearing on application—time and place—notice—open to public—record of proceedings.** On receipt of such an application the county superintendent shall set a time for a hearing with respect to said application within thirty (30) days of such receipt and notice thereof shall be posted on the front door of the schoolhouse of the existing school district where the hearing is to be held for at least ten (10) days prior to such hearing. The hearing shall be open to the public and shall be at the schoolhouse of the existing district or at a designated schoolhouse if there be more than one and there shall be in attendance the trustees and clerk of the existing school district who shall be separately notified in



writing of the time and place of the hearing by the county superintendent. The applicant shall also be notified in writing of the time and place of the hearing by the county superintendent. Such notice shall be given at least ten (10) days prior to the hearing. The county superintendent shall preside at the hearing and shall see that a record of the proceedings is kept.

History: En. Sec. 4, Ch. 105, L. 1965.

**75-5505. Conduct of hearing—evidence supporting application—opposition.** The applicant shall present such information and data in support of its application as it deems necessary and appropriate. The trustees of the existing district and the county superintendent may ask such questions as are pertinent to the application of any person or persons presenting information or data in behalf of the applicant and may present information and data in support of or in opposition to the application.

History: En. Sec. 5, Ch. 105, L. 1965.

**75-5506. Action by board of trustees of existing district—order of county superintendent—review.** Within thirty (30) days after the hearing the board of trustees of the existing district shall at a regular or special meeting thereof determine by majority vote whether or not the proposed new district is acceptable to the existing district. The clerk of the school district shall forthwith advise the county superintendent of the action of the board and the county superintendent shall within ten (10) days after receiving such advice make an order in accordance therewith, provided that if the county superintendent shall conclude that the creating, existence and operation of such a new school district is not practical nor feasible he shall have the authority to disapprove the same. The action taken by the county superintendent shall be subject to review by the state superintendent of public instruction whose decision shall be final.

History: En. Sec. 6, Ch. 105, L. 1965.

**75-5507. Order creating district—description of boundaries—district number—beginning of existence—trustees—laws governing.** If the order of the county superintendent shall provide for the creation of a new school district he shall specifically describe the boundaries thereof, designate the number of such school district and the said new district shall exist from and after the first day of July following the making of such an order. The county superintendent shall name the first trustees and designate the terms of office to be served by each until subsequent school elections shall determine their successors. All of the existing laws relating to school districts and their operations not inconsistent with this act shall apply to and govern such newly created district.

History: En. Sec. 7, Ch. 105, L. 1965.

**75-5508. Acquisition of contiguous land—boundaries of new district extended—children in area to attend school at child care institution.** In the event the duly licensed child care institution shall acquire land contiguous to the new school district after the creation of such school district, all children of persons residing upon such land shall attend the school for

which the new school district was created for the duly licensed child care institution and such acquisition of land shall, upon acquisition by the duly licensed child care institution, be deemed for all purposes attendant with school and school affairs as part of the school district created for the duly licensed child care institution and the county superintendent of schools shall consider such newly acquired land as may be acquired as the new boundary for the school district created for the duly licensed child care institution and such lands acquired shall be deemed a part of and within the duly licensed child care institution's school district.

**History:** En. Sec. 8, Ch. 105, L. 1965.

vided the act should be in effect from and after its passage and approval. Approved March 1, 1965.

**Effective Date**

Section 9 of Ch. 105, Laws 1965 pro-





# REVISED CODES OF MONTANA

## VOLUME 5

### Part 1

### 1969 Cumulative Pocket Supplement

#### *Containing*

AMENDMENTS TO ACTS AND NEW LAWS ENACTED BY THE  
LEGISLATIVE ASSEMBLY SINCE PUBLICATION OF  
REPLACEMENT VOLUME 5 (PART 1) OF  
THE 1947 REVISED CODES

#### AND

ANNOTATIONS SUPPLEMENTING REPLACEMENT VOLUME 5  
(PART 1) THROUGH VOLUME 447, PACIFIC  
REPORTER (2ND SERIES)

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## NEW LAWS IN VOLUME 5 (Part 1)

For index see pocket supplement to Replacement Volume 9

### ENACTED IN 1967

Arts council, state, 82-3601 to 82-3609.  
Bond Validating Act, 79-2001 to 79-2004.  
Claims against state, assignment, 83-901 to 83-904.  
Criminal investigator, state, 82-414 to 82-420.  
Entomologist, state, 82-804.1 to 82-804.4.  
Glendive mental retardation center, 80-2310 to 80-2312.  
Juvenile correctional institutions, 80-1410 to 80-1413.  
Juvenile reception and evaluation center, 80-1704.  
Law enforcement, teletypewriter communication system, 82-3901 to 82-3906.  
Legislative Audit Act, 79-2301 to 79-2313.  
Mental health programs and centers, 80-2401.1, 80-2405 to 80-2411.  
Planning and Economic Development Act, 82-3701 to 82-3709.  
Post-Attack Resource Management Act, 77-1501 to 77-1508.  
Post-Enemy-Attack Continuity in Government Act, 82-3801 to 82-3809.  
Public contractors delinquent in performance, 82-1927, 82-1928.  
Residence of public contractor, determination, 82-1925.1.  
State building program, scheduling, 78-910.  
State fire marshal, promulgation of rules, 82-1202.1, 82-1202.2.  
State land resources, development, 81-2401 to 81-2408.  
State lands, equalization payments to counties, 81-1115 to 81-1121.

### ENACTED IN 1969

After care division, department of institutions, 80-1414 to 80-1416.  
Archives for preservation of records, 82-3207 to 82-3209.  
Biennial reports to governor, 82-4001, 82-4002.  
Bond Validating Act, 79-2001 to 79-2004.  
Contractors with state, 82-4101 to 82-4104.  
General fund, reimbursement for cost of central services, 79-2401 to 79-2415.  
Governor-elect, orderly transition of power to, 82-1311 to 82-1314.  
Reconstruction of capitol, construction of supreme court building, 78-1201 to 78-1209.  
Soil and water conservation districts, 76-220 to 76-233.

## AMENDMENTS IN VOLUME 5 (Part 1)

Adjutant general, 77-117, 77-120.  
Administration, state department, 82-3303, 82-3306, 82-3316, 82-3317.  
Aging problems, state committee, 82-3501 to 82-3505.  
Arts council, 82-3606.  
Audit charge for agencies financed by earmarked funds, 79-2313.  
Auditor's fiscal duties, 79-101, 79-102, 79-108, 79-109.  
Bonds, long-range building program, 79-2202, 79-2203, 79-2205.  
Budget estimates, 79-1013.  
Civil defense, 77-1304.  
Commitment to juvenile facility, 80-2204.  
Controller, state, 79-1012, 82-109.2, 82-110, 82-111.  
Examiner, state, 82-1002, 82-1005, 82-1007, 82-1009, 82-1011.  
Fire marshal, state, 82-1201 to 82-1202.2, 82-1208, 82-1209, 82-1211, 82-1218, 82-1231.  
Forester, state, 81-1411.  
Hail insurance, state board, 82-1516, 82-1519.  
Indian affairs, co-ordinator, 82-2701 to 82-2703.  
Land commissioners, 81-103.  
Natural resources, state council, 82-3001 to 82-3003.  
Printing, prices for state, 82-1149.  
Prison, 80-1903, 80-1908 to 80-1911.  
Purchasing department, state, 82-1910, 82-1916, 82-1924 to 82-1926.



## AMENDMENTS IN VOLUME 5 (Part 1)

Soil and water conservation districts, 76-103, 76-104, 76-107, 76-108, 76-201, 76-205 to 76-210, 76-215, 76-216.  
State depository board, 79-301.  
State finance, contingent revolving accounts, 79-602.  
State institutions,  
    Boulder river school and hospital, 80-2301 to 80-2309.  
    Deaf and blind, 80-105, 80-107.  
    Department of institutions, 80-1403, 80-1404, 80-1405.  
    Eastmont training center, 80-1403.  
    Galen state hospital, 80-1701 to 80-1703.  
    Glendive mental retardation center, 80-2310, 80-2312.  
    Institutionalized persons, payment for care of, 80-1601, 80-1603.  
    Payment for care of residents, 80-1601.  
    Vocational and industrial schools, 80-2202 to 80-2206, 80-2209 to 80-2212.  
    Warm Springs state hospital, 80-2401 to 80-2404.  
State lands, 81-209, 81-304, 81-502, 81-1403.  
Supreme court clerk, 82-503.  
Supreme court reports, 82-2002.  
Teletype communications system for law enforcement made permanent, 82-3901 to 82-3906.  
Trust and legacy fund, invested money, 79-1202.  
Veterans' preference in public employment, 77-501.  
War orphans' attendance at university without fees, 77-909.

# MONTANA REVISED CODES

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## TITLE 76—SOIL AND WATER CONSERVATION

### Chapter

1. State soil and water conservation districts law, 76-103, 76-104, 76-107, 76-108.
2. Soil and water conservation district assessments and funds, 76-201, 76-205 to 76-210, 76-215, 76-216, 76-220 to 76-233.

### CHAPTER 1—STATE SOIL AND WATER CONSERVATION DISTRICTS LAW

#### Section

- 76-103. Definitions.  
76-104. State soil conservation committee.  
76-107. Appointment, qualifications and tenure of supervisors.  
76-108. Powers of districts and supervisors.

**76-103. Definitions.** Wherever used or referred to in this act, unless a different meaning clearly appears from the context:

(1) to (9). \* \* \* [Same as parent volume.]

(10) "Land occupier" or "occupier of land" includes any person, firm, corporation, municipality or other entity who shall hold title to, or shall be in possession of, any lands lying within a district organized under the provisions of this act, whether as owner, lessee, renter, tenant, or otherwise;

(11). \* \* \* [Same as parent volume.]

**History:** En. Sec. 3, Ch. 72, L. 1939;  
amd. Sec. 2, Ch. 73, L. 1961; amd. Sec. 1,  
Ch. 146, L. 1967.

#### Amendments

The 1967 amendment inserted "municipality or other entity" after "corporation" in subdivision (10).

**76-104. State soil conservation committee.** A. There is hereby established, to serve as an agency of the state, and to perform the functions conferred upon it in this act, the state soil conservation committee. The state soil conservation committee shall consist of seven (7) members. The following shall serve as members of the committee: The director of the state agricultural experiment station at Bozeman, Montana; the director of the state extension service at Bozeman, Montana; and the commissioner of the state department of agriculture. Four (4) members to be appointed by the governor from a list of twenty (20) submitted by the Montana association of soil and water conservation districts, at the next annual meeting of such association. In the formation of such list to be submitted to the governor, nominations shall be made by the convention and each district shall have one (1) vote. No person shall be eligible for the selection as a member unless he is at the time of selection or shall have been at some previous time a soil conservation district supervisor. From the

list of twenty (20) names submitted the governor shall appoint one (1) person to serve a one-year term, one (1) person to serve a two-year term, one (1) person to serve a three-year term, and one (1) person to serve a four-year term; thereafter each year a list of five (5) names will be compiled in the same manner and submitted to the governor, from which list the governor shall appoint one (1) person to serve a four (4) year term on the state soil conservation committee. In the event a vacancy should occur for any reason among the members a successor shall be appointed by the governor to fill the unexpired term, which successor must be chosen from the last previous list submitted to the governor. The committee may invite the secretary of agriculture of the United States of America to appoint one person to serve with the above-mentioned members as a non-voting member of the committee. The committee shall keep a record of its official actions, shall adopt a seal, which seal shall be judicially noticed, and may perform such acts, hold such public hearings, and promulgate such rules and regulations as may be necessary for the execution of its functions under this act.

B. The state soil conservation committee may employ an administrative officer and such other agents and employees, permanent and temporary, as it may require, and shall determine their qualifications, duties, and compensation. The committee may call upon the state for such legal services as it may require, or may employ its own counsel and legal staff. It shall have authority to delegate to its chairman, to one or more of its members, or to one or more agents or employees, such powers and duties as it may deem proper. Upon request of the committee for the purpose of carrying out any of its functions, the supervising officer of any state agency or of any state institution of learning shall, in so far as may be possible under available appropriations, and having due regard to the needs of the agency to which the request is directed, assign or detail to the committee members of the staff or personnel of such agency or institution of learning, and make such special reports, surveys, or studies as the committee may request.

C. The committee shall annually elect a chairman from its own membership. State committeemen shall continue as members of the state committee so long as they shall retain the offices by virtue of which they shall be serving on the committee. The appointed members shall hold office for four (4) years and their term of office shall be concurrent with the governor. A majority of the committee shall constitute a quorum, and the concurrence of a majority in any matter within their duties shall be required for its determination. Ex officio members of the committee shall receive no compensation for their services on the committee. Other members of the committee shall receive twenty dollars (\$20) per day while on duty. All members of the state committee shall be entitled to expenses, including traveling expenses, necessarily incurred in the discharge of their duties on the committee. The committee shall provide for the execution of surety bonds for all employees and officers who shall be entrusted with funds or property; shall provide for the keeping of a full and accurate record of all proceedings and of all resolutions, regulations, and



orders issued or adopted; and shall provide for an annual audit of the account of receipts and disbursements.

D. \* \* \* [Same as parent volume.]

**History:** En. Sec. 4, Ch. 72, L. 1939; amd. Sec. 1, Ch. 21, L. 1951; amd. Sec. 1, Ch. 47, L. 1967; amd. Sec. 1, Ch. 291, L. 1969.

#### Amendments

The 1967 amendment substituted "twenty dollars" for "five dollars" in subsection C.

The 1969 amendment, in the fourth sentence of subsection A, deleted "farmer" before "members" near the beginning, substituted "Montana association of soil and water conservation districts" for "Montana

soil conservation districts association," deleted "farmer" before "member" and "members" in the sixth and eighth sentences, respectively; in subsection B, deleted a former fourth sentence reading, "It shall be supplied with suitable office accommodations at the state college at Bozeman, Montana, and shall be furnished with the necessary supplies and equipment"; and, in the third sentence in subsection C, deleted "farmer" before "members."

**76-107. Appointment, qualifications and tenure of supervisors.** The governing body of the district shall, if there are no incorporated municipalities within the boundaries of said district, consist of five (5) supervisors, elected as provided hereinabove.

In all cases where the boundaries of such soil and water conservation district includes any incorporated municipality or municipalities, said board of supervisors, in addition to said five (5) elected supervisors, shall consist of two (2) appointed supervisors, making a total of seven (7) supervisors in such districts. The two (2) appointed supervisors must be residents of the municipalities within the district. The legislative bodies of the incorporated municipalities within the district shall, after consultation with the elected supervisors, appoint the two (2) additional supervisors. The term of office of the appointed supervisors shall be three (3) years.

Where there are more than two (2) incorporated municipalities within a district then the two (2) appointed supervisors shall represent all the municipalities and urban interests in the district, and no municipality shall have more than one (1) appointed supervisor residing therein.

The supervisors shall annually elect a chairman from their members. The term of office of each supervisor shall be three (3) years, except that the supervisors who are first appointed shall be designated to serve for terms of one (1) and two (2) years, respectively, from the date of their appointment. An elected supervisor shall hold office until his successor has been elected and has qualified. Any vacancy occurring in the office of an elected supervisor shall be filled by appointment by the remaining supervisors until the next regular election, when a successor shall be elected to serve the unexpired term. A majority of the supervisors shall constitute a quorum and the concurrence of a majority in any matter within their duties shall be required for its determination. A supervisor shall receive no compensation for his services, but he shall be entitled to expenses, including traveling expenses, necessarily incurred in the discharge of his duties.

The supervisors may employ a secretary and such other officers, agents, and employees, permanent and temporary, as they may require, and shall

determine their qualifications, duties, and compensation. The supervisors may call upon the attorney general of the state for such legal services as they may require, or may employ their own counsel and legal staff. The supervisors may delegate to their chairman, to one or more supervisors, or to one or more agents or employees, such powers and duties as they may deem proper. The supervisors shall furnish to the state soil conservation committee, copies of such ordinances, rules, regulations, orders, contracts, forms, and other documents as they shall adopt or employ, and such other information concerning their activities as may be required in the performance of its duties under this act.

The supervisors shall provide for the execution of surety bonds for all employees and officers who shall be entrusted with funds or property; shall provide for the keeping of a full and accurate record of all proceedings, and of all resolutions, regulations, and orders issued or adopted; and shall provide for an annual audit of the accounts of receipts and disbursements. Any supervisor may be removed by the state soil conservation committee upon notice and hearing, for neglect of duty or malfeasance in office, but for no other reason.

The supervisors may invite the legislative body of any municipality or county located near the territory comprised within the district to designate a representative to advise and consult with the supervisors of the district on all questions of program and policy which may affect the property, water supply, or other interests of such municipality or county.

**History:** En. Sec. 7, Ch. 72, L. 1939; amd. Sec. 1, Ch. 4, L. 1959; amd. Sec. 2, Ch. 146, L. 1967.

the boundaries of said district" in the first sentence of the first paragraph; inserted the second and third paragraphs; and inserted "an elected" before "supervisor" in the third and fourth sentences of the fourth paragraph.

#### **Amendments**

The 1967 amendment inserted "if there are no incorporated municipalities within

**76-108. Powers of districts and supervisors.** A. A soil conservation district organized under the provisions of this act shall constitute a governmental subdivision of this state, and a public body corporate and politic, exercising public powers, and such district, and the supervisors thereof, shall have the following powers, in addition to others granted in other sections of this act:

(1) \* \* \* [Same as parent volume.]

(2) To conduct soil, vegetation, and water resources conservation projects on lands within the districts upon obtaining the consent of the owner of such lands or the necessary rights or interest in such land;

(3) To carry out preventive and control measures and works of improvement for flood prevention and the conservation, development, utilization, and disposal of water within the district, including, but not limited to, engineering operations, range management, methods of cultivation, the growing of vegetation, changes in use of land, and the measures listed in subsection C of section 76-102, R. C. M. 1947, on lands owned or controlled by this state or any of its agencies with the co-operation of the agency administering and having jurisdiction thereof, and on any other

lands within the district upon obtaining the consent of the occupier of such lands or the necessary rights or interests in such lands;

(4) and (5). \* \* \* [Same as parent volume.]

(6) To make available on such terms as it shall prescribe, to land occupiers within the district, agricultural and engineering machinery and equipment, fertilizer, seeds and seedlings, and such other material or equipment, as will assist such land occupiers to carry on operations upon their lands for the conservation of soil resources and for the prevention and control of soil erosion, and for flood prevention and the conservation, development, utilization, and disposal of water;

(7) to (11) \* \* \* [Same as parent volume.]

(12) To borrow money and incur indebtedness and to issue bonds or other evidence of such indebtedness; also to refund or retire an indebtedness or lien that may exist against the district or property thereof;

(13) To fix and revise as necessary and collect rates, fees, tolls, rents, or other charges for the use of or for services, facilities and materials furnished or provided. Revenues from these sources may be expended in carrying out the purposes and provisions of this act;

(14) To cause taxes to be levied in the same manner provided for in Title 76, chapter 2, R. C. M. 1947, for the purpose of paying any obligation of the district and to accomplish the purposes of this act in the manner herein provided.

B. No provisions with respect to the acquisition, operation, or disposition of property by other public bodies shall be applicable to a district organized hereunder unless the legislature shall specifically so state.

**History:** En. Sec. 8, Ch. 72, L. 1939; amd. Sec. 2, Ch. 5, L. 1959; amd. Sec. 2, Ch. 291, L. 1969.

see parent volume; in subdivision (3), inserted "R. C. M. 1947" after "section 76-102" and substituted "or" for "of" before "the necessary rights"; in subdivision (6), inserted "and" before "disposal of water"; inserted present subdivisions (12) through (14); and designated former subdivision (12) as subsection B.

#### Amendments

The 1969 amendment designated the first paragraph as subsection A; rewrote subdivision (2), for previous text of which

### CHAPTER 2—SOIL AND WATER CONSERVATION DISTRICT ASSESSMENTS AND FUNDS

#### Section

- 76-201. Notice of organization of district filed.
- 76-205. Division between counties of money to be raised by regular and special assessment.
- 76-206. Expenses to be covered by estimate.
- 76-207. Regular and special assessments.
- 76-208. Maximum regular assessment.
- 76-209. Levy of regular and special assessment.
- 76-210. Computation of rate of assessment.
- 76-215. Depository of district funds.
- 76-216. Receipt and crediting of district funds—responsibility on bond.
- 76-220. District authorized to borrow money—pledging credit of district or issuance of warrants—levy for repayment—limitation on warrants.
- 76-221. Investment of funds in interest-bearing securities authorized—conversion into cash.
- 76-222. Investment of unneeded surplus funds—deposit of funds with depository or bank—surety bond or pledge of securities to ensure payment of deposit.
- 76-223. Issuance of bonds authorized—other financing—special elections.
- 76-224. Establishment of project areas upon petition—special assessments.



- 76-225. Hearing on petition to establish project area—report of supervisors—election on creation—filing notice of creation.
- 76-226. Protests against proposed projects or creation of project area.
- 76-227. Description of work or project area.
- 76-228. District area included in project area—administration of affairs.
- 76-229. Estimates of expenses of project area—financing by assessments.
- 76-230. Federal authority unaffected.
- 76-231. Special assessments a lien.
- 76-232. Assessments unaffected by misnomers and mistakes relating to ownership.
- 76-233. Duty to maintain improvements.

**76-201. Notice of organization of district filed.** The supervisors of a soil and water conservation district shall, within ten (10) days after the creation of the district, or within thirty (30) days after the effective date of this act, cause a notice declaring the district organized to be filed for record in the office of the county clerk and recorder of each county in which any portion of the district is situated.

**History:** En. Sec. 1, Ch. 253, L. 1963;      **Amendments**  
 amd. Sec. 3, Ch. 291, L. 1969.      The 1969 amendment inserted “and water” before “conservation district.”

**76-205. Division between counties of money to be raised by regular and special assessment.** If the district lies in more than one county the supervisors of the district shall divide the amount of the estimate of the regular assessment in the proportion to the value of the land in the district lying in each county. The value shall be determined from the last assessment rolls of the counties. The supervisors shall furnish the boards of county commissioners of each of the respective counties a statement of the part of the estimate apportioned to the county. The estimates of the special assessments shall be divided in proportion to the value of land lying within the project area.

**History:** En. Sec. 5, Ch. 253, L. 1963;      **Amendments**  
 amd. Sec. 4, Ch. 291, L. 1969.      The 1969 amendment inserted “of the regular assessment” after “amount of the estimate” in the first sentence; and added the last sentence.

**76-206. Expenses to be covered by estimate.** The total amount of the estimate shall be sufficient to raise the amount of money necessary during the ensuing year to pay the incidental expenses of the district.

**History:** En. Sec. 6, Ch. 253, L. 1963;      mated cost of repairs to and maintenance  
 amd. Sec. 5, Ch. 291, L. 1969.      of property and works and estimated expenses of any action or proceeding to which district was or might be a party, including the cost of employing engineers and attorneys.

**Amendments**  
 The 1969 amendment deleted provisions requiring that estimate be sufficient for costs of work during ensuing year, esti-

**76-207. Regular and special assessments.** Assessments levied pursuant to this act shall be known as regular and special assessments.

**History:** En. Sec. 7, Ch. 253, L. 1963;      **Amendments**  
 amd. Sec. 6, Ch. 291, L. 1969.      The 1969 amendment inserted “and special” before “assessments.”

**76-208. Maximum regular assessment.** The regular assessment in any one (1) year shall not exceed one and one-half ( $1\frac{1}{2}$ ) mills on the dollar of total taxable valuation of real property within the district, except that within incorporated cities and towns. The valuation shall be determined according to the last assessment roll.

**History:** En. Sec. 8, Ch. 253, L. 1963; amd. Sec. 3, Ch. 152, L. 1965; amd. Sec. 7, Ch. 291, L. 1969.

**Amendments**

The 1969 amendment increased the assessment from "one-half ( $\frac{1}{2}$ ) of one (1) mill" to "one and one-half ( $1\frac{1}{2}$ ) mills" and substituted "district" for "county" in the first sentence.

**76-209. Levy of regular and special assessment.** The board of county commissioners of each county in which there lies any portion of the district may, annually, at the time of levying county taxes, levy an assessment on the taxable real property within the district, except that within incorporated cities and towns. It shall be known as the "..... (name of district) soil and water conservation district regular assessment," and shall be sufficient to raise the amount reported to them in the estimate of the supervisors.

The board of county commissioners of each county in which there lies any portion of a project area may, annually, at the time of levying county taxes, levy an assessment on the taxable real property within the project area, not to exceed three (3) mills. It shall be known as "..... (name of the project area) special assessment," and shall be sufficient to raise the amount reported to them in the estimate of the supervisors.

**History:** En. Sec. 9, Ch. 253, L. 1963; amd. Sec. 4, Ch. 152, L. 1965; amd. Sec. 8, Ch. 291, L. 1969.

**Amendments**

The 1969 amendment substituted "district" for "county" after "real property within the" in the first sentence; in the second sentence, substituted "soil and wa-

ter conservation district regular assessment" for "soil conservation district assessment" and deleted a proviso at the end reading, "provided, however, that income from the levy of the assessment provided in this act for any single district shall not exceed one thousand dollars (\$1000)"; and added the second paragraph.

**76-210. Computation of rate of assessment.** The board of county commissioners shall determine the rate of assessment by deducting fifteen per cent (15%) for anticipated delinquencies from the total assessed value of the taxable real property in the district, except that within incorporated cities and towns and then dividing the sum required to be raised by the remainder of the total assessed value. If a fraction of a cent occurs in a valuation of one hundred dollars (\$100) it shall be taken as a full cent.

**History:** En. Sec. 10, Ch. 253, L. 1963; amd. Sec. 5, Ch. 152, L. 1965; amd. Sec. 9, Ch. 291, L. 1969.

**Amendments**

The 1969 amendment substituted "district" for "county" and inserted "that" before "within incorporated cities" in the first sentence.

**76-215. Depository of district funds.** The treasury of the principal county is the depository of all of the county tax funds of the district.

**History:** En. Sec. 15, Ch. 253, L. 1963; amd. Sec. 10, Ch. 291, L. 1969.

**Amendments**

The 1969 amendment inserted "county tax" before "funds."

**76-216. Receipt and crediting of district funds—responsibility on bond.**

The treasurer of the principal county shall receive and receipt for all county tax money of the district and place the same to the credit of the district. He is responsible on his official bond for the safekeeping and disbursement, in the manner provided in this act, of the money of the district held by him.

**History:** En. Sec. 16, Ch. 253, L. 1963;  
amd. Sec. 11, Ch. 291, L. 1969.

**Amendments**

The 1969 amendment inserted "county tax" before "money of the district" in the first sentence.

**76-220. District authorized to borrow money—pledging credit of district or issuance of warrants—levy for repayment—limitation on warrants.**

If after the levy of the annual assessments for the current year, the board finds that because of some unusual of unforeseen cause, funds raised through the collection of the assessments, and from other sources, will not be sufficient for the proper maintenance and operation of the district, and the works therein, the board may borrow additional funds needed to an amount not to exceed fifty cents (\$.50) per acre for the lands within the district and may pledge the credit of the district for the payment of the same, or the board may request the county commissioners to issue and register warrants in anticipation of further collections. The board shall include in the levy for the ensuing year the amount required to pay the loan or to retire the warrants. The warrants shall not exceed ninety per cent (90%) of the assessment for the year.

**History:** En. Sec. 12, Ch. 291, L. 1969.

**76-221. Investment of funds in interest-bearing securities authorized**

**—conversion into cash.** The board of supervisors shall have the power and authority to direct the investment of funds in a sinking fund in interest-bearing securities whenever in their judgment the same may be to the best interests of the district. But, all such securities shall be converted into cash in time to meet the principal on the bonds, payable from such sinking fund promptly at their maturity.

**History:** En. Sec. 13, Ch. 291, L. 1969.

**76-222. Investment of unneeded surplus funds—deposit of funds with depository or bank—surety bond or pledge of securities to ensure payment of deposit.**

The board of supervisors of a soil and water conservation district may invest any surplus funds of the district, except county tax funds, not needed for immediate use in the operations of the district or its activities, or to pay bonds or coupons, or to meet current expenses, in interest-bearing bonds or securities of the United States or of any agency of the United States if the bonds are guaranteed by the United States, or in bonds of the state of Montana or any county or municipal corporation in said state. The board of supervisors of said district may require any funds of the district to be deposited with such depository or bank as may be designated by the board, and likewise shall have authority to require the treasurer of the district to take from such depository a



bond with corporate surety to ensure payment of any such deposit, or to require such depository to pledge securities of the same kind as the district is authorized to invest its funds in, to ensure payment of any such deposit.

**History:** En. Sec. 14, Ch. 291, L. 1969.

**76-223. Issuance of bonds authorized—other financing—special elections.** Whenever a board of supervisors deems it necessary, it may issue bonds payable from revenues, assessments, or both, or the district may use other financing as provided for by this act for the cost of works. The board of supervisors may call a special election to vote upon the proposition of issuing the bonds or may submit the proposition as a special question at a regular or general election. The notice of the election and the election itself shall be carried out in accordance with section 18 [17] [76-225] of this act. If from the returns of the election it appears that the majority of votes cast at such election were in favor of and assented to the incurring of the indebtedness, then the board of supervisors may, by resolution, provide for the issuance of such bonds. The authorization of such undertaking, the form, and content shall be carried out in accordance with section 11-2404 of the Municipal Revenue Bond Act of 1939. Validity of such bonds, use of revenue, and refunding shall be in accordance with the provisions of sections 11-2406, 11-2410, and 11-2414 of the Municipal Revenue Bond Act of 1939. Any bonds issued under this act have the same force, value, and use as bonds issued by a municipality and are exempt from taxation as property within the state of Montana.

**History:** En. Sec. 15, Ch. 291, L. 1969.

**Compiler's Notes**

The compiler inserted the bracketed number "17" and reference to "76-225" in the third sentence.

**76-224. Establishment of project areas upon petition—special assessments.** Whenever the public interest or convenience may require, and upon the petition of a county, city, village, or by a co-operative grazing association or other special purpose district, or by more than fifty per cent (50%) of the freeholders affected thereby the board of supervisors is hereby authorized and empowered to establish project areas for carrying out projects to accomplish one or more of the purposes of the district and within which area special assessments can be made for carrying out project purposes.

**History:** En. Sec. 16, Ch. 291, L. 1969.

**76-225. Hearing on petition to establish project area—report of supervisors—election on creation—filing notice of creation.** Upon receipt of a petition to establish a project area the board or boards of supervisors shall cause due notice to be given of a public hearing on the petition. Prior to the hearing the board or boards of supervisors shall make, or cause to be made, an investigation of the need for establishment of the proposed project area and shall prepare a report of their findings. The report shall be presented and read at the hearing on the petition. If the

board, or boards, of supervisors finds that it is not feasible, desirable or practical to establish the proposed project area it shall make an order denying the petition and shall state therein its reasons for so doing. If, however, the board finds that the project is desirable, proper and necessary, it shall grant the petition, establish the boundaries of the proposed project area specifying those lands that will be benefited by the proposed project area and excluding those lands that will not be so benefited, and give due notice of an election to be held in the proposed area for the purpose of determining whether or not the project area shall be created. The question shall be submitted to the electors by ballot on which the words "For creation of proposed project area" and "Against creation of proposed project area" shall appear, with a square before each proposition and directions to insert an "X" mark in the square before one or the other of said propositions as the voters may favor or oppose creation of the project area. No person shall be entitled to vote at the election unless such person possesses all the qualifications required of electors under the general laws of the state and is the owner of taxable real property situated within the boundaries of the proposed project area and located within the county in which he proposes to vote. If the majority of the votes cast at the election are in favor of creating a project area, the board, or boards, of supervisors shall create the project area and shall file with the county clerk and recorder in each county in which there lies a portion of the project area a notice of creation of the project area setting forth the purposes of the area and the boundaries thereof.

History: En. Sec. 17, Ch. 291, L. 1969.

**76-226. Protests against proposed projects or creation of project area.** At any time within fifteen (15) days after the date of the last publication of the notice of the hearing on the petition, any owner of property liable to be assessed for the project may protest against the proposed project or the creation of the project area or both. The protest must be in writing and be delivered to the secretary of the soil and water conservation district who shall endorse thereon the date of its receipt by him. At the public hearing on the petition the board of supervisors shall proceed to hear and pass upon all protests made and its decision shall be final and conclusive; except when owners of more than fifty per cent (50%) of the land in the proposed project area protest the project. If owners of more than fifty per cent (50%) of the land protest the project, no further action may be taken for a period of six (6) months from the date of the hearing, after which a new petition may be filed.

History: En. Sec. 18, Ch. 291, L. 1969.

**76-227. Description of work or project area.** In all resolutions, notices, orders and determinations, it shall be sufficient to briefly describe the work or the project area, or both.

History: En. Sec. 19, Ch. 291, L. 1969.

**76-228. District area included in project area—administration of affairs.** A project area may include a part or all of any district or may include areas in more than one (1) district. The affairs of a project area

shall be administered by the board, or boards, of supervisors or their authorized agents.

**History:** En. Sec. 20, Ch. 291, L. 1969.

**76-229. Estimates of expenses of project area—financing by assessments.** When a project area has been created, the board, or boards, of supervisors shall estimate the expenses of the project area from the date of its establishment until the end of the ensuing fiscal year and before July 1, in each year thereafter shall estimate project area expenses for the fiscal year ensuing. Estimates of project area expenses may include revenue needed to pay the interest or principal of any bonded debt, costs of rights of way, easements, or other interest in property deemed necessary for the construction, operation and maintenance of any projects therein. The expense of the project area may, in the discretion of the board, or boards, of supervisors, be financed in whole from revenue received by regular assessments or by revenue received in part from regular assessments and in part from special assessments. Upon adoption of a budget covering necessary expenses, the board, or boards, of supervisors shall send a copy of such budget or apportionment thereof to the board of county commissioners and/or city auditor of each county and/or city in the project area. When the board, or boards, of supervisors has determined that a special assessment is necessary, the board of county commissioners of such county in which there lies any portion of a project area shall annually, at the time of levying county taxes, levy a special assessment of the taxable real property in the project area, not to exceed three (3) mills. It shall be known as the "\_\_\_\_\_ (name of district) soil and water conservation district special assessment," and shall be sufficient to raise the income reported to them in the estimate of the supervisors. Each lot or parcel of land to be assessed shall be assessed with that part of the amount of money required which its taxable valuation bears to the total taxable valuation of all the lands to be assessed. Funds produced each year by this special tax levy shall be available until spent, and if this special tax levy in any year does not produce sufficient revenue to pay the project area expenses, a fund sufficient to pay the same may be accumulated. A special assessment to defray the expenses of a project area may be spread over a term of not to exceed forty (40) years.

**History:** En. Sec. 21, Ch. 291, L. 1969.

**76-230. Federal authority unaffected.** The provisions of this section shall not apply to the government of the United States or any department, bureau, or agency thereof, except to such extent as the government of the United States or any department, bureau, or agency thereof may desire to take advantage of its provisions, it being the express purpose and intent of this section to aid but not to interfere with the government of the United States or of any department, bureau, or agency thereof in any undertaking over which such federal authority desires to exercise full supervision and control. The provisions of this section shall not be construed to impair, limit, or repeal any right whatsoever, which the government of the United States or any department, bureau, or agency thereof



has to full and complete jurisdiction, management, or control over projects over which such federal authority desires to exercise such rights, it being the purpose of this section expressly to subordinate any power of jurisdiction and to never interfere directly with such federal authority.

**History:** En. Sec. 22, Ch. 291, L. 1969.

**76-231. Special assessments a lien.** Any special assessment made and levied to defray the cost and expenses of any of the work enumerated in this act, together with any percentages imposed for delinquency and for cost of collection, shall constitute a lien against the property upon which such assessment is levied, and after the date levying such assessment, which lien can only be extinguished by payment of such assessment, with all penalties, costs and interest.

**History:** En. Sec. 23, Ch. 291, L. 1969.

**76-232. Assessments unaffected by misnomers and mistakes relating to ownership.** When under the provisions of this act special taxes and assessments are assessed against any lot or parcel of land as the property of a particular person, no misnomer of the owner or supposed owner or other mistake, relating to the ownership thereof, shall affect such assessment or render it void or voidable.

**History:** En. Sec. 24, Ch. 291, L. 1969.

**76-233. Duty to maintain improvements.** Whenever any project petitioned for, or created by the state or federal government, has been made, built, constructed, erected or accomplished as in this act provided, it is hereby made the duty of the board, or boards, of supervisors, under whose jurisdiction the project area was created, to adequately and suitably maintain and preserve said improvements and fully to keep the same in proper repair and operation by contract or otherwise, in the way or manner as the board shall deem suitable and proper.

**History:** En. Sec. 25, Ch. 291, L. 1969.

## TITLE 77—SOLDIERS, SAILORS AND MILITARY AFFAIRS

### Chapter

1. Militia, composition, enrollment—officers, general provisions, 77-117, 77-120.
5. Soldiers and sailors preference in public employment, 77-501.
9. Veterans' free tuition at university of Montana, 77-909.
13. Civil defense, 77-1304.
15. Post-attack resource management, 77-1501 to 77-1508.

### CHAPTER 1—MILITIA, COMPOSITION, ENROLLMENT—OFFICERS, GENERAL PROVISIONS

#### Section

- 77-117. The adjutant general of the state—assistant adjutants general.  
77-120. Duties of adjutant general—salary.

**77-117. (1346) The adjutant general of the state—assistant adjutants general.** There shall be an adjutant general of the state of Montana, who shall be appointed by the governor, and shall have the rank of major general. He shall hold office for the term for which the governor appointing him shall have been elected, and until his successor shall have been appointed. He shall be selected from the active list of the national guard of this state and shall have been federally recognized in the rank of major or above immediately prior to his appointment. He shall have had at least ten (10) years of service as an officer of the active national guard of this state during the fifteen (15) years immediately prior to his appointment. He shall perform the duties prescribed for him in this chapter and in the regulations now or hereafter issued thereunder, and in the statutes of the United States now or hereafter enacted, and such duties as pertain to the duties of the chiefs of staff departments. The salary of the adjutant general shall be in such amount as may be specified by the legislative assembly in the appropriation to the adjutant general. If the legislative assembly does not specify the maximum salary of the adjutant general, any increase in the salary of the adjutant general must be approved by the board of examiners. Before approving any salary increase, the board of examiners shall review the salaries of comparable positions in Montana state government, other states, and private industry, provided, however, that no part of said salary shall be paid by the state when the adjutant general is on extended active duty with the United States military service or is receiving pay as a civilian employee of the federal government; provided that if, by reason of the call or draft of officers of the Montana national guard into the federal service, there are no officers of the national guard possessing the requisite qualifications as set forth above for appointment, then any officer of the national guard may be appointed as acting adjutant general.

The adjutant general shall establish, within the state headquarters of the Montana national guard, separate departments for the army national guard and the air national guard. Each department shall have a brigadier

general at its head, who will be referred to as assistant adjutant general for Montana army national guard and assistant adjutant general for Montana air national guard. The assistant adjutants general shall be appointed by the adjutant general with the approval of the governor. One (1) shall be selected from the active list of the Montana army national guard and the other from the active list of the Montana air national guard, and each must have the qualifications set forth above for appointment as adjutant general. They shall perform such duties as are prescribed by the adjutant general.

**History:** En. Sec. 23, Ch. 191, L. 1919; re-en. Sec. 1346, R. C. M. 1921; amd. Sec. 1, Ch. 21, L. 1949; amd. Sec. 1, Ch. 26, L. 1955; amd. Sec. 1, Ch. 272, L. 1959; amd. Sec. 1, Ch. 74, L. 1963; amd. Sec. 5, Ch. 237, L. 1967.

#### Amendments

The 1967 amendment, in the first paragraph, substituted the sixth and seventh sentences and the portion of the eighth sentence preceding the proviso, for a sentence fixing the salary at \$7,500.

**77-120. (1349) Duties of adjutant general—salary.** The adjutant general shall be ex officio chief of staff. He shall hold office until his successor is appointed and qualified. He shall appoint the civilian employees of his department, and may remove any of them in his discretion.

The expenses of the adjutant general's department, necessary to the military service, shall be audited, allowed, and paid as other military expenditures are audited, allowed, and paid.

1. The adjutant general shall keep a roster of all active, reserve, and retired officers of the militia of the state, and keep in his office all records and papers required to be kept and filed therein, and shall report as provided in section 2 [82-4002] of this act.

2 to 11. \* \* \* [Same as parent volume.]

12. The annual salary of the assistant adjutant shall be in such amount as may be specified by the legislative assembly in the appropriation to the adjutant general. If the legislative assembly does not specify the maximum salary of the assistant adjutant general, any increase in the salary of the assistant adjutant general must be approved by the board of examiners. Before approving any salary increase, the board of examiners shall review the salaries of comparable positions in Montana state government, other states, and private industry.

**History:** En. Sec. 20, Ch. 191, L. 1919; re-en. Sec. 1349, R. C. M. 1921; subd. 12: En. Sec. 1, Ch. 118, L. 1947; re-en. Sec. 1, Ch. 20, L. 1949; subd. 13: Sec. 2, Ch. 118, L. 1947 as added Sec. 1, Ch. 20, L. 1949; amd. Sec. 2, Ch. 272, L. 1959; amd. Sec. 35, Ch. 177, L. 1965; amd. Sec. 6, Ch. 237, L. 1967; amd. Sec. 32, Ch. 93, L. 1969.

#### Amendments

The 1967 amendment substituted subparagraph 12 for one which read, "The annual salary of the adjutant general of the state of Montana shall be four thousand two hundred dollars (\$4,200.00)"; and deleted subparagraph 13, which read, "The annual salary of the assistant ad-

jutant general of the state of Montana shall be three thousand six hundred dollars (\$3,600.00)."

The 1969 amendment, in subparagraph 1, substituted the reporting requirements of section 82-4002 for former provision requiring a printed biennial report of the operations and conditions of the organized militia to be submitted to the governor during December of each even-numbered year.

#### Cross-References

Bonds of state officers and employees, sec. 6-105 et seq.



CHAPTER 5—SOLDIERS AND SAILORS PREFERENCE IN  
PUBLIC EMPLOYMENT

## Section

77-501. Purpose of act—Definitions—preference.

**77-501. (5653) Purpose of act—definitions—preference.** The purpose of this act is to provide for preference of veterans, their unremarried widows, and dependents, and certain disabled civilians in appointment and employment in every public department and upon all public works of the state of Montana and of any county and city thereof.

## (1) Definitions.

(a) The term “veterans” as herein used, means men and women who served in the armed forces of the United States, and who have been separated from such service upon conditions other than dishonorable, in time of war or declared national emergency as follows: the Civil War; the Spanish American War; the Philippine Insurrection; World War I, between April 6, 1917, and November 11, 1918, both dates inclusive; World War II, which term means such service between September 16, 1940, and December 31, 1946, both dates inclusive; the Korean War, military expedition, or police action, between June 26, 1950, and January 31, 1955, both dates inclusive; and those honorably discharged veterans who have served on active military duty for more than one hundred eighty (180) days after January 31, 1955, or who were discharged or released because of a service-connected disability, including, but not limited to, those veterans serving because of the Vietnam Conflict.

(b). \* \* \* [Same as parent volume.]

## (2) Preference to appointment and employment.

\* \* \* [Same as parent volume.]

## (3) Credit for examinations.

When written or oral examinations are required for employment as above described, disabled veterans and their wives, their unremarried widows, and other dependents of disabled veterans, shall have added to their examination ratings a credit of ten points, and all other veterans, their wives, unremarried widows, and dependents shall have added to their examination ratings a credit of five points; provided that the fact that an applicant has claimed a veterans' credit shall not be made known to the examiners until ratings of all applicants have been recorded; after which such credits shall be added to the examination rating and the records shall show the examination rating and the veteran's credit; provided further that the benefits of this subsection are in addition to and not in derogation of the preference in appointment and/or employment given by subsection (2) hereof.

## (4) Eligibility.

\* \* \* [Same as parent volume.]

## (5) Enforcement of preference.

\* \* \* [Same as parent volume.]

**History:** En. Sec. 1, Ch. 211, L. 1921; re-en. Sec. 5653, R. C. M. 1921; amd. Sec. 1, Ch. 133, L. 1927; amd. Sec. 1, Ch. 66, L. 1937; amd. Sec. 1, Ch. 160, L. 1943; amd. Sec. 1, Ch. 223, L. 1947; amd. Sec. 1, Ch. 26, L. 1949; amd. Sec. 1, Ch. 120, L. 1955; amd. Sec. 1, Ch. 193, L. 1969.

#### Amendments

The 1969 amendment, in subdivision (1), item (a), substituted "December 31, 1946" for "September 2, 1945" as terminal date for service in World War II and added "and those honorably discharged veterans \* \* \* because of the Vietnam Conflict"; deleted former item (c), which read, "The word 'per centum' means per centum of the

total aggregate points of the examination hereinafter referred to"; and in subdivision (3), substituted "ten points" and "five points" for "ten per centum (10%)" and "five per centum (5%)" after "credit of."

#### Separability Clause

Section 2 of Ch. 193, Laws 1969 read "It is the intent of the legislative assembly that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

### CHAPTER 9—VETERANS' FREE TUITION AT UNIVERSITY OF MONTANA

#### Section

77-909. War orphans' attendance to be without fees.

**77-909. War orphans' attendance to be without fees.** There shall be established under this act the authority of the state board of education to waive, the charges for the matriculation, tuition, any and all educational fees, for such children of members of the armed forces of the United States who served on active duty during World War II and/or the Korean or Vietnam conflicts and who, at the time of entry into such service, had legal residence in this state and who were heretofore, or shall hereafter be, either killed in action or shall have died as a result of injury, disease, or other disability incurred while in the service of the armed forces of the United States, as are now attending or may hereafter attend any of the units of the greater university of Montana, provided:

(a) and (b). \* \* \* [Same as parent volume.]

**History:** En. Sec. 1, Ch. 141, L. 1957; amd. Sec. 1, Ch. 150, L. 1965; amd. Sec. 1, Ch. 225, L. 1969.

#### Amendments

The 1969 amendment substituted "Korean or Vietnam conflicts" for "Korean conflict."

### CHAPTER 13—CIVIL DEFENSE

#### Section

77-1304. State civil defense agency.

**77-1304. State civil defense agency.** (a) There is hereby created in the state adjutant general's department, a civil defense agency, with a director of civil defense (hereinafter called the "director") who shall be the head thereof. The director shall be appointed by, and shall hold office at the pleasure of the governor, and shall be compensated at a salary to be fixed by the legislative assembly in the appropriation to the adjutant general. If the legislative assembly does not specify the maximum salary of the director of civil defense, any increase in the salary of the director

must be approved by the board of examiners. Before approving any salary increase the board of examiners shall review the salaries of comparable positions in Montana state government, other states, and private industry. The director shall devote his full time and energies to the duties of director of civilian defense including co-operation and co-ordination with the commander of the home guard.

(b) to (e). \* \* \* [Same as parent volume.]

**History:** En. Sec. 4, Ch. 218, L. 1951; amd. Sec. 3, Ch. 220, L. 1953; amd. Sec. 7, Ch. 237, L. 1967.

**Amendments**

The 1967 amendment, in subsection (a),

substituted "by the legislative assembly \* \* \* and private industry" before "The director" for "by the governor, which salary however, shall not exceed six thousand six hundred dollars (\$6,600.00) per year."

## CHAPTER 15—POST-ATTACK RESOURCE MANAGEMENT

### Section

- 77-1501. Citation of act.
- 77-1502. Legislative findings—policy of state.
- 77-1503. Definition of terms.
- 77-1504. State emergency resource planning committee—composition.
- 77-1505. Governor's powers and duties under act.
- 77-1506. Proclamation of emergency—governor's powers during emergency.
- 77-1507. Judicial inquiry as to emergency proclamation and facts.
- 77-1508. Penalty for violation of rules and regulations.

**77-1501. Citation of act.** This act may be cited as the "Post-attack Resource Management Act."

**History:** En. Sec. 1, Ch. 297, L. 1967.

**Title of Act**

An act to provide for the emergency management of resources.

**77-1502. Legislative findings—policy of state.** (1) The legislature recognizes that an attack upon the United States is a possibility; that such attack might be of unprecedented size and destructiveness; that a considerable period of time may elapse after an attack before federal operational control over the management of resources can be instituted; and that federal planning and activities with respect to post-attack recovery and rehabilitation necessarily are predicated on the ability of the states and their political subdivisions to prepare for, and respond promptly to, the problems created by an attack. Therefore, it is hereby found and declared to be necessary:

(a) To create an office of emergency resource management for the execution of a plan for emergency resource management;

(b) To confer upon the governor and upon the executive heads of governing bodies of political subdivisions of the state the emergency powers provided herein.

(2) It is further declared to be the purpose of this act and the policy of this state that all resource management functions of this state be co-ordinated to the maximum extent with the comparable functions of the federal government, of other states and localities, and of private agencies to the end that the most effective preparation and use may be made of available man power, resources, and facilities in an emergency.

**History:** En. Sec. 2, Ch. 297, L. 1967.



**77-1503. Definition of terms.** As used in this act, unless the context clearly indicates otherwise:

(1) "Emergency Resources Management Plan" shall mean that plan prepared by the state emergency resources planning committee, approved by the federal office of emergency planning and adopted by the governor, which sets forth the organization, administration, and functions for the emergency management by the state government of essential resources and economic stabilization within the state. The plan shall provide an emergency organization and emergency administrative policies and procedures for the conservation, allocation, distribution, and use of essential resources available to the state following a civil defense emergency such as an attack upon the United States. It shall be supplemental to the national plan for emergency preparedness adopted by the president of the United States, and shall become operative upon the establishment of a civil defense emergency. To the extent that the federal government is either incapable of or not prepared to conduct its emergency resources management program, the state plan will substitute for and replace the federal program until such time as the federal program becomes effective in the state.

(2) "Enemy attack" means an actual attack by a foreign nation by hostile air raids, or other forms of warfare, upon this state or any other state or territory of the United States.

(3) "Political subdivision" shall mean any county, city, town, or township of the state.

History: En. Sec. 3, Ch. 297, L. 1967.

**77-1504. State emergency resource planning committee—composition.**

(1) The governor may establish a state emergency resource planning committee (hereinafter referred to as the "state committee") and the office of state emergency planning director (hereinafter referred to as the "director"), and appoint to serve at his pleasure the members of such state committee and the director.

(2) The state committee shall consist of the governor, who shall be chairman, the director, other state officials designated by the governor, and persons representative of industry, commerce, labor, agriculture, civic, governmental, and professional groups designated by the governor. In the absence of the governor, the director shall act as chairman.

History: En. Sec. 4, Ch. 297, L. 1967.

**77-1505. Governor's powers and duties under act.** (1) The governor shall have general direction and control of the emergency resources management within this state and all officers, boards, agencies, individuals, or groups established under the emergency resource management plan.

(2) In performing his duties under this act, the governor is authorized to co-operate with the federal government, with other states, and with private agencies in all matters pertaining to the emergency management of resources.

(3) In performing his duties under this act, and to effect its policies and purpose, the governor is further authorized and empowered to make, amend, and rescind the necessary orders, rules, and regulations to carry

out the provisions of this act within the limits of authority conferred upon him herein, with due consideration of the emergency resources management plans of the federal government.

History: En. Sec. 5, Ch. 297, L. 1967.

**77-1506. Proclamation of emergency—governor's powers during emergency.** (1) Following an attack, the governor, if he finds such action necessary to deal with the danger to the public safety caused thereby or to aid in the post-attack recovery or rehabilitation of the United States or any part thereof, shall declare by proclamation the existence of a post-attack recovery and rehabilitation emergency. Any such proclamation shall be ineffectual, unless the legislature is then in session or the governor simultaneously issues an order convening the legislature in special session within forty-five (45) days.

(2) During the period when the proclamation issued pursuant to subsection (1) of this section is in force, or during the continuance of any emergency declared by the president of the United States or the congress calling for post-attack recovery and rehabilitation activities, subject to the limitations set forth in this act, and in a manner consistent with any rules, regulations, or orders and policy guidance issued by the federal government, the governor may issue, amend and enforce rules, regulations, and orders to:

(a) Control, restrict, and regulate by rationing, freezing, use of quotas, prohibitions on shipments, price fixing, allocation or other means, the use, sale or distribution of food, feed, fuel, clothing and other commodities, materials, goods or services;

(b) Prescribe and direct activities in connection with but not limited to use, conservation, salvage, and prevention of waste of materials, services, and facilities, including production, transportation, power, and communication facilities, training and supply of labor, utilization of industrial plants, health and medical care, nutrition, housing, including the use of existing and private facilities, rehabilitation, education, welfare, child care, recreation, consumer protection, and other essential civil needs; and

(c) Take such other action as may be necessary for the management of resources following an attack.

(3) All rules, regulations, and orders issued pursuant to authority conferred by this act shall have the full force and effect of law during the continuance of a proclamation or declaration of emergency as contemplated by this section, when a copy of the rule, regulation, or order is filed in the office of the secretary of state or, if issued by a local or area official, when filed in the office or offices of the county clerk and recorder. If, by reason of destruction or disruption attendant upon or resulting from attack, the filing requirements of this subsection cannot be met, public notice by such means as may be available shall be deemed a complete and sufficient substitute. All existing laws, ordinances, rules, regulations, and orders inconsistent with the provisions of this act, or any rule, regulation or order issued under the authority thereof, shall be inoperative during the period of time and to the extent such inconsistency exists.

(4) Any authority exercised pursuant to a proclamation or emergency contemplated by this section may be exercised with respect to the entire territory over which the governor or other official, as the case may be, has jurisdiction, or as to any specified part thereof.

(5) The governor's power and authority to issue a proclamation following an attack shall be terminated by the passage of a joint resolution of the legislature or by declaration of the termination of the emergency by the president or by the congress; provided that the proclamation shall terminate automatically six (6) months after issuance and a similar proclamation may not be issued unless concurrence is given thereto by a joint resolution of the legislature.

History: En. Sec. 6, Ch. 297, L. 1967.

**77-1507. Judicial inquiry as to emergency proclamation and facts.** Every proclamation and the facts related therein issued under this act shall be subject to judicial inquiry by the state supreme court as to the existence of the facts underlying the issuance of the proclamation and whether such action was reasonable under the circumstances.

History: En. Sec. 7, Ch. 297, L. 1967.

**77-1508. Penalty for violation of rules and regulations.** Any person violating any of the rules, regulations or orders adopted and promulgated under section 6 [77-1506] of this act shall, upon conviction thereof, be subject to a fine of not to exceed ten thousand dollars (\$10,000) or to a term of imprisonment of not to exceed five (5) years, or both.

History: En. Sec. 8, Ch. 297, L. 1967.



## TITLE 78—STATE CAPITOL

### Chapter

9. Future building needs, 78-910.  
12. Reconstruction and repair of public buildings and capitol building in Helena—construction of supreme court and law library building, 78-1201 to 78-1209.

### CHAPTER 9—FUTURE BUILDING NEEDS

#### Section

- 78-910. Scheduling of state building program.

**78-910. Scheduling of state building program.** The state controller shall, by careful advance planning, ordering of construction priorities, consultation with architects, and timing of bid lettings, direct the building program of the state in such a manner as to reduce to a minimum the effects of weather on construction and to stabilize as far as possible the work opportunities of the construction labor force.

**History:** En. Sec. 1, Ch. 116, L. 1967. in such a manner as to minimize the importance of weather on construction and to stabilize the work opportunities of the construction labor force.

#### Title of Act

An act to require the state controller to schedule the state's building program

### CHAPTER 12—RECONSTRUCTION AND REPAIR OF PUBLIC BUILDINGS AND CAPITOL BUILDING IN HELENA—CONSTRUCTION OF SUPREME COURT AND LAW LIBRARY BUILDING

#### Section

- 78-1201. Borrowing of state funds authorized.  
78-1202. Employment of architects and engineers—approval of plans and specifications.  
78-1203. Acquisition of land—bids and contracts—bonds.  
78-1204. Maximum borrowing power—deposit of moneys.  
78-1205. Terms of bonds, indentures, and notes.  
78-1206. Sale of bonds, indentures, and notes—registration and accounts.  
78-1207. Funds available for repayment of obligations.  
78-1208. Moneys deposited in sinking fund.  
78-1209. Budget act inapplicable.

**78-1201. Borrowing of state funds authorized.** In order to provide for land acquisition for public buildings at the state capital; the reconstruction, improvement, remodeling, repair and furnishing of the state capitol building of the state of Montana at Helena, Montana; for the construction of a supreme court building and state library building, the state board of examiners of the state of Montana is authorized to borrow sums of money from time to time from the unpledged investment funds available to any state agency or division of government, and to issue bonds, indentures or notes therefor.

**History:** En. Sec. 1, Ch. 375, L. 1969. dollars (\$2,000,000) for land acquisition for public buildings at the state capitol; for the reconstruction, improvement, remodeling, repair and furnishing of the state capitol building of the state of Mon-

#### Title of Act

An act authorizing the state board of examiners to borrow up to two million

tana at Helena, Montana; for construction of a supreme court and law library building; providing for the issuance of bonds, indentures and/or notes; dedicating income from capitol building land grant for repayment of loans; enumerating the pow-

er and duties of the state board of examiners in carrying out the provisions of this act; and providing for a select committee of the house of representatives and senate relating thereto.

**78-1202. Employment of architects and engineers—approval of plans and specifications.** With the approval of the state board of examiners, the state controller is hereby authorized, directed and empowered to employ an architect or architects, an engineer or engineers for such period of time as he may deem proper for the purpose of making the necessary studies and preparing complete plans and specifications for the purposes set forth in section 1 [78-1201] of this act; to proceed with the reconstruction, improvement, remodeling, repair and furnishing of the state capitol building and to proceed with the construction of the supreme court and law library building. The plans and specifications of said architect or architects, engineer or engineers shall be approved by a select committee comprised of four (4) members of the house of representatives, not more than two (2) from either political party, appointed by the speaker; and four (4) members of the senate, not more than two (2) from either political party, appointed by the committee on committees.

**History:** En. Sec. 2, Ch. 375, L. 1969.

**78-1203. Acquisition of land—bids and contracts—bonds.** The board of examiners and the state controller shall purchase or condemn the lands described in section 1 [78-1201] of this act upon the advice of the select committee. The state board of examiners shall call for bids for the construction of the supreme court building and the state library building, and for the reconstruction, improvement, remodeling, repair, and furnishing of the state capitol building and shall let contracts for the same, all in accordance with the laws of the state of Montana. Said board shall require the contractors to give bonds to the state of Montana in such amounts as the board may determine, conditioned for the faithful performance of their duties and contracts.

**History:** En. Sec. 3, Ch. 375, L. 1969.

**78-1204. Maximum borrowing power—deposit of moneys.** The aggregate amount which the state board of examiners is authorized to borrow under this act for the purposes herein expressed shall not be in excess of the sum of two million dollars (\$2,000,000). All moneys borrowed or realized from the sale of bonds authorized by this act shall be deposited in the capitol building program account, bond proceeds and insurance clearance fund.

**History:** En. Sec. 4, Ch. 375, L. 1969.

**78-1205. Terms of bonds, indentures, and notes.** The bonds, indentures and/or notes issued by the state board of examiners under authority of this act shall not bear interest at a rate in excess of four and one-half per cent (4½%) per annum payable semiannually. They shall bear such date as the state board of examiners shall prescribe, and shall be payable

over such period of years, not exceeding twenty-five (25), as said board may specify. All bonds, indentures and/or notes shall be optional and redeemable at any time after the date of issue, at the option of the state board of examiners. Said bonds, indentures and/or notes shall be in such denominations and sums and shall contain such recitals as the state board of examiners may determine, shall be signed by the governor, the attorney general, and the secretary of state as members of said board, and shall be paid at the office of the state treasurer of the state of Montana. Coupons attached to any such bonds may bear the facsimile signature of the members of said board.

**History:** En. Sec. 5, Ch. 375, L. 1969.

**78-1206. Sale of bonds, indentures, and notes—registration and accounts.** Said bonds, indentures and/or notes shall be sold by the state board of examiners at such time and in such manner as the board shall deem best to carry out the provisions of this act; provided that none of such bonds shall be sold for less than par, plus accrued interest to the date of delivery of the bonds. Each of said bonds, indentures and/or notes shall be registered before delivery with the state treasurer of the state of Montana, who shall keep accurate accounts of payments of interest and principal upon said bonds, indentures and/or notes.

**History:** En. Sec. 6, Ch. 375, L. 1969.

**78-1207. Funds available for repayment of obligations.** The principal and interest of the bonds, indentures and/or notes authorized by this act shall be payable out of the following fund and from it only: As much as may be necessary from the income received subsequent to January 1, 1970, from the capitol building land grant shall be, and the same is hereby dedicated and appropriated for the repayment of the principal and interest of the bonds, indentures and/or notes provided for by this act.

**History:** En. Sec. 7, Ch. 375, L. 1969.

**78-1208. Moneys deposited in sinking fund.** To provide for the payment of the interest and principal of the bonds, indentures and/or notes authorized by this act, all the sums of money hereinbefore dedicated and appropriated to the payment of the principal and interest of said bonds, indentures and/or notes shall be paid and deposited in the sinking fund in the state treasury.

**History:** En. Sec. 8, Ch. 375, L. 1969.

**78-1209. Budget act inapplicable.** The appropriation herein provided for shall be deemed and held valid notwithstanding the provisions of the budget act.

**History:** En. Sec. 9, Ch. 375, L. 1969.

**Separability Clause**

Section 10 of Ch. 375, Laws 1969 read "Every section of this act and every part of each section is hereby declared to be

independent of each other, and the holding of any section or part hereof to be void or ineffective for any cause shall not be deemed to affect any other section or part hereof."





## TITLE 79—STATE FINANCE

### Chapter

1. General fiscal duties of state auditor, 79-101, 79-102, 79-108, 79-109.
3. State depository board—deposit and investment of state funds, 79-301.
6. Perpetual appropriations for support of state institutions—contingent revolving accounts, 79-602.
10. State Budget Act, 79-1012, 79-1013.
12. Montana trust and legacy fund—unified investment plan, 79-1202.
20. Bond Validating Act, 79-2001 to 79-2004.
22. Long-range building program bonds, 79-2202, 79-2203, 79-2205.
23. Legislative Audit Act, 79-2301 to 79-2313.
24. State board of review—reimbursement of general fund for costs of central services, 79-2401 to 79-2415.

### CHAPTER 1—GENERAL FISCAL DUTIES OF STATE AUDITOR

#### Section

- 79-101. State auditor—general fiscal duties.
- 79-102. Certificate of settlement.
- 79-108. Warrants—presentation—cancellation.
- 79-109. Issuance of duplicate warrant.

**79-101. (151) State auditor—general fiscal duties.** It is the duty of the state auditor:

1. To superintend the fiscal concerns of the state.
2. When requested, to give information in writing to either house of the legislative assembly relating to the fiscal affairs of the state or the duties of his office.
3. To suggest plans for the improvement and management of the public revenues.
4. To keep an account of all warrants drawn upon the treasurer, and such other account and appropriation records that he determines to be essential for the support of the accounting records maintained in the office of the state controller.
5. To keep an account between the state and the state treasurer, and therein charge the state treasurer with the balance in the treasury when he came into office, and with all moneys, received by him, and credit him with all warrants drawn on and paid by him.
6. To keep a register of warrants, showing the fund upon which they are drawn, the number, in whose favor, and the date issued.
7. In his discretion to examine and settle the accounts of persons indebted to the state, and certify the amount to the treasurer, and upon presentation and filing of the treasurer's receipt therefor, to give such person a discharge and charge the treasurer therewith.
8. In his discretion to require any person presenting an account for settlement to be sworn before him, and to answer, orally or in writing, as to any facts relating to it.
9. To require all persons who have received any moneys belonging to the state, and have not accounted therefor, to settle their accounts.

10. In his discretion to inspect the books of any persons charged with the receipt, safekeeping, or disbursement of public moneys.

11. In his discretion to require all persons who have received moneys or securities, or have had the disposition or management of any property of the state of which an account is kept in his office, to render statements thereof to him; and all such persons must render statements at such times and in such form as he may require.

12. In his discretion to examine the collection of moneys due the state, and institute suits in its name for official delinquencies in relation to the assessment, collection, and payment of the revenue, and against persons who by any means have become possessed of public money or property, and failed to pay over or deliver the same, and against debtors of the state; of which suits the courts of the county in which the seat of government may be located have jurisdiction, without regard to the residence of the defendants.

13. In his discretion, to off set any amount due a state agency from a person or entity, against any amount owing such person or entity by any state agency. The state auditor may deduct from the claim, and draw his warrants for the amounts offset in favor of the respective state agencies to which due, and, for any balance, in favor of the claimant. Whenever insufficient to offset all amounts due state agencies, the amount available shall be applied in such manner as the state auditor, in his discretion, shall determine. If, in the discretion of the state auditor, the person or entity refuses or neglects to file his claim within a reasonable time, the head of the state agency owing the amount shall file the claim on behalf of such person or entity; if approved by the state controller it shall have the same force and effect as though filed by such person or entity. The amount due any person or entity from the state or any agency thereof is the net amount otherwise owing such person or entity after any offset as in this section provided.

14. To draw warrants on the state treasurer for the payment of moneys directed by law to be paid out of the treasury; but no warrant must be drawn unless authorized by law.

15. To authenticate with his official seal all warrants drawn by him, and all copies of papers issued from his office.

16. In his discretion promulgate rules and regulations regarding the distribution and processing of warrants issued.

17. In his discretion establish a cost accounting system to determine the unit cost of issuing and processing warrants and provide for a system of charges for services rendered in issuing and processing warrants for claims submitted by any department or agency of the state. No such charge shall be made for warrants issued against the general fund. Funds collected under this section for budgeted programs shall be deposited to the credit of the general fund. Funds collected for new or unforeseen programs may be deposited to the credit of a revolving fund account and expended for the purposes of paying the processing expenses incurred as a result of the new program.

18. To collect and pay into the state treasury all fees received by him.



19. To perform such other duties as are prescribed by law.

20. In his discretion to establish, under the joint control of the state controller and the state auditor, a system of filing and storage of the original copy of claims paid by state warrant.

**History:** En. Sec. 420, Pol. C. 1895; re-en. Sec. 170, Rev. C. 1907; re-en. Sec. 151, R. C. M. 1921; amd. Sec. 1, Ch. 94, L. 1969. Cal. Pol. C. Sec. 433.

#### Amendments

The 1969 amendment deleted former subdivisions 2, 3, 6, 10, 18, and 19, for text of which see parent volume; redesignated former subdivisions 4 and 5 as 2 and 3; redesignated former subdivision 7 as 4 and substituted "and such other account \* \* \* state controller" for "and a separate account under the head of each specific appropriation, showing at all times the unexpended balance of such appropriation"; redesignated former subdivision 8 as 5; redesignated former subdivision 9 as 6, and substituted "and the date issued" for "for what service, the appropriation applicable to the payment thereof, when the liability accrued, and a receipt from the person to whom the warrant is delivered"; redesignated

former subdivision 11 as 7, and inserted "In his discretion" at the beginning; redesignated former subdivisions 12 through 15 as 8 through 11; redesignated former subdivision 16 as 12, and substituted "In his discretion to examine" for "To direct and superintend" at the beginning and deleted "all" before "moneys" and "debtors"; inserted new paragraph 13; redesignated former subdivision 17 as 14, and deleted ", and upon an unexhausted specific appropriation provided by law to meet the same. Every warrant must be drawn upon the fund out of which it is payable, and specify the service for which it is drawn, when the liability accrued, and the specific appropriation applicable to the payment thereof"; redesignated former subdivision 20 as 15, and deleted "drafts and" before "warrants drawn"; inserted new subdivisions 16 and 17; redesignated former subdivisions 21 and 22 as 18 and 19; and added new subdivision 20.

**79-102. (152) Certificate of settlement.** The certificate mentioned in subdivision 7, of section 79-101, must show by whom the payment is to be made; the amount thereof, and the fund into which it is to be paid, and must be numbered in order, beginning with number 1 at the commencement of each fiscal year.

**History:** En. Sec. 421, Pol. C. 1895; re-en. Sec. 171, Rev. C. 1907; re-en. Sec. 152, R. C. M. 1921; amd. Sec. 2, Ch. 94, L. 1969. Cal. Pol. C. Sec. 434.

#### Amendments

The 1969 amendment substituted "subdivision 7" for "subdivision 11" before "of section 79-101."

#### 79-107. Repealed.

##### Repeal

Section 79-107 (Sec. 427, Pol. C. 1895), relating to auditor's execution of an of-

ficial bond, was repealed by Sec. 5, Ch. 94, Laws 1969.

**79-108. (158) Warrants — presentation — cancellation.** All warrants drawn by the state auditor on the state treasury shall be presented for payment within one (1) year after the date of the issue thereof. Should the payee or legal holder of any warrant fail to present it for payment within the time specified, the state auditor shall enter the same as canceled on the books of his office and the amount shall be credited to the account from which it was drawn. Should the payee or legal owner of any canceled warrant present it for payment, or in the event the warrant has been lost or destroyed, the payee present a claim for payment, after the lapse of one (1) year from the date of issue, the state auditor may, upon proper showing by affidavit, issue a new warrant in lieu thereof, and the state treasurer is authorized to pay the new warrant. The state auditor

shall furnish the state treasurer with a list of warrants canceled under the provisions of this section.

**History:** En. Sec. 1, Ch. 80, L. 1907; Sec. 178, Rev. C. 1907; re-en. Sec. 158, R. C. M. 1921; amd. Sec. 3, Ch. 94, L. 1969.

#### Amendments

The 1969 amendment rewrote this section to extend time for presenting warrants from six months to one year. For previous text, see parent volume.

**79-109. (159) Issuance of duplicate warrant.** A. The state auditor is hereby empowered and authorized to issue a duplicate warrant whenever any warrant drawn by him upon the treasurer of the state of Montana shall have been lost or destroyed. This duplicate warrant must be in the same form as the original, except that it must have plainly printed across its face the word "duplicate," and, except as herein provided, no such warrant shall be issued or delivered, except the person entitled to receive the same shall deposit with the state auditor a bond in double the amount for which the duplicate warrant is issued, conditioned to save the state of Montana, and its officers, harmless on account of the issuance of said duplicate warrant.

B. No bond of indemnity shall be required:

(1) When the payee is the United States government, a state of the United States, any agency, instrumentality or officer of the United States government or of a state, or any county, city, city and county, town, district, or other political subdivision of a state or any officer thereof;

(2) When the owner or custodian is the state of Montana or any agency or officer thereof;

(3) When the owner or custodian is a bank, savings and loan association, admitted insurer, or trust company whose financial condition is regulated by the United States government or by the state of Montana; or

(4) When the amount of the lost or destroyed warrant is less than fifty dollars (\$50);

Provided, however, that where the owner or custodian applies under the provisions of subsection (3) or (4) hereof, the application shall include an agreement to indemnify and hold harmless the state, its officers and employees, from any loss resulting from the issuance of a duplicate warrant. Any loss incurred in connection with the issuance of a duplicate warrant shall be charged against the account from which the payment was derived.

**History:** En. Sec. 1, Ch. 19, L. 1909; re-en. Sec. 159, R. C. M. 1921; amd. Sec. 4, Ch. 94, L. 1969.

#### Repealing Clause

Section 5 of Ch. 94, Laws 1969 read "Section 79-107, R. C. M. 1947, is repealed."

#### Amendments

The 1969 amendment designated the former section as subsection A, inserted "except as herein provided" before "no such warrant" and deleted "by the state auditor" after "issued or delivered" in the second sentence; and added subsection B.

#### Effective Date

Section 6 of Ch. 94, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved February 24, 1969.

CHAPTER 3—STATE DEPOSITORY BOARD—DEPOSIT AND INVESTMENT  
OF STATE FUNDS

## Section

79-301 State depository board—funds in the hands of the state treasurer.

**79-301. (182) State depository board—funds in the hands of the state treasurer. (1). \* \* \* [Same as parent volume.]**

(2) No deposits in excess of the amount guaranteed or insured according to law shall be made of state funds by said depository board, or by the state treasurer under the direction of said board, unless such bank shall first have delivered to the state treasurer or trustee with some solvent bank as hereinafter provided, as security therefor, cashier's check or checks issued by the Federal Reserve Bank, bonds of the United States government and its dependents, bonds guaranteed by the United States government or its dependents, bonds and warrants of the state of Montana, bonds and warrants of any county of the state of Montana, and bonds of any city, town or school district of the state of Montana, which are a general obligation of such county, city, town or school district, bonds of the Federal Land Banks, Federal Intermediate Credit Bank debentures, Federal Home Loan Bank notes and bonds, Bank for Co-operatives' debentures, Federal National Mortgage Association notes, bonds and guaranteed certificates of participation, obligations of or fully guaranteed by the Government National Mortgage Association, Farmers' Home Administration insured notes, notes fully guaranteed as to principal and interest by the Small Business Administration, Federal Housing Administration debentures, general obligation bonds of other states and counties of other states and bonds issued in the United States of America, which are quoted on the New York market which shall be acceptable at not to exceed ninety per centum (90%) of such market quotation, in at least the amount of such deposits in excess of the amount guaranteed or insured according to law, which bonds or security shall be first approved by the state depository board; provided, that the state depository board may require security in a greater amount than that above named; provided, that when negotiable securities are furnished, such securities may be placed in trust and the trustees' receipt may be accepted in lieu of the actual securities when such receipt is in favor of the state treasurer, his successors in office, and the state of Montana, and the form of receipt and the trustees have been approved by the state examiner.

(3) to (5). \* \* \* [Same as parent volume.]

**History:** Ap. p. 183, Rev. C. 1907; en. Sec. 1, Ch. 129, L. 1909; re-en. Sec. 182, R. C. M. 1921; amd. Sec. 1, Ch. 85, L. 1923; amd Sec. 1, Ch. 180, L. 1929; amd. Sec. 1, Ch. 62, L. 1935; amd. Sec. 1, Ch. 35, L. 1963; amd. Sec. 1, Ch. 259, L. 1969.

**Amendments**

The 1969 amendment, in subsection (2), deleted "bonds of the Federal Land Banks" after "United States government or its dependents"; substituted "bonds of the Federal Land Banks, Federal Intermediate Credit Bank \* \* \* of such market quotation" for "or bonds of some good solvent surety company authorized to do business in the state of Montana" before "in at least the amount of such deposits."



## CHAPTER 6—PERPETUAL APPROPRIATIONS FOR SUPPORT OF STATE INSTITUTIONS—CONTINGENT REVOLVING ACCOUNTS

## Section

79-602. Contingent revolving accounts—when established.

**79-602. (195) Contingent revolving accounts—when established.** The state controller may authorize the establishment and maintenance at any and all of the state institutions, or in any of the departments, boards, or commissions, of Montana of contingent revolving accounts, transferring in trust to the business offices of said institutions such sums of money as may appear necessary, to be used by said institutions for the payment of demands requiring immediate cash payment, such as payment of minor invoices, invoices for which discount period is too short to take advantage of the discount if payment is made by warrant, freight and express charges, travel advances, postage, publications requiring remittance to accompany the order, and the establishment of cash change funds, all under specific regulations to be established by the state controller. But each and every state institution granted a contingent revolving account shall report to the state controller monthly all transactions involving such contingent revolving accounts, with proper vouchers for every payment made therefrom. The state controller may cancel such authorizations and recall such funds at pleasure.

**History:** En. Sec. 4, Ch. 112, L. 1921; re-en. Sec. 195, R. C. M. 1921; amd. Sec. 9, Ch. 80, L. 1961; amd. Sec. 1, Ch. 148, L. 1969.

**Amendments**

The 1969 amendment inserted "such as payment of minor invoices \* \* \* cash change funds, all" after "demands requiring immediate cash payment" in the first sentence.

## CHAPTER 10—STATE BUDGET ACT

## Section

79-1012. Governor chief budget officer.

79-1013. Blanks for preparation of budget estimates—distribution—form—submission of information.

**79-1012. Governor chief budget officer.** The governor shall be the chief budget officer of the state. The state controller shall be ex officio budget director and it shall be his duty to carry out provisions of this chapter.

**History:** En. Sec. 1, Ch. 158, L. 1959; amd. Sec. 1, Ch. 101, L. 1969.

**Amendments**

The 1969 amendment substituted the second sentence for the following provi-

sion: "and shall appoint a director of the budget, who shall hold office at the pleasure of the governor, and whose duty it shall be to carry out the provisions of this chapter."

**79-1013. Blanks for preparation of budget estimates—distribution—form—submission of information.** In the preparation of a state budget the director of the budget shall not later than the first day of July in the year preceeding the convening of the legislative assembly, distribute to all state offices and institutions, including the judicial department, the proper blanks necessary for the preparation of budget estimates. These blanks shall be in such form as shall be prescribed by the director of the budget

to procure such information as the director of the budget shall, in his discretion, feel is necessary for the preparation of a budget including budget estimates, estimates of revenues, actual revenues received, expenditures made and other information classified and grouped as requested by the director of the budget and covering such period or periods of time as specified by the director of the budget.

(a) Except as provided in this paragraph, it shall be the duty of each department and agency to submit information requested by the director of the budget on or before the first day of August in the year preceding the convening of the legislative assembly. Each unit of the university of Montana, each state custodial institution and the Montana state highway commission shall submit such information on or before the first day of September of such year.

(b). \* \* \* [Same as parent volume.]

**History:** En. Sec. 2, Ch. 158, L. 1959; was apparent in the text of the amendment. Sec. 1, Ch. 91, L. 1961; amd. Sec. 1, Ch. 223, L. 1969. tory act.

#### Compiler's Notes

Although the title of Ch. 223, Laws 1969 stated that this section was amended to change the reporting date, no such change

#### Amendments

The 1969 amendment inserted "and the Montana state highway commission" after "each state custodial institution" in subdivision (a).

### CHAPTER 12—MONTANA TRUST AND LEGACY FUND— UNIFIED INVESTMENT PLAN

#### Section

79-1202. Moneys to be invested according to unified plan.

#### **79-1202. (5668.20) Moneys to be invested according to unified plan.**

1. \* \* \* [Same as parent volume.]

2. The state board of land commissioners is hereby authorized and required to invest in the long term investment fund the following: Moneys administered by the Montana highway patrolmen's retirement board in excess of twenty-five thousand dollars (\$25,000); moneys administered by the public employees' retirement board; moneys administered by the industrial accident board; all moneys subject to investment as designated by the teachers' retirement board; moneys designated as available by the Montana fish and game commission and all other moneys designated by statute. Moneys in the long term investment fund may be invested as follows:

(a) to (c). \* \* \* [Same as parent volume.]

(d) In first mortgages on unencumbered real property when such mortgages are guaranteed or insured in the amount of thirty per centum (30%) or more of the loan made in the event of default by the United States government or any agency or corporate agency of the United States government and in obligations of housing authorities subject to the terms and limitations of section 35-143, and in unencumbered real property, and in first mortgages of unencumbered real property, not exceeding seventy-five per cent (75%) of the value of the property, provided, however, no

more than fifty per centum (50%) of the funds in one (1) account shall be invested in such mortgages and real property.

(e) In first mortgage bonds, debentures, notes and other evidences of indebtedness issued, assumed or guaranteed by any solvent and operating corporation existing under the laws of the United States of America or any state thereof which bonds, debentures, notes and other evidences of indebtedness are, at the time of such investment, within the three (3) highest quality grades for the rating of such bonds, debentures, notes and other evidences of indebtedness by any nationally recognized investment rating agency.

(f). \* \* \* [Same as parent volume.]

3. The state board of land commissioners is hereby authorized and required to invest in the short term investment fund any surplus cash in the office of the state treasurer; any money in the sinking fund, which is not required for the immediate payment of any bond principal or interest, or which cannot be used for payment and redemption of bonds outstanding because of the same not being redeemable under the option provisions contained therein; any Montana highway patrolmen's retirement moneys less than twenty-five thousand dollars (\$25,000) as directed by the Montana highway patrolmen's retirement board and any other moneys designated by statute to be so invested or any moneys in the custody of any officer or officers of the state, or any governing body of any city, county or school district, the investment of which moneys is requested by the officer, or officers or governing body and which moneys are subject to investment. The moneys in the short term investment fund may be invested as follows:

(a) and (b). \* \* \* [Same as parent volume.]

All securities purchased and all cash on hand for each account or subfund shall be kept separate in the short term investment fund and all interest collected shall be credited to the account or subfund for which the securities were purchased.

The state board of land commissioners is hereby authorized to employ, for the purpose of securing advice on retention, sale or purchase of securities, an expert on financial matters who has had a minimum of ten (10) years' experience in the investment field. The said board is also authorized to obtain financial and investment counsel and services from qualified persons and sources on a fee or contract basis.

**History:** En. Sec. 2, Ch. 70, L. 1929; amd. Sec. 8, Ch. 176, L. 1953; amd. Sec. 1, Ch. 118, L. 1957; amd. Sec. 1, Ch. 173, L. 1959; amd. Sec. 1, Ch. 67, L. 1963; amd. Sec. 16, Ch. 147, L. 1963; amd. Sec. 1, Ch. 256, L. 1963; amd. Sec. 1, Ch. 78, L. 1967; amd. Sec. 1, Ch. 185, L. 1967.

#### Compiler's Notes

This section was amended twice in 1967, once by Ch. 78 and once by Ch. 185. Neither amendatory act referred to or incorporated the changes made by the other. Since the two amendments do not appear to conflict, the compiler has made a composite section embodying the amendments made by both 1967 acts.

#### Amendments

Chapter 78, Laws of 1967, substituted the last sentence of the last paragraph for "and there shall not be paid for such services an amount in excess of one thousand dollars (\$1,000.00) in any one fiscal year."

Chapter 185, Laws of 1967, reduced the insurance requirement in the first clause of paragraph 2(d) from 50% to 30%; inserted "and in unencumbered real property \* \* \* value of the property" in paragraph 2(d); added "and real property" at the end of paragraph 2(d); and deleted "public utility" before "corporation" in paragraph 2(e).



**Effective Date**

Section 2 of Ch. 185, Laws 1967 provided the act should be in effect from and

after its passage and approval. Approved February 27, 1967.

## CHAPTER 20—BOND VALIDATING ACT

**Section**

- 79-2001. Short title of act.  
79-2002. Definitions.  
79-2003. Validation of bonds heretofore issued.  
79-2004. Act does not apply to pending actions.

**79-2001. Short title of act.** This act may be cited as "The 1969 Bond Validating Act."

**History:** En. Sec. 1, Ch. 43, L. 1969.

**Title of Act****Compiler's Notes**

Chapter 43 of Laws 1969 was substituted for Ch. 96, Laws 1967 and assigned section numbers identical with those of the 1967 law. Previous bond validating acts enacted since 1935 were: Ch. 6, Laws 1937; Ch. 164, Laws 1939; Ch. 45, Laws 1941; Ch. 117, Laws 1943; Ch. 196, Laws 1945; Ch. 81, Laws 1947; Ch. 2, Laws 1953; Ch. 5, Laws 1955; Ch. 4, Laws 1957; Ch. 16, Laws 1959; Ch. 19, Laws 1961; Ch. 100, Laws 1963; Ch. 75, Laws 1965.

An act validating, ratifying, approving and confirming bonds and other instruments or obligations, heretofore issued by public bodies of this state, and all proceedings heretofore taken by such public bodies, to authorize and issue such bonds, instruments and other obligations, however described, and providing that this act may be cited as "The 1969 Bond Validating Act"; containing a repealing clause and providing an effective date.

**79-2002. Definitions.** The following terms, wherever used or referred to in this act, shall have the following meanings:

(1) The term "public body" shall include a county, city, town, school district, irrigation district, drainage district, special improvement district, or any other political or governmental subdivision of the state of Montana, and shall also include the state board of education, the state board of examiners, the state water conservation board, the state highway commission, or any other governmental agency of this state.

(2) The term "bonds" shall include bonds, notes, warrants, debentures, certificates of indebtedness, temporary bonds, temporary notes, interim receipts, interim certificates and all instruments or obligations evidencing or representing indebtedness, or evidencing or representing the borrowing of money, or evidencing or representing a charge, lien or encumbrance on specific revenues, income or property of a public body, including all instruments or obligations payable from a special fund.

**History:** En. Sec. 2, Ch. 43, L. 1969.

**79-2003. Validation of bonds heretofore issued.** All bonds heretofore issued by any public body of this state, and all proceedings heretofore taken for the authorization and issuance of such bonds, for the levy, establishment, pledge and appropriation of taxes, special assessments and other charges and revenues to pay such bonds, and for the sale, exchange, execution and delivery thereof, are hereby validated, ratified, approved and confirmed, notwithstanding any lack of power (other than constitutional) of such public body, or the governing board or commission or officers

thereof, to authorize and issue such bonds, or to sell, exchange, execute or deliver the same, and notwithstanding any defects or irregularities (other than constitutional) in such proceedings or in such sale, exchange, execution or delivery, and bonds of such public bodies, whether heretofore issued or hereafter issued under the authority of proceedings heretofore taken, are and shall be binding, legal, valid and enforceable obligations of such political body.

**History:** En. Sec. 3, Ch. 43, L. 1969.

**79-2004. Act does not apply to pending actions.** This act shall not apply to or affect any action or appeal instituted on or before January 1, 1969, in which the validity of any such proceedings or of any such bonds is at issue.

**History:** En. Sec. 4, Ch. 43, L. 1969.

**Effective Date**

**Repealing Clause**

Section 5 of Ch. 43, Laws 1969 repealed all acts and parts of acts in conflict therewith.

Section 6 of Ch. 43, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved February 20, 1969.

**CHAPTER 22—LONG-RANGE BUILDING PROGRAM BONDS**

**Section**

79-2202. Long-range building program bonds.

79-2203. Sinking fund account.

79-2205. Authorization of bonds.

**79-2202. Long-range building program bonds.** (1) When authorized by the legislative assembly, and within the limits of such authorization and the further limitations in this section, the board may issue and sell bonds of the state of Montana in such manner as it shall deem necessary and proper to provide funds to finance the long-range building program. All bonds issued hereunder shall contain a statement that they are not and shall never become a debt or liability of the state of Montana within the meaning of any constitutional or statutory limitation or provision, and that no ad valorem tax may be levied upon property within the state of Montana to pay principal thereof or interest thereon, but that the bonds and interest are payable solely from the proceeds of special taxes pledged and appropriated to the sinking fund account as provided in this chapter, and shall contain the pledge of the state of Montana to continue to levy and collect said special taxes and to apply the proceeds thereof to the retirement of said bonds and the payment of interest thereon. Bonds may be issued hereunder to provide funds for the payment or redemption of the outstanding War Veterans' Compensation Bonds and World War I Veterans' Compensation Bonds issued pursuant to Initiative No. 54, and the amendment thereof, chapter 270, Laws of 1963, and the outstanding long-range building program bonds issued under this section.

(2) Each series of such bonds shall be issued by the board upon request of the controller, in such denominations and form, whether payable to bearer or registered as to principal or both principal and interest, with such provisions for conversion or exchange and for the issuance of notes in anticipation of the execution and delivery of definitive bonds,

bearing interest at such rate or rates not exceeding five and one-half per centum (5½%) per annum, maturing at such times not exceeding thirty (30) years from date of issue, subject to redemption at such earlier times and prices and upon such notice, and payable at the office of such fiscal agency of the state of Montana, as the board shall determine subject to the limitations contained in this section.

(3) and (4). \* \* \* [Same as parent volume.]

(5) All proceeds of bonds issued hereunder shall be deposited in the clearance fund account, except that any premiums and accrued interest received shall be deposited in the sinking fund account. For the purposes set forth in subdivision (1) hereof, the state treasurer acting by and with the approval of the state board of examiners may set aside such funds as may be necessary to assure the redemption, or payment at maturity, of all of the outstanding War Veterans' Compensation Bonds and World War I Veterans' Compensation Bonds and as may be necessary or required to fulfill the obligations of the state of Montana by virtue thereof. With such funds the state treasurer with the approval of the state board of examiners is hereby authorized to call said bonds for redemption in accordance with the provisions thereof, at any redemption date, to pay said bonds on the maturity dates thereof, to deposit securities in escrow for the purpose of assuring such payments at future dates, and to take such other steps as may be necessary to fulfill all of the obligations of the state of Montana existing under the provisions of said bonds and the laws and resolutions authorizing the same.

(6) The state board of examiners is hereby authorized to employ a fiscal agent to assist it in the performance of its duties hereunder.

**History:** En. Sec. 2, Ch. 276, L. 1965; added the last two sentences; and added amd. Sec. 2, Ch. 318, L. 1967; amd. Sec. 1, subsection 6.  
Ch. 146, L. 1969.

The 1969 amendment, in subsection (2), substituted "five and one-half per centum (5½%)" for "five per centum (5%)" before "per annum."

**Amendments**  
The 1967 amendment, in subsection (1), added the last sentence; in subsection (5),

**79-2203. Sinking fund account.** (1) to (4). \* \* \* [Same as parent volume.]

(5) The state hereby pledges and appropriates, and directs to be credited as received to the sinking fund account, eleven per centum (11%) of all money received from the collection of the income tax and the corporation license tax referred to in section 84-1901, and such additional amount of said taxes, if any, as may at any time be needed to comply with the principal and interest and reserve requirements stated in subsection (2) of this section; provided that no more than eleven per centum (11%) of such tax collections shall be deemed to be pledged for the purpose of subsection (3) of section 79-2202. The pledge and appropriation herein made shall be and remain at all times a first and prior charge upon all money received from the collection of said taxes.

(6) The state pledges and appropriates and directs to be credited as received to the sinking fund account all money received from the collection of each of the excise taxes on cigarettes and other tobacco products



which are levied, imposed and assessed by section 84-5606, subdivisions (3) and (4), as amended, after the payment and redemption in full of the outstanding bonds for which said taxes have heretofore been pledged and appropriated, or after the necessary funds have been set aside for such payment and redemption as provided in this act. The state also pledges and appropriates and directs to be credited as received to the sinking fund account all money received from the collection of the excise taxes on other tobacco products which are or may hereafter be levied, imposed and assessed by law for that purpose. Nothing herein shall impair or otherwise affect the provisions and covenants contained in the resolutions authorizing the War Veterans' Compensation Bonds, the World War I Veterans' Compensation Bonds or the presently outstanding long-range building program bonds. Subject to the provisions of the preceding sentence, the pledge and appropriation herein made shall be and remain at all times a first and prior charge upon all money received from the collection of all taxes referred to in this subdivision (6).

**History:** En. Sec. 3, Ch. 276, L. 1965; amd. Sec. 3, Ch. 318, L. 1967.

#### Amendments

The 1967 amendment, in subsection (5), increased appropriations to the sinking fund from 5 per centum to 11 per centum; in subsection (6), deleted "After approval through initiative or referendum by a majority of the electors voting at

an election prior to January 1, 1967," at the beginning of the subsection; deleted "upon such approval also" before "pledges"; substituted "said taxes have" for "any such tax has" before "heretofore"; added "or after the necessary funds \* \* \* in this act" at the end of the first sentence; and added the last three sentences.

**79-2205. Authorization of bonds.** The board is authorized to issue and sell long-range building program bonds in an amount not exceeding eighteen million dollars (\$18,000,000), over and above the amount of the long-range building program bonds previously authorized upon the conditions and in the manner stated in this chapter. The board is also authorized to issue and sell long-range building program bonds in such amount as may be required to provide funds for the payment or redemption of outstanding bonds as contemplated in section 79-2202, subdivisions 1 and 5.

**History:** En. Sec. 5, Ch. 276, L. 1965; amd. Sec. 4, Ch. 318, L. 1967; amd. Sec. 2, Ch. 146, L. 1969.

#### Amendments

The 1967 amendment inserted "over and above the amount of the long-range building program bonds outstanding January 1, 1967," before "upon the conditions"; and added the last sentence.

The 1969 amendment substituted "eighteen million dollars (\$18,000,000)" for

"thirteen million five hundred thousand dollars (\$13,500,000)" and substituted "previously authorized" for "outstanding January 1, 1967" before "upon the conditions" in the first sentence.

#### Effective Date

Section 3 of Ch. 146, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved February 27, 1969.

## CHAPTER 23—LEGISLATIVE AUDIT ACT

### Section

79-2301. Title and purpose of act.

79-2302. Definitions.

79-2303. Legislative audit committee—appointment and term of members—officers.

79-2304. Meetings.

- 79-2305. Appointment and qualifications of legislative auditor.
- 79-2306. Appointment of employees.
- 79-2307. Term and removal of legislative auditor.
- 79-2308. Duties of legislative auditor.
- 79-2309. Audit standards and objectives.
- 79-2310. Recommendations of legislative auditor.
- 79-2311. Legislative auditor to assist legislative assembly during sessions.
- 79-2312. Information from state agencies.
- 79-2313. Audit charge against earmarked money.

**79-2301. Title and purpose of act.** This act may be cited as "The Legislative Audit Act." Because the legislative assembly is responsible for authorizing the expenditure of public moneys, designating the sources from which moneys may be collected, shaping the administration to perform the work of state government, and is held finally accountable for fiscal policy, the legislative assembly should also be responsible for the audit of fiscal accounts and records so that it may be assured that its directives have been faithfully carried out. It is the intent of this act that each agency of state government be audited for the purpose of furnishing the legislative assembly with factual information vital to the discharge of its legislative duties.

**History:** En. Sec. 1, Ch. 249, L. 1967.

**Title of Act**

"The Legislative Audit Act" creating a legislative audit committee and the office of legislative auditor and providing for the audit of state agencies by the

legislative auditor; amending sections 82-1002, 82-1005, 82-1007, 82-1009, 82-110, 71-206, 4-347, 4-230, and 5-910, R. C. M. 1947; repealing sections 82-1014, 82-1015, 82-1016, 84-4403, 84-4404, and 84-4405, R. C. M. 1947, and providing an effective date.

**79-2302. Definitions.** In this act

(1) "State agency" means all offices, departments, boards, commissions, institutions, universities, colleges, and any other person or any other administrative unit of state government that spends or encumbers public moneys by virtue of an appropriation from the legislative assembly, or that handles money on behalf of the state, or that holds any trust or agency moneys from any source.

(2) "Committee" means the legislative audit committee.

**History:** En. Sec. 2, Ch. 249, L. 1967.

**79-2303. Legislative audit committee—appointment and term of members—officers.** The legislative audit committee consists of four (4) members of the Senate and four (4) members of the House of Representatives appointed before the sixtieth legislative day in the same manner as standing committees of the respective houses are appointed. A vacancy on the committee occurring when the legislative assembly is not in session shall be filled by the selection of a member of the legislative assembly by the remaining members of the committee. No more than two (2) of the appointees of each house shall be members of the same political party. Membership on the committee shall terminate with the termination of each member's term of office, or on December 31 of the year following the year in which the appointment was made, whichever event first occurs. The committee shall elect one of its members as chairman and such other officers as it deems necessary.

**History:** En. Sec. 3, Ch. 249, L. 1967.

**79-2304. Meetings.** The committee shall meet once each quarter to advise and consult with the legislative auditor. Committee members shall be reimbursed from the appropriation to the office of the legislative auditor for their actual and necessary expenses incurred as a result of such interim meetings.

History: En. Sec. 4, Ch. 249, L. 1967.

**79-2305. Appointment and qualifications of legislative auditor.** The committee shall appoint the legislative auditor and set his salary. The legislative auditor shall hold a degree from an accredited college or university with a major in accounting or an allied field and shall have at least two (2) years experience in the field of governmental accounting and auditing.

History: En. Sec. 5, Ch. 249, L. 1967.

**79-2306. Appointment of employees.** The legislative auditor may appoint whatever employees are necessary to carry out the provisions of this act, within the limitations of legislative appropriations.

History: En. Sec. 6, Ch. 249, L. 1967.

**79-2307. Term and removal of legislative auditor.** The legislative auditor is solely responsible to the legislative assembly. He shall hold office for a term of two (2) years beginning with July 1 of each odd-numbered year. The committee may remove him for misfeasance, malfeasance or nonfeasance in office at any time after notice and hearing.

History: En. Sec. 7, Ch. 249, L. 1967.

**79-2308. Duties of legislative auditor.** The legislative auditor shall

(1) Audit the financial affairs and transactions of every state agency at least once each biennium.

(2) Make a full, complete and written report of each audit. A copy of each report shall be furnished to the state controller, to the state agency which is audited, to each member of the committee, and to the legislative council.

(3) Report immediately in writing to the attorney general any apparent violation of penal statutes disclosed by the audit of a state agency, and furnish the attorney general all information in his possession relative to the violation.

(4) Report immediately in writing to the governor any instances of misfeasance, malfeasance or nonfeasance by a state officer or employee disclosed by the audit of a state agency.

(5) Report immediately to the surety upon the bond of any official or employee when an audit discloses a shortage in the accounts of the official or employee. The failure to notify the surety does not release the surety from any obligation under the bond.

(6) Report to the legislative assembly during the first week of each regular session. Each biennial report shall contain, among other things,



copies of, or summaries of audit reports on state agencies and any recommendations relating to such reports.

History: En. Sec. 8, Ch. 249, L. 1967.

**79-2309. Audit standards and objectives.** The objectives of audits of state agencies conducted by the legislative auditor are to determine whether

(1) The agency is carrying out only those activities or programs authorized by the legislative assembly and is conducting them efficiently and effectively.

(2) Expenditures are made only in furtherance of authorized activities and in accordance with the requirements of applicable laws and regulations.

(3) The agency collects and accounts properly for all revenues and receipts arising from its activities.

(4) The assets of the agency or in its custody are adequately safeguarded and controlled and utilized in an efficient manner.

(5) Reports and financial statements by the agency to the governor, the legislative assembly, and central control agencies disclose fully the nature and scope of the activities conducted, and provide a proper basis for evaluating the agency's operations.

History: En. Sec. 9, Ch. 249, L. 1967.

**79-2310. Recommendations of legislative auditor.** The reports of the legislative auditor may include comments, recommendations and suggestions, but he shall have no power to enforce them nor shall he otherwise influence or direct executive or legislative action.

History: En. Sec. 10, Ch. 249, L. 1967.

**79-2311. Legislative auditor to assist legislative assembly during sessions.** During sessions of the legislative assembly, the legislative auditor and his staff, when requested, shall assist the legislative assembly, its committees, and its members by gathering and analyzing information relating to the fiscal affairs of state government.

History: En. Sec. 11, Ch. 249, L. 1967.

**79-2312. Information from state agencies.** All state agencies shall aid and assist the legislative auditor in the auditing of books, accounts and records. The legislative auditor may examine at any time the books, accounts and records, confidential or otherwise, of a state agency; however, this shall not be construed as authorizing the publication of information which the law prohibits publishing.

History: En. Sec. 12, Ch. 249, L. 1967.

**79-2313. Audit charge against earmarked money.** (1) As used in this section:

(a) "Earmarked money" means a fund, account or any other money, other than general fund money, but excluding trust or agency money, that is earmarked for the support of a particular agency, program or service.

(b) "Audit charge" means the actual cost of the audit of a state agency by the legislative auditor as computed by the legislative auditor, but not more than seventy-five (\$75) per audit staff person per day.

(2) At the request of the legislative auditor, a state agency shall transfer to the general fund from earmarked moneys under its control an amount equal to the audit charge multiplied by the percentage that the annual expenditure of earmarked moneys is of the total annual expenditure of the state agency.

**History:** En. Sec. 13, Ch. 249, L. 1967;  
amd. Sec. 1, Ch. 4, L. 1969.

#### Amendments

The 1969 amendment inserted "per audit staff person" before "per day" in subdivision (1)(b).

### CHAPTER 24—STATE BOARD OF REVIEW—REIMBURSEMENT OF GENERAL FUND FOR COSTS OF CENTRAL SERVICES

#### Section

- 79-2401. State board of review.
- 79-2402. Members of board.
- 79-2403. Per diem expenses for member not a state officer.
- 79-2404. State controller as chairman—substitutes.
- 79-2405. Records—dissent.
- 79-2406. Seal—authentication of records.
- 79-2407. Quorum—vacancy.
- 79-2408. Secretary—cost of operation.
- 79-2409. "Administrative cost" defined—state agencies.
- 79-2410. Determination of administrative cost—charge against agency's fund.
- 79-2411. Factors in determining share of administrative cost—tax proceeds—highway purposes—constitutional restriction.
- 79-2412. Certification—statement—administrative cost due—deferment—transfer of funds.
- 79-2413. Funds unavailable—unable to pay—written request for deferment—requirements.
- 79-2414. Certification—advance payment—deferment—funds unavailable—transfer.
- 79-2415. Deferred advance payment—written request—advance applied against share of administrative cost—excess amount refunded.

**79-2401. State board of review.** As used in this act, "board" means the state board of review.

**History:** En. Sec. 1, Ch. 11, L. 1969.

#### Title of Act

An act to provide for reimbursement to the state general fund for the costs of central services financed from the general

fund that are provided to agencies which operate with nongeneral fund moneys and to provide a board of review to determine that the amount of these charges is fair and equitable.

**79-2402. Members of board.** There is in the executive branch of state government a state board of review. The board consists of the state controller, the state auditor, both acting *ex officio*, and a third member who shall be appointed by and serve at the pleasure of the governor. The third member may be a state officer who shall act *ex officio*.

**History:** En. Sec. 2, Ch. 11, L. 1969.

**79-2403. Per diem expenses for member not a state officer.** If the third member is not a state officer acting *ex officio*, he shall receive twenty-five dollars (\$25) for every day of actual attendance at meetings of the

board, together with his necessary traveling expenses in attending such meetings.

**History:** En. Sec. 3, Ch. 11, L. 1969.

**79-2404. State controller as chairman—substitutes.** The state controller is chairman of the board. A member of the board may appoint a representative to act for him in carrying out the provisions of this act.

**History:** En. Sec. 4, Ch. 11, L. 1969.

**79-2405. Records—dissent.** The board shall keep a record of all its proceedings, and any member may cause his dissent to the action of the majority upon any matter to be entered upon the record.

**History:** En. Sec. 5, Ch. 11, L. 1969.

**79-2406. Seal—authentication of records.** The board shall have a seal, bearing the following inscription: "State Board of Review." The seal shall be fixed to all writs and authentications of copies of records and to other instruments as the board directs.

**History:** En. Sec. 6, Ch. 11, L. 1969.

**79-2407. Quorum—vacancy.** A majority of the board constitutes a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the board. The act of a majority of the board when in session as a board is the act of the board. A vacancy in the board does not impair the right of the remaining members to exercise all the powers of the board.

**History:** En. Sec. 7, Ch. 11, L. 1969.

**79-2408. Secretary—cost of operation.** The state controller shall provide the board a secretary and all other assistance necessary for the board to fulfill its duties. All costs of operating the board shall be paid from moneys appropriated to the state controller.

**History:** En. Sec. 8, Ch. 11, L. 1969.

**79-2409. "Administrative cost" defined—state agencies.** As used in this act, "administrative costs" means the amounts expended by those state agencies which costs are attributable to the operations of all state agencies and a proration of any cost to, or expense of, the state for services of facilities provided for those state agencies which costs are attributable to the operations of all state agencies, for supervision or administration of the state government, or for services to the various state agencies.

**History:** En. Sec. 9, Ch. 11, L. 1969.

**79-2410. Determination of administrative cost—charge against agency's fund.** The state board of review shall determine, and may at any time redetermine, which funds shall be charged a share of administrative costs as to the function supported by any such fund and the amount which shall be charged against any fund as its fair share of administrative costs. These costs shall be a charge against any fund designated by the board.

**History:** En. Sec. 10, Ch. 11, L. 1969.



**79-2411. Factors in determining share of administrative cost—tax proceeds—highway purposes—constitutional restriction.** In determining or redetermining the fair share, the board may consider such factors of cost distribution and cost estimation as it deems necessary. However, that as to the proceeds of those taxes, the use of which is restricted by section 1b, of article XII, of the Montana constitution, the board shall assess only those administrative costs ascertained as being necessarily incurred in connection with highway purposes as set forth in that article.

History: En. Sec. 11, Ch. 11, L. 1969.

**79-2412. Certification—statement—administrative cost due—deferment—transfer of funds.** The board shall certify annually to the state controller the amount determined to be the fair share of administrative costs due and payable from each state agency and shall certify forthwith to the controller any amount redetermined to be the fair share of administrative costs due and payable from any state agency. The controller shall forthwith transmit to each state agency, from which administrative costs have been determined or redetermined to be due, a statement in writing setting forth the amount of the administrative costs due from the state agency, and stating that, unless a written request to defer payment is filed by the state agency with the state controller within thirty (30) days after the mailing of the statement by the controller to the state agency, the controller will direct the state treasurer to transfer the amount of the administrative costs from the special fund or funds chargeable therewith to the state general fund. The controller shall specify on the statement the special fund appropriations to be charged at the time transfers are made covering the administrative costs.

History: En. Sec. 12, Ch. 11, L. 1969.

**79-2413. Funds unavailable—unable to pay—written request for deferment—requirements.** If, upon receipt of the statement provided in section 12 [79-2412] of this act, the state agency does not have funds available by law for the payment of the administrative costs, or if any transfer might, if effected, result in loss to the state or to any special fund affected, of any federal funds, or would be in violation of the constitution or any law of the United States, or if it has any other reason why the payment of the costs should not be made at the time specified on the statement, the state agency shall, prior to the expiration of the thirty (30) day period referred to in the statement, file with the controller, in duplicate, a written request to defer payment of the administrative costs. The request shall set forth the reasons why the payment should be deferred. Upon receipt of a request filed because of lack of availability of funds or because of any reason other than lack of availability of funds, the controller shall forthwith transmit one (1) copy of the request to the board; and shall defer action to effect the transfer of funds until the transfer has been approved by the board.

History: En. Sec. 13, Ch. 11, L. 1969.

**79-2414. Certification—advance payment—deferment—funds unavailable—transfer.** The board may certify at any time during the year to the

state controller the amount as it determines, based upon experience of the preceding year, to be a reasonable advance for administrative costs to be made from the appropriation of each state agency supported from a fund, designated in accordance with section 10 [79-2410] of this act. The controller shall forthwith transmit to each state agency a statement in writing setting forth the amount of the advance, and stating that unless a written request to defer payment because of lack of availability of funds is filed by the state agency with the controller within thirty (30) days after the mailing of the statement by the controller to the state agency, the controller will transfer the amount of the advance from the special fund, or funds concerned, to the state general fund. The controller shall specify on the statement the special fund appropriation to be charged.

**History:** En. Sec. 14, Ch. 11, L. 1969.

**79-2415. Deferred advance payment—written request—advance applied against share of administrative cost—excess amount refunded.** If, upon receipt of the statement provided in section 14 [79-2414] of this act, the state agency does not have funds available by law for the payment of the advance, the state agency shall, prior to the expiration of the thirty (30) day period referred to in the statement, file with the state controller, in duplicate, a written request to defer payment of the advance. Upon receipt of a request, the controller shall forthwith transmit one (1) copy of the request to the board and shall defer action to effect the transfer of funds covering the advance referred to in the request until the transfer has been approved by the board. Any advance shall be applied against the state agency's fair share of administrative costs determined or redetermined as provided in section 12 [79-2412] and section 13 [79-2413] of this act. If the amount advanced exceeds the state agency's fair share of administrative costs, the controller shall transfer from the state general fund to the special fund appropriation the excess amount advanced.

**History:** En. Sec. 15, Ch. 11, L. 1969.





## TITLE 80—STATE INSTITUTIONS

### Chapter

1. Montana state school for the deaf and blind, 80-105, 80-107.
14. State department of institutions, 80-1403 to 80-1405, 80-1410 to 80-1416.
16. Payments for the care of residents of institutions, 80-1601, 80-1603.
17. Galen state hospital, 80-1701 to 80-1704.
19. State prison, 80-1903, 80-1905, 80-1908 to 80-1911.
22. State vocational school for girls and state industrial school, 80-2202 to 80-2206, 80-2209 to 80-2212.
23. Boulder river school and hospital, 80-2301 to 80-2312.
24. Division of mental hygiene—state hospital and mental health centers, 80-2401, 80-2401.1, 80-2402 to 80-2411.

### CHAPTER 1—MONTANA STATE SCHOOL FOR THE DEAF AND BLIND

#### Section

- 80-105. Eligibility of children for admittance.  
80-107. Duration of attendance at school.

**80-105. Eligibility of children for admittance.** On proper application being made therefor, deaf and blind children who are not more than eighteen (18) years of age residing within the state of Montana, and nonresident children, who are not more than eighteen (18) years of age, who are not mentally deficient, dangerously diseased in body, or of confirmed immorality, or incapacitated for useful instruction by reason of physical disability, may be admitted to such school.

**History:** En. Sec. 4, Ch. 182, L. 1943; reached the age of five (5) and" after "blind children"; and substituted "who are not more than eighteen (18) years of age" for "between such ages" after "non-resident children."

#### Amendments

The 1967 amendment deleted "who have

**80-107. Duration of attendance at school.** Every child admitted to such school shall be entitled to attend such school until reaching the age of twenty-one (21) years unless the board of education and superintendent determine that attendance at the school will not benefit the child; provided, that nothing in this section shall be construed so as to prevent the suspension or expulsion of any child at any time for insubordination or other cause deemed good and sufficient by the board of education and superintendent.

**History:** En. Sec. 6, Ch. 182, L. 1943; amd. Sec. 2, Ch. 282, L. 1967.

#### Amendments

The 1967 amendment deleted "for a period of ten (10) years, or" after "such school" and substituted "unless the board of education and superintendent determine that attendance at the school will not benefit the child" after "twenty-one (21) years" for "if such age be reached before the expiration of such ten (10) year period. Any child who has attended the school for a period of ten (10) years, but has not yet reached the age of twenty-

one (21) years, with the consent and approval of the superintendent of the school, may petition the state board of education to remain in such school for an additional period of two (2) years, or until arriving at the age of twenty-one (21) years if such child will arrive at such age before the expiration of such additional two (2) year period. The board shall consider the petition upon the scholastic record and the record as to obedience and morality of such child while in such school and if it finds it proper to do so may grant the same."

## CHAPTER 14—STATE DEPARTMENT OF INSTITUTIONS

## Section

- 80-1403. Institutions in department.  
 80-1404. Director of department—appointment, powers and duties.  
 80-1405. Powers and duties of board.  
 80-1410. Establishment of juvenile correctional facilities.  
 80-1411. Control and management of juvenile correctional centers—rules—special programs.  
 80-1412. Youth forest camp—work program.  
 80-1413. Participation by governing boards in research programs.  
 80-1414. Aftercare agreement to be signed by child before release from juvenile facility to custody of aftercare division.  
 80-1415. Control over minor so released vested in department of institutions.  
 80-1416. Detention of child who violates aftercare agreement—delivery on request to aftercare division.

**80-1403. Institutions in department.** The following institutions are in the state department of institutions:

- (1) Galen state hospital
- (2) Montana veterans' home
- (3) State prison
- (4) Montana children's center
- (5) Mountain View school
- (6) Pine Hills school
- (7) Boulder river school and hospital
- (8) Warm Springs state hospital
- (9) Montana center for the aged
- (10) Swan river youth forest camp
- (11) Eastmont training center
- (12) Such other institutions or departments established or to be established in the future having the function or purpose of providing care and services for juvenile delinquents including but not limited to youth forest camps and juvenile reception and evaluation centers.

No state institution may be moved, discontinued or abandoned without prior consent of the legislative assembly.

**History:** En. Sec. 3, Ch. 199, L. 1965; amd. Sec. 1, Ch. 320, L. 1967; amd. Sec. 1, Ch. 280, L. 1969. The 1969 amendment inserted new clause (11) and redesignated former clause (11) as clause (12).

**Amendments**

The 1967 amendment changed the names of the institutions listed in clauses (1), (5), (6), (7) and (8); and added clauses (10) and (11).

**Effective Date**

Section 2 of Ch. 280, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 10, 1969.

**80-1404. Director of department—appointment, powers and duties.** The board shall appoint the director, who is the chief executive and administrative officer of the department. The director shall be a person qualified by experience, training and professional competence in institutional rehabilitation and treatment management. The function of the director, in addition to other duties assigned to him by law, is to execute the policies established by the board. The director shall appoint employees for the central office of the department.

History: En. Sec. 4, Ch. 199, L. 1965; amd. Sec. 2, Ch. 320, L. 1967.

at the end of the section, which read "The board shall appoint and after hearing held discharge the warden or superintendent of institutions."

#### Amendments

The 1967 amendment deleted a sentence

### 80-1405. Powers and duties of board. The board shall:

- (1) \* \* \* [Same as parent volume.]
- (2) Report as provided in section 2 [82-4002] of this act.
- (3) to (7) \* \* \* [Same as parent volume.]

(8) To choose, appoint and discharge the warden or superintendent of each of the institutions or facilities in the department and, unless the legislative assembly has specified the salary of the warden or superintendent of the institution or facility in the appropriation to the department of institutions, fix their compensation after approval by the board of examiners. Before approving any salary increase, the board of examiners shall review the salaries of comparable positions in Montana state government, other states, and private industry.

History: En. Sec. 5, Ch. 199, L. 1965; amd. Sec. 3, Ch. 320, L. 1967; amd. Sec. 33, Ch. 93, L. 1969.

The 1969 amendment substituted the reporting requirements of section 82-4002 for former provision requiring annual reports to governor and biennial reports to legislature.

#### Amendments

The 1967 amendment added subparagraph (8).

### 80-1406. Warden and superintendents of institutions, etc.

#### Discretionary Authority of Warden of State Prison.

Actions of warden of state prison in denying inmate access to money deposited in his spending account would not be in-

terfered with in light of wide discretionary powers granted warden and in absence of clear showing that warden abused discretion. *Petition of Spurlock*, 151 M 380, 443 P 2d 5.

**80-1410. Establishment of juvenile correctional facilities.** The state department of institutions within the annual or biannual budgetary appropriation therefor may establish, maintain and operate facilities as may be needed properly to diagnose, care for, train, educate, and rehabilitate children in need of these services, and ten (10) years of age or older and under twenty-one (21), including but not limited to, the Mountain View school, the Pine Hills school and the youth forest camp.

History: En. Sec. 8, Ch. 320, L. 1967.

#### Title of Act

An act relating to the powers and duties of the board of institutions and to certain institutions under its management and control; providing the board's power to fix salaries of superintendents of institutions with the approval of the board of examiners if the salaries of superintendents or wardens are not specified by the legislative assembly in the appropriation to the department of institutions; changing the name of certain institutions; generally revising and amending the laws relating to juvenile correctional institu-

tions; providing for the control and management of juvenile correctional facilities including juvenile correctional facilities hereafter authorized by the legislature; providing for transferring of prisoners sent to the state prison who are under the age of twenty-one (21) to juvenile correctional facilities; amending sections 80-1403, 80-1404, 80-1405, 80-1601, 80-1701, 80-1702, 80-1703, 80-2202, 80-2203, 80-2204, 80-2205, 80-2206, 80-2209, 80-2210, 80-2211, 80-2212, 80-2301, 80-2302, 80-2303, 80-2304, 80-2305, 80-2306, 80-2307, 80-2308, 80-2309, 80-2401, 80-2402, 80-2404, repealing 80-2201, 80-2208, R. C. M. 1947.



**80-1411. Control and management of juvenile correctional centers—rules—special programs.** All of the facilities provided for in section 8 [80-1410] of this act or which may hereafter be established by the department pursuant to the authority granted by section 8 [80-1410] of this act shall exercise their functions under the supervision, direction, control and general management of the department. Except where otherwise provided by law, the department by rule and regulations shall establish standards of care, policies of admission, transfers, discharge and aftercare supervision and from time to time it shall order such changes in the policies, conduct or management of the facilities as seems desirable in order to provide adequate care for children and adequate service to the courts. The department shall develop special programs within each facility which are adaptable to the particular needs of its operation.

**History:** En. Sec. 9, Ch. 320, L. 1967.

**80-1412. Youth forest camp—work program.** In the case of a youth forest camp, a work program shall be provided by the Montana state forester, and shall be carried out with co-operation between the state forester and the camp superintendent.

**History:** En. Sec. 10, Ch. 320, L. 1967.

**80-1413. Participation by governing boards in research programs.** The duly constituted and governing board of any penal, corrective, or custodial institution of the state of Montana is hereby enabled and authorized to participate in and co-operate with programs of research and development being conducted and carried on by any units of the Montana university system, by any of the other educational institutions of the state of Montana or by any foundation or agency thereof, in the fields of science, health, education and natural resources. Such programs may include the voluntary participation of the inmates of the institution in testing and experimental work conducted as a part thereof. Any funds received from the authorized programs may be shared with the participating inmates or otherwise held and used for the welfare and rehabilitation thereof, and shall not become a part of the regular budgeted operation of the institution.

**History:** En. Sec. 1, Ch. 98, L. 1967.

#### **Title of Act**

An act authorizing voluntary participation in programs of research and development in the fields of science, health, education and natural resources by the governing boards of state penal, correc-

tive or custodial institutions, and by the inmates thereof for use in welfare and rehabilitation work within said institutions.

#### **Cross-References**

Research and development programs of educational units, sec. 75-313.

**80-1414. Aftercare agreement to be signed by child before release from juvenile facility to custody of aftercare division.** A child released by the department of institutions from one of the state juvenile facilities to the supervision, custody and control of the aftercare division of the department of institutions shall, before being so released, sign an aftercare agreement containing the terms and conditions under which the child is so released.

**History:** En. Sec. 1, Ch. 158, L. 1969.

**Title of Act**

An act providing for the apprehension and detention of a child released from the custody of one of the state juvenile

facilities to the supervision, custody and control of the aftercare division of the department of institutions, who has violated the terms of his or her aftercare agreement.

**80-1415. Control over minor so released vested in department of institutions.** The department of institutions has control over a child so released until he attains the age of twenty-one (21) years, subject, however, to the general jurisdiction of the various courts of Montana for acts committed by such child while under the control of the department.

**History:** En. Sec. 2, Ch. 158, L. 1969.

**80-1416. Detention of child who violates aftercare agreement — delivery on request to aftercare division.** A child who violates the terms and conditions of his or her aftercare agreement may be detained, day or night, by the department of institutions or by any law officer of the state of Montana or any county or city of the state of Montana, upon certificates in writing to such officer by the director of the aftercare division of the department of institutions or any aftercare counselor of the department of institutions to the effect that such child has violated the terms and conditions of his or her aftercare agreement. Upon detention by a law officer of the state of Montana as hereinbefore provided, such child shall on request be delivered to the custody of the aftercare division of the department of institutions who may

(1) return such child to one of the juvenile facilities of the state of Montana, or

(2) continue such child under the supervision of the aftercare division.

**History:** En. Sec. 3, Ch. 158, L. 1969.

**Effective Date**

Section 4 of Ch. 158, Laws 1969 pro-

vided the act should be in effect from and after its passage and approval. Approved February 28, 1969.

CHAPTER 16—PAYMENTS FOR THE CARE OF RESIDENTS OF INSTITUTIONS

Section

80-1601. Institutions subject to per diem charge.

80-1603. Monthly assessment of charges—annual computation of rate—investigation—claim of state—review—deposit of receipts.

**80-1601. Institutions subject to per diem charge.** The state department of institutions shall collect and process per diem payments for the care of residents in the following institutions:

- (1) Montana children's center
- (2) Warm Springs state hospital
- (3) Boulder river school and hospital
- (4) Galen state hospital
- (5) Montana veterans' home

(6) Montana center for the aged.

(7) Eastmont Training Center.

**History:** En. Sec. 13, Ch. 199, L. 1965; amd. Sec. 4, Ch. 320, L. 1967; amd. Sec. 1, Ch. 276, L. 1969.

#### Amendments

The 1967 amendment, in subparagraph (2), substituted "Warm Springs state hospital" for "State Hospital"; in subparagraph (3), substituted "Boulder river school and hospital" for "State Training School and Hospital"; and, in subpara-

graph (4), substituted "Galen state hospital" for "State Pulmonary Disease Hospital."

The 1969 amendment added subparagraph (7).

#### Effective Date

Section 2 of Ch. 276, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 10, 1969.

**80-1603. Monthly assessment of charges—annual computation of rate—investigation—claim of state—review—deposit of receipts.** (1) The department shall assess monthly against each resident or responsible person, the full per diem charge, a proportionate share of the per diem charge, or no per diem charge, based upon financial information given to the department during its investigation. The per diem shall be computed on July 1 of each year by the director of institutions.

(2) For the purpose of such investigations, every agency and department of the state is required to render all reasonable assistance to the department of institutions in obtaining all information necessary for the proper implementation of the purposes of such an investigation. The director and any representative of the department duly authorized by the director, shall have the power to administer oaths, take testimony, subpoena and compel the attendance of witnesses and the production of books, papers, records and documents deemed material appurtenant in connection with the duty of securing payments for support as provided by this act. Any person failing to obey such subpoena, upon petition of the director or representative of the department, to any judge of the district court of the state of Montana, may be ordered by the judge to appear and show cause for his disobedience of the subpoena. The judge, after hearing, may order that the subpoena be obeyed, or if it is made to appear to the judge that the subpoena was for any reason inappropriately issued, may dismiss the petition. Any person who fails to obey the subpoena when ordered to do so by the judge may be punished as for contempt of court on application of the district court by the director or his representative.

(3) The state of Montana shall have a claim against the estate of any patient and against the estate of any responsible person, for any amount due and owing to the state of Montana at the date of death or such resident or such person. Such claim against the estate of any responsible person shall not have priority against such estate for the amount necessary to rear and educate surviving children of the responsible person.

(4) The attorney general shall collect any claim which the state may have hereunder against such estate. No such claim shall be enforced against any real estate while it is occupied as a home by the surviving spouse or the resident or responsible person.

(5) If a resident or responsible person disagrees with the determination of the department as to the ability of such resident or responsible person



to pay all or any part of the per diem charge, an appeal may be filed within thirty (30) days of such determination with the state board of institutions. If such resident thereafter disagrees with the determination of the appeal by the state board of institutions, an appeal may be filed and taken to any court of record in Montana having jurisdiction of the resident or responsible person liable for such payment.

(6) The department may, at any time, review and change any determination for per diem payments. In any case, however, no resident of an institution shall be released by reason of the nonpayment of the per diem, if in the judgment of the superintendent of the institution at which he is a resident, such release is medically inadvisable.

(7) All per diem payments received by the department shall be deposited in the state treasury to the credit of the general fund.

**History:** En. Sec. 15, Ch. 199, L. 1965; amd. Sec. 1, Ch. 240, L. 1969.

#### Amendments

The 1969 amendment rewrote subsection (1), for previous text of which see parent volume; inserted subsections (2) to (4); redesignated and rewrote former subsection (2) as subsection (5); redesignated former subsection (3) as subsection (6) and deleted "and may, if necessary, request a further investigation by a county department of public welfare" at the end of the first sentence; and redesignated former subsection (4) as subsection (7).

tion (2) as subsection (5); redesignated former subsection (3) as subsection (6) and deleted "and may, if necessary, request a further investigation by a county department of public welfare" at the end of the first sentence; and redesignated former subsection (4) as subsection (7).

### CHAPTER 17—GALEN STATE HOSPITAL

#### Section

80-1701. Location and primary function of hospital—secondary function.

80-1702. Qualifications of superintendent.

80-1703. Transfer of patient to mental institution—notice to relatives.

80-1704. Juvenile reception and evaluation center—committal—duties—transportation to and from.

**80-1701. Location and primary function of hospital—secondary function.** (1) The institution located at Galen is the Galen state hospital and, as its primary function, provides:

(a) Treatment of tuberculosis and silicosis (commonly called miner's consumption).

(2) If there are space and funds available, the hospital shall also treat the following:

(a) Emphysema, bronchiectasis, carcinoma of the lung and other diseases of the lung pertaining to pulmonary disorders.

(b) Geriatric and senile patients afflicted with pulmonary disorders and patients who are residents of another state institution.

**History:** En. Sec. 17, Ch. 199, L. 1965; amd. Sec. 5, Ch. 320, L. 1967.

#### Amendments

The 1967 amendment substituted "Galen state hospital" for "State Pulmonary Disease Hospital" in subsection (1).

**80-1702. Qualifications of superintendent.** The superintendent of Galen state hospital shall be a physician legally qualified to practice medicine in Montana with at least (4) years in the practice of his profession, including at least one (1) year's experience in a general hospital.

**History:** En. Sec. 18, Ch. 199, L. 1965; amd. Sec. 6, Ch. 320, L. 1967.

#### Amendments

The 1967 amendment substituted "Galen state hospital" for "state pulmonary disease hospital."

**80-1703. Transfer of patient to mental institution—notice to relatives.**

A mentally retarded or mentally ill person residing at Galen state hospital may be transferred to the Warm Springs state hospital, the Montana center for the aged, or the Boulder river school and hospital with the approval of the department of institutions if the department determines that the transfer will be in the best interests of the patient. Unless a medical or psychiatric emergency exists fifteen (15) days prior to the transfer the department shall send notice of the proposed transfer to the patient's parent, guardian, or spouse, or if none is known, his nearest relative or friend. In the case of an emergency transfer, the department shall send notice within seventy-two (72) hours after the time of transfer.

**History:** En. Sec. 19, Ch. 199, L. 1965;  
amd. Sec. 7, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment substituted "Galen state hospital" for "state pulmonary dis-

ease hospital"; substituted "Warm Springs state hospital" for "state hospital"; substituted "Boulder river school and hospital" for "state training school and hospital"; and made a minor change in punctuation.

**80-1704. Juvenile reception and evaluation center—committal—duties—**

**transportation to and from.** The reception and evaluation center for children at the Galen state hospital as established by law shall be subject to the rules and regulations adopted and promulgated by the state department of institutions and shall accept from the juvenile courts the temporary custody of children then being held on a charge, under which the child could be adjudged a delinquent. For the period during which children are in the custody of the reception and evaluation center for children, it shall provide for them a residential program of care and study. The reception and evaluation center for children may not in any event detain or hold a child in custody for a period of time greater than forty-five (45) days. To assist the juvenile courts in making a decision regarding the child's disposition the reception and evaluation center for children will forward recommendations to the court to include, but not limited to, a psychiatric social summary; psychological evaluation, medical report; diagnostic school report; and a psychiatric report prepared by a consulting psychiatrist, for those for whom this kind of evaluation is considered necessary. Transportation to and from the reception and evaluation center shall be provided by the county of such child's residence.

**History:** En. Sec. 20, Ch. 320, L. 1967.

**Cross-References**

Juvenile court committal of delinquents, sec. 10-611.

**Repealing Clause**

Section 21 of Ch. 320, Laws 1967 read  
"Sections 80-2201 and 80-2208, R. C. M.  
1947, are hereby repealed."

**CHAPTER 19—STATE PRISON****Section**

- 80-1903. Working hours of prison employees.
- 80-1905. Good time allowance—forfeiture—probationers and parolees—application of prior law.
- 80-1908. Commitment of inmates to state hospital.
- 80-1909. Establishment of intensive rehabilitation center authorized.
- 80-1910. Standards of admission.
- 80-1911. Management and control of center.

**80-1903. Working hours of prison employees.** A period of eight (8) hours in each period of twenty-four (24) consecutive hours constitutes a day's work for all employees of the state prison. The staff of correctional personnel shall not work more than forty (40) hours or five (5) days a week except in cases of riots, escapes or other emergencies endangering health, life, or property.

**History:** En. Sec. 26, Ch. 199, L. 1965;  
amd. Sec. 1, Ch. 232, L. 1969.

#### Amendments

The 1969 amendment substituted "forty (40)" for "forty-eight" before "hours" and "five (5)" for "six" before "days" in the second sentence.

**80-1905. Good time allowance—forfeiture—probationers and parolees—application of prior law.** (1) The state department of institutions shall adopt rules and regulations providing for the granting of good time allowance for inmates employed in any prison work or activity. The good time allowance shall operate as a credit on his sentence as imposed by the court, conditioned upon the inmate's good behavior and compliance with the rules and regulations made by the department or the warden. The rules adopted by the department may not grant good time allowance to exceed:

(a) to (c). \* \* \* [Same as parent volume.]

(d) thirteen (13) days per month for those inmates enrolled in school inside the walls who successfully complete the course of study or who while so enrolled are released from prison by discharge or parole.

(e) ten (10) days for each pint of blood donated by an inmate.

(2) and (3). \* \* \* [Same as parent volume.]

**History:** En. Sec. 28, Ch. 199, L. 1965;  
amd. Sec. 1, Ch. 219, L. 1967.

#### Amendments

The 1967 amendment added subdivisions (d) and (e) in subsection (1).

### DECISIONS UNDER FORMER LAW

#### Forfeiture of Good Time Allowance

A prisoner who, by virtue of former section 80-740.1, was earning good time under former section 80-739, the prior law,

was subject to the provisions of former section 80-741, the forfeiture statute, which existed under the old law. Petition of Brandt, 147 M 175, 410 P 2d 708.

**80-1908. Commitment of inmates to state hospital.** The procedures for committing an inmate of the state prison to the state hospital are the same as for any other person. Provided, however, that nothing in this act shall be deemed to prevent the temporary transfer of an inmate of the state prison to the Warm Springs state hospital for treatment or evaluation. Such transfers may only be authorized by the department of institutions upon recommendation of the warden of the state prison and the superintendent of the Warm Springs state hospital and shall be for a period not to exceed sixty days and shall not exceed a total of one hundred twenty days in any twelve-month period.

**History:** En. Sec. 31, Ch. 199, L. 1965;  
amd. Sec. 1, Ch. 294, L. 1969.

#### Effective Date

Section 2 of Ch. 294, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 11, 1969.

#### Amendments

The 1969 amendment added the last two sentences.



**80-1909. Establishment of intensive rehabilitation center authorized.** Within the budgetary limits provided them by law, the board of institutions is authorized to establish on property owned by the state of Montana on which prison facilities are or may be located a prison facility designed to make possible the segregation of certain types of prisoners from other prisoners.

**History:** En. Sec. 1, Ch. 221, L. 1969.

**Title of Act**

An act providing for the establishment of an intensive rehabilitation center at the

Montana state prison; providing standards of admission to such center; providing for the management and control of such center.

**80-1910. Standards of admission.** The facility shall be designated and known as the "intensive rehabilitation center" and shall be the place of custody for those male prisoners who in consideration of their age, type of crime for which committed, physical condition, behavior, attitude and prospects of reformation, are those most likely to benefit from such place of custody.

**History:** En. Sec. 2, Ch. 221, L. 1969.

**80-1911. Management and control of center.** The warden of the Montana state prison, subject to the supervision and control of the department of institutions shall operate and manage such intensive rehabilitation center, and shall make such rules and regulations for the operation, management, and admission to such center as may from time to time be necessary and desirable.

**History:** En. Sec. 3, Ch. 221, L. 1969.

## CHAPTER 22—STATE VOCATIONAL SCHOOL FOR GIRLS AND STATE INDUSTRIAL SCHOOL

**Section**

80-2202. Superintendents to manage facilities.

80-2203. Curricula at facilities.

80-2204. Maximum age of commitment.

80-2205. Medical examination before commitment—records required to accompany child committed.

80-2206. Commitment expenses—arrangement for transportation.

80-2209. Transfer of child to any other facility or institution—notice to parents or guardian and committing court.

80-2210. Commutation of sentence to state prison—commitment of child to department of institutions—revocation of commutation—transfer of child to a juvenile facility.

80-2211. Child leaving juvenile facility without permission—apprehension and return.

80-2212. Aiding resident in leaving school—penalty.

### 80-2201. Repealed.

**Repeal**

This section (Sec. 45, Ch. 199, L. 1965), relating to the location and functions of vocational and industrial schools, was repealed by Sec. 21, Ch. 320, Laws 1967 and Sec. 34, Ch. 320, Laws 1967.

**80-2202. Superintendents to manage facilities.** Each facility provided for herein shall be under the immediate management and control of a superintendent.

**History:** En. Sec. 46, Ch. 199, L. 1965; amd. Sec. 11, Ch. 320, L. 1967.

facility provided for herein" for "The state vocational school for girls and the state industrial school"; and made a minor change in phraseology.

**Amendments**

The 1967 amendment substituted "Each

**80-2203. Curricula at facilities.** The academic and vocational curriculum in facilities containing academic and vocational training shall include such academic and vocational subjects as are taught in the public schools of the state, and shall conform to the standards set by the state board of education.

**History:** En. Sec. 47, Ch. 199, L. 1965; amd. Sec. 12, Ch. 320, L. 1967.

academic and vocational curriculum in facilities containing academic and vocational training" for "The curricula of the state vocational school for girls and the state industrial school."

**Amendments**

The 1967 amendment substituted "The

**80-2204. Maximum age of commitment.** No child shall be committed by any juvenile court to the Mountain View school, Pine Hills school or other juvenile facility who has attained the age of eighteen (18) years, except, however, that any person under twenty-one (21) years who prior to attaining the age of eighteen (18) years came under the jurisdiction of the juvenile court by reason of delinquent conduct and whose adjudication of delinquency, including the finding that commitment to some institution was necessary is not made until after the child reaches the age of eighteen (18) years shall be committed to the department of institutions who shall then have the obligation to test and evaluate the person to determine the proper place of detention for the person who shall thereupon be confined at that institution until the person shall have attained the age of twenty-one (21) years unless sooner discharged by the department of institutions.

**History:** En. Sec. 48, Ch. 199, L. 1965; amd. Sec. 13, Ch. 320, L. 1967; amd. Sec. 15, Ch. 262, L. 1969.

be committed to the Mountain View school, Pine Hills school or the department of institutions who has attained the age of eighteen (18)."

**Amendments**

The 1967 amendment substantially rewrote this section. For previous text, see parent volume.

The 1969 amendment rewrote this section which formerly read, "No child shall

**Repealing Clause**

Section 16 of Ch. 262, Laws 1969 read "Sections 10-604, 10-605, 10-609, 10-618, 10-619, 10-620, 10-632, 75-3001, and 75-3002, R. C. M. 1947, are repealed."

**80-2205. Medical examination before commitment—records required to accompany child committed.** Before a child is committed to the Mountain View school or the Pine Hills school or the department of institutions he shall be examined by a licensed physician. A child committed to one of the schools or the department of institutions shall be accompanied by the order of commitment, a medical examination report, an adequate social history, and any school records.

**History:** En. Sec. 49, Ch. 199, L. 1965; amd. Sec. 14, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment substantially rewrote this section. For previous text, see parent volume.

**80-2206. Commitment expenses—arrangement for transportation.** The expenses of committing a child to the Mountain View school or the Pine Hills school or to the department of institutions and transporting such child to the Mountain View school or the Pine Hills school or the place designated by the department for it to receive custody and the expense of returning such child to the county of residence shall be borne by the county of residence. The district judge shall arrange for transportation of the child to the place where the department of institutions has directed that it will receive custody of such child.

History: En. Sec. 50, Ch. 199, L. 1965;  
amd. Sec. 15, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment completely rewrote this section. For previous text, see parent volume.

**80-2208. Repealed.**

**Repeal**

This section (Sec. 52, Ch. 199, L. 1965), relating to the placement or discharge of residents of vocational and industrial

schools, was repealed by Sec. 21, Ch. 320, Laws 1967 and Sec. 34, Ch. 320, Laws 1967.

**80-2209. Transfer of child to any other facility or institution—notice to parents or guardian and committing court.** (1) The department of institutions upon recommendation of the superintendent of a facility may transfer a child resident in one of its juvenile facilities to any other facility or institution under the jurisdiction and control of the department.

(2) In the case of transfers of children in juvenile facilities to Warm Springs state hospital or Boulder river school and hospital and unless medical or psychiatric emergency exists, fifteen (15) days prior to the transfer the department of institutions shall send notice of the proposed transfer to the parents or legal guardian of the child and to the district court who committed the child. In the case of an emergency transfer, the department shall send notice within seventy-two (72) hours after the time of transfer.

History: En. Sec. 53, Ch. 199, L. 1965;  
amd. Sec. 16, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment completely rewrote this section. For previous text, see parent volume.

**80-2210. Commutation of sentence to state prison—commitment of child to department of institutions—revocation of commutation—transfer of child to a juvenile facility.** (1) Upon the application of a child under the age of twenty-one (21) years who has been sentenced to the state prison, or upon the application of his parents or guardians, the governor may, after consulting with the department of institutions and with the approval of the board of pardons, commute the sentence by committing such child to the department of institutions during his minority or until sooner placed or discharged.

(2) If such child's behavior after being committed to the department of institutions indicates that he is not a proper person to reside at one of the department's juvenile facilities, the governor after consulting with the department of institutions with the approval of the board of pardons,



may revoke the commutation and return him to the state prison to serve out his unexpired term, and the time spent by him at one of the department juvenile facilities or while a refugee from one of the department juvenile facilities, shall not be considered as a part of his original sentence.

Upon recommendation of the warden and with the approval of the department of institutions a child under the age of twenty-one (21) years, who has been sentenced to the state prison, may be transferred to any juvenile facility under the jurisdiction and control of the department. Upon such transfer such child shall be under the supervision and control of the facility to which he is transferred.

If such child's behavior after transfer to such juvenile facility indicated he might be released on parole or his sentence commuted and he be discharged from custody, the superintendent of such facility, with the approval of the department, may make an appropriate recommendation to the state board of pardons and the governor who may, in their discretion, parole such child or commute his sentence.

If such child's behavior after transfer to a juvenile facility indicates he is not a proper person to reside in such facility, upon recommendation of the superintendent, and with the approval of the department, such child shall be returned to the state prison to serve out his unexpired term.

**History:** En. Sec. 54, Ch. 199, L. 1965;  
amd. Sec. 17, Ch. 320, L. 1967.

#### Amendments

The 1967 amendment, in subsection (1), substituted "twenty-one (21)" for "eighteen (18)"; substituted "department of institutions" for "state vocational school for girls or state industrial school" before "during his minority"; in subsection (2), substituted "committed to the department

of institutions" for "sent to one of such schools" before "indicates"; substituted "one of the department's juvenile facilities" for "one of the schools" after "reside at"; substituted "department juvenile facilities or while a refugee from one of the department juvenile facilities" for "schools, or while a refugee from one of the schools" before "shall not be considered"; and added the second, third and fourth paragraphs in subsection (2).

**80-2211. Child leaving juvenile facility without permission—apprehension and return.** A child who has left a juvenile facility of the department without permission may be apprehended and returned by any citizen.

**History:** En. Sec. 55, Ch. 199, L. 1965;  
amd. Sec. 18, Ch. 320, L. 1967.

#### Amendments

The 1967 amendment substituted "a juvenile facility of the department" for "the state vocational school for girls or state industrial school."

**80-2212. Aiding resident in leaving school—penalty.** A person who permits or assists a resident of any juvenile facility to leave a facility without permission, or who furnished or attempts to furnish to such a resident a tool, weapon, or other article with the intent of aiding him to leave without permission, or who harbors or conceals a resident who has left without permission, shall on conviction be punished by imprisonment for a term of not less than six (6) months or more than two (2) years, or by a fine not exceeding one thousand dollars (\$1,000), or by both such fine and imprisonment.

**History:** En. Sec. 56, Ch. 199, L. 1965;  
amd. Sec. 19, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment substituted "any juvenile facility to leave a facility" for "the state vocational school for girls or the state industrial school to leave the school" after "a resident of."

**CHAPTER 23—BOULDER RIVER SCHOOL AND HOSPITAL****Section**

- 80-2301. Location and function of school.
- 80-2302. Superintendent to manage school—school in division of mental retardation.
- 80-2303. Residence required for admittance to school.
- 80-2304. Application of parent or guardian for admission of mentally retarded person—supporting affidavits—social summary.
- 80-2305. Applications heard by district court—hearing—medical and psychological examination—social summary—order approving application.
- 80-2306. Admission to school to await accommodations—records to accompany person admitted—transportation costs.
- 80-2307. Temporary admissions to school.
- 80-2308. Transfer of patient to hospital—notice to parents or guardian and committing court.
- 80-2309. Discharge from school.
- 80-2310. Mental retardation center at Glendive—services provided.
- 80-2311. Capacity of mental retardation center.
- 80-2312. Supervision of Glendive center—transfers to Boulder river school and hospital.

**80-2301. Location and function of school.** (1) The institution located at Boulder is the "Boulder river school and hospital." The primary function of the school is the care, treatment, training and education of mentally retarded persons.

(2) As used in this act "mental retardation" is a state of subnormal development of the human organism which results in the mental incapability of the person affected to adapt himself to the daily demands of his social environment.

**History:** En. Sec. 58, Ch. 199, L. 1965;  
amd. Sec. 22, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment substituted "Boulder river school and hospital" for "State Training School and Hospital" in subsection (1).

**80-2302. Superintendent to manage school—school in division of mental retardation.** The superintendent of the Boulder river school and hospital is responsible for the immediate management and control of the school. The school is in the division of mental retardation of the department of institutions.

**History:** En. Sec. 59, Ch. 199, L. 1965;  
amd. Sec. 23, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment substituted "Boulder river school and hospital" for "state training school and hospital."

**80-2303. Residence required for admittance to school.** To be eligible for admittance to the Boulder river school and hospital, a mentally retarded person or his parent or guardian shall have been a resident of the state for at least one (1) year.

**History:** En. Sec. 60, Ch. 199, L. 1965;  
amd. Sec. 24, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment substituted "Boulder river school and hospital" for "state training school and hospital."

**80-2304. Application of parent or guardian for admission of mentally retarded person—supporting affidavits—social summary.** If an application for admission of a mentally retarded person to the Boulder river school and hospital is made by the guardian or parent it shall be filed with the department of institutions, in a form prescribed by the department and available at the county department of public welfare office. The application shall be supported by the affidavit of two (2) physicians or one (1) psychologist acceptable to the department of institutions and one (1) physician certifying that the person whose admission is sought is mentally retarded. The county department of public welfare, where the retarded person resides, shall prepare a social summary on the retarded person for the use of the Boulder river school and hospital.

**History:** En. Sec. 61, Ch. 199, L. 1965;  
amd. Sec. 25, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment substituted "Boulder river school and hospital" for "state training school and hospital" wherever it appears in this section.

**80-2305. Applications heard by district court—hearing—medical and psychological examination—social summary—order approving application.** If the application for admission is made by someone other than the parent or legal guardian of a mentally retarded person, it shall be filed with the clerk of the district court. The application shall be in a form prescribed by the state department of institutions. The judge shall set the time and place for hearing the application, and the clerk shall notify the parents or guardians, and other interested persons. The court shall name two (2) physicians or one (1) psychologist acceptable to the department of institutions, and one (1) physician, to examine the person whose admission is sought. The county department of public welfare shall prepare a social summary of the person for the use of the court. If the court concludes from the examination and other information obtained at the hearing that the person whose admission is sought, is a proper person for admission to the Boulder river school and hospital, the court shall issue an order approving the application.

**History:** En. Sec. 62, Ch. 199, L. 1965;  
amd. Sec. 26, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment substituted "Boulder river school and hospital" for "state training school and hospital" in the sixth sentence.

**80-2306. Admission to school to await accommodations—records to accompany person admitted—transportation costs.** A person may not be taken to the Boulder river school and hospital until the department of institutions has ascertained whether or not there is room at the school to accommodate the person. If there is not room, the application shall be filed with the department, which shall grant admission when room becomes available. When there is room the person shall be sent to the school with a copy of the court order, if any, the application, and the social summary prepared by the county department of public welfare. The costs of transportation to the school shall be paid by the county where the person resides.



**History:** En. Sec. 63, Ch. 199, L. 1965;  
amd. Sec. 27, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment substituted "Boulder river school and hospital" for "state training school and hospital" in the first sentence.

**80-2307. Temporary admissions to school.** In order to utilize facilities more efficiently during the temporary or seasonal decreases in population, and in order to extend the benefits of training and treatment programs offered by the Boulder river school and hospital to mentally retarded persons whose extended commitment is not sought, the department of institutions may admit a mentally retarded person to the school for a period not exceeding sixty (60) days on the application of the person's parent or guardian.

**History:** En. Sec. 64, Ch. 199, L. 1965;  
amd. Sec. 28, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment substituted "Boulder river school and hospital" for "state training school and hospital."

**80-2308. Transfer of patient to hospital—notice to parents or guardian and committing court.** With the approval of the department of public institutions, a patient of the Boulder river school and hospital may be transferred to the Warm Springs state hospital or the Galen state hospital. Unless a medical or psychiatric emergency exists, fifteen (15) days prior to the transfer the department shall send notice of the proposed transfer to the parents or legal guardian of the person, and to the district court, if any, which committed the person. In the case of an emergency transfer, the department shall send notice within seventy-two (72) hours after the time of transfer.

**History:** En. Sec. 65, Ch. 199, L. 1965;  
amd. Sec. 29, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment substituted "Boulder river school and hospital" for "state

training school and hospital" after "patient of the"; and substituted "Warm Springs state hospital or the Galen state hospital" for "state hospital of (or) the state pulmonary disease hospital" after "transferred to the" in the first sentence.

**80-2309. Discharge from school.** (1) With the approval of the department of institutions, the superintendent may discharge a person admitted to the Boulder river school and hospital.

(2). \* \* \* [Same as parent volume.]

**History:** En. Sec. 66, Ch. 199, L. 1965;  
amd. Sec. 30, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment substituted "Boulder river school and hospital" for "state training school and hospital" at the end of subsection (1).

**80-2310. Mental retardation center at Glendive—services provided.** The board of institutions shall establish, construct, equip, maintain and provide services for a mental retardation center at Glendive to be called "Eastmont training center" for residential and outpatient care of mentally retarded persons residing in Montana. The center shall be planned, constructed, equipped and shall provide services similar to those provided

at the state training school and hospital at Boulder; provided, however, that the center shall not be a duplication of the state training school and hospital but shall be an extension thereof.

**History:** En. Sec. 3, Ch. 255, L. 1967;  
amd. Sec. 1, Ch. 275, L. 1969.

#### Amendments

The 1969 amendment inserted "to be called 'Eastmont training center'" after "at Glendive" in the first sentence.

**80-2311. Capacity of mental retardation center.** The center to be constructed under the provisions of this act shall not exceed the requirements of two hundred (200) bed units.

**History:** En. Sec. 4, Ch. 255, L. 1967.

**80-2312. Supervision of Glendive center—transfers to Boulder river school and hospital.** The board of institutions shall plan, supervise, and provide rules and regulations for, but not limited to, the construction, equipment, maintenance, staff requirements and services to be provided at the center. The board shall provide for temporary transfers from the Eastmont training center to the Boulder river school and hospital for special medical, psychological, surgical and other services on a temporary basis.

**History:** En. Sec. 5, Ch. 255, L. 1967;  
amd. Sec. 2, Ch. 275, L. 1969.

"or" before "other services on a temporary basis" in the second sentence.

#### Amendments

The 1969 amendment substituted "Eastmont training center to the Boulder river school and hospital" for "Glendive center to the state training school and hospital at Boulder"; and substituted "and" for

#### Effective Date

Section 3 of Ch. 275, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 10, 1969.

## CHAPTER 24—DIVISION OF MENTAL HYGIENE—STATE HOSPITAL AND MENTAL HEALTH CENTERS

### Section

- 80-2401. Location and function of hospital—hospital in division of mental hygiene.
- 80-2401.1. Definition of terms.
- 80-2402. Superintendent is supervisor of division—qualifications of superintendent.
- 80-2403. Functions of division of mental hygiene.
- 80-2404. Alcoholism services center.
- 80-2405. Department of institutions to control public mental health programs—establishment of standards, qualifications and compensation—compliance with federal guidelines.
- 80-2406. Clinics and community services.
- 80-2407. Mental health regions.
- 80-2408. Continuation of services.
- 80-2409. Availability of services.
- 80-2410. Mental health centers established—staffing.
- 80-2411. Supervision of mental health centers.

**80-2401. Location and function of hospital—hospital in division of mental hygiene.** The institution located at Warm Springs is the "Warm Springs state hospital." The only function of the state hospital is the care and treatment of mentally ill persons and alcoholics. The Warm Springs

state hospital is in the division of mental hygiene of the department of institutions.

**History:** En. Sec. 67, Ch. 199, L. 1965;  
amd. Sec. 31, Ch. 320, L. 1967.

#### Amendments

The 1967 amendment substituted "Warm Springs state hospital" for "state hospital" throughout this section.

**80-2401.1. Definition of terms.** As used in this act, unless the context clearly indicates otherwise:

(1) Public mental health facility is any public service or group of services operating under the guidelines of the division of mental hygiene of the department of institutions offering mental health care on an inpatient or outpatient basis to the mentally ill.

(2) Community comprehensive mental health center is a facility not necessarily encompassed within one building offering at least the following five (5) basic mental health services to the public:

- (a) Twenty-four (24) hour inpatient care.
- (b) Part-time hospitalization.
- (c) Outpatient service.
- (d) Emergency service.
- (e) Consultation and education in mental health.

(3) Mental health clinic is an outpatient facility offering mental health care to the public.

**History:** En. Sec. 1, Ch. 246, L. 1967.

#### Title of Act

An act expanding duties and services of the division of mental hygiene of the state board of public institutions by establishing and conducting mental health clinics and community comprehensive mental health centers; creating regional mental health boards; providing for the organization thereof; defining the duties of regional mental health boards; authorizing the participation of the division of mental hygiene of the state board of public institutions in contractual or co-operative arrangements with regional mental health boards and others; provid-

ing the division of mental hygiene and the regional mental health boards the authority to receive gifts, grants, donations, and any other form of support and enabling counties participating in regional mental health programs to use tax moneys to finance the programs of prevention, diagnosis and treatment of mental illness; giving the division of mental hygiene of the state board of public institutions general supervisory power and control over all public mental health programs in the state of Montana; amending section 80-2403 of the Revised Codes of Montana, 1947, enacted as section 69, chapter 199, Laws of 1965; and repealing all other acts and parts of acts in conflict herewith.

**80-2402. Superintendent is supervisor of division—qualifications of superintendent.** The superintendent of the Warm Springs state hospital is the supervisor of the division of mental hygiene. The superintendent shall be a licensed physician who has fulfilled the residency requirements of the American Board of Psychiatry and Neurology in the speciality of psychiatry.

**History:** En. Sec. 68, Ch. 199, L. 1965;  
amd. Sec. 32, Ch. 320, L. 1967.

#### Amendments

The 1967 amendment substituted "Warm Springs state hospital" for "state hospital" in the first sentence.

**80-2403. Functions of division of mental hygiene.** The division of mental hygiene of the department of institutions shall:



(1) Take cognizance of matters affecting the mental health of the citizens of the state.

(2) Initiate preventive mental hygiene activities of the state's mental health program, including but not limited to the implementation of mental health care and treatment, prevention and research as can best be accomplished by community centered services. Such means shall be utilized by the division of mental hygiene as will initiate and operate these services in co-operation with local agencies as established under provisions of sections 4 and 5 [80-2406 and 80-2407] below.

(3) Make scientific and medical research investigations relative to the incidence, cause, prevention and care of mental illness.

(4) Collect and disseminate information relating to mental hygiene.

(5) Prepare a comprehensive plan for the development of public mental health services in the state. Such public mental health services shall include, but not be limited to, community comprehensive mental health centers, mental hygiene clinics, traveling service units, consultative and educational services.

(6) Provide by regulation for the examination of persons, who shall apply for examination or who shall be admitted either as inpatients or outpatients into the state hospital or other public mental health facility under the supervision and control of the division of mental hygiene, for the purpose of diagnosing and prescribing treatment of mental illness.

(7) Receive from agencies of the government of the United States and other agencies, persons or groups of persons, associations, firms or corporations, grants of money, receipts from fees, gifts, supplies, materials, and contributions, for the development of mental health services within the state.

**History:** En. Sec. 69, Ch. 199, L. 1965;  
amd. Sec. 2, Ch. 246, L. 1967.

#### Amendments

The 1967 amendment added "including but not limited to \* \* \* below" after "mental health program" at the end of subparagraph (2); in subparagraph (3), inserted "research" after "medical"; substituted "a comprehensive plan" for "plans" after "Prepare" at the beginning of subparagraph (5); inserted "public" before "mental" in the first sentence and added the second sentence to subparagraph (5); rewrote subparagraph (6), which formerly read, "Examine persons received into the state hospital and other persons who apply for examination, for the purpose of diagnosing and prescribing

treatment of mental illness"; deleted old subparagraph (7), which read, "Establish and conduct clinics in cities and towns of the state for the diagnosis and treatment of mental illness"; redesignated old subparagraph (8) as new subparagraph (7); and in new subparagraph (7), inserted "government of the" before "United States" near the beginning of the subparagraph; inserted "persons or groups of persons, associations, firms or corporations" after "agencies"; inserted "receipts from fees, gifts, supplies, materials and contributions" after "grants of money"; substituted "health" for "hygiene" before "services"; and deleted "and use such moneys in its operation" at the end of the subparagraph.

**80-2404. Alcoholism services center.** (1) There is an alcoholism services center at the Warm Springs state hospital. The admittance and discharge procedures for alcoholics are the same as for mentally ill persons.

(2) and (3). \* \* \* [Same as parent volume.]

**History:** En. Sec. 70, Ch. 199, L. 1965; amd. Sec. 33, Ch. 320, L. 1967.

**Amendments**

The 1967 amendment substituted "Warm Springs state hospital" for "state hospital" at the end of the first sentence of subsection (1).

**Repealing Clause**

Section 34 of Ch. 320, Laws 1967 read "Section 80-2201, R. C. M. 1947, and section 80-2208, R. C. M. 1947, are hereby repealed."

**Effective Date**

Section 35 of Ch. 320, Laws 1967 read "The institutional name changes specified in this act shall be effective January 1, 1968."

**80-2405. Department of institutions to control public mental health programs—establishment of standards, qualifications and compensation—compliance with federal guidelines.** The department of institutions, through the division of mental hygiene, shall control the public mental health programs which receive any state assistance by establishing and promulgating rules, regulations, and standards for providing mental health facilities and services. It shall set minimum standards for programs, establish appropriate qualifications and compensation scales and personnel policies for persons employed in such programs. All public mental health facilities and services shall, subject to the approval of the department of institutions, comply with existing federal guidelines and with requirements which will enable them to qualify for available matching funds.

**History:** En. Sec. 3, Ch. 246, L. 1967.

**80-2406. Clinics and community services.** (1) The division of mental hygiene may establish and conduct community comprehensive mental health centers, mental health clinics and other facilities in cities, towns and areas of the state for the purpose of aiding in the prevention, diagnosis and treatment of mental illness. Such centers, clinics or other facilities may be provided directly by state agencies or indirectly through contract or co-operative arrangements with other agencies of government, regional or local, private or public agencies, private professional persons or hospitals, under rules and regulations promulgated and established by the division of mental hygiene.

(2) State funds specifically appropriated for regional mental health service programs shall not exceed fifty per cent (50%) of the total expenditures of the programs.

**History:** En. Sec. 4, Ch. 246, L. 1967.

**80-2407. Mental health regions.** (1) Mental health regions shall be established in the state mental health plan and shall conform to the mental health regions as established in the state mental health construction plan promulgated by the state board of health under sections 82-3314 to 82-3318, R.C.M. 1947, and the federal Community Mental Health Centers Act.

(2) Upon the establishment of the mental health regions, the county commissioners in each of the various counties in a region shall designate a person from their respective county to serve as a representative of the county on a regional mental health board, which board shall be established under guidelines adopted by the division of mental hygiene. All appointments to said board shall be for terms of two (2) years.

(3) The duties of any organized regional mental health board shall include:

(a) Annual review and evaluation of mental health needs and services within said region.

(b) Submission to the division of mental hygiene and to each of the participating counties within the region of plans and budget proposals to provide and support mental health services within the region.

(c) Establishment of a recommended proportionate level of financial participation by each of the counties involved in the provision of mental health service within the limits of this section.

(d) Receipt and administration of such moneys and other support as are made available for the purpose of providing mental health services by the participating agencies, including grants from the United States government and other agencies, receipts for established fees for services rendered, tax moneys, gifts, donations and other support.

All funds so received by the board shall be used to carry out the purposes of this act.

(e) Supervision by appropriate administrative staff personnel of the operation of community mental health services in the region.

(f) Keeping all records of the board and making such reports as may be required.

(4) Regional mental health board members shall be reimbursed from funds of the board for actual and necessary expense incurred in attending meetings and in the discharge of other board duties when assigned by the board.

(5) The regional board of mental health may submit to the board of county commissioners of each of the counties within the constituted mental health region an annual budget, specifying each county's recommended proportionate share, not later than June 10 in each year. If the board of county commissioners shall include in the county budget the county's proportionate share of the regional board's budget, it shall be designated as a participating county. Funds for each participating county's proportionate share for the operation of mental health services within the region shall be derived from the county's general fund; provided, however, if the general fund is insufficient to meet the approved budget, a levy not to exceed one (1) mill may be made on the taxable valuation in addition to all other taxes allowed by law to be levied on such property.

(6) The regional board of mental health, with the approval of the division of mental hygiene, may establish a schedule of fees for mental health services supported by financial contributions of the region's participating counties, which fees shall be paid by each nonparticipating county for services rendered to the residents of such nonparticipating county. Such fees may be received by the board and used to implement the budget and to provide services.

**History:** En. Sec. 5, Ch. 246, L. 1967.

Act, referred to in subsection (1), is compiled in the United States Code as Tit. 42, secs. 2681 to 2687.

**Compiler's Notes**

The Community Mental Health Centers



**80-2408. Continuation of services.** Nothing in this act shall be construed to prevent the continuation of existing mental health services or facilities.

**History:** En. Sec. 6, Ch. 246, L. 1967.

**80-2409. Availability of services.** The services of the division of mental hygiene of the department of institutions shall be made available without discrimination on the basis of race, color, creed or ability to pay and shall comply with the provisions of Title VI of the Civil Rights Act of 1964.

**History:** En. Sec. 7, Ch. 246, L. 1967.

**Compiler's Notes**

Title VI of the Civil Rights Act of 1964, referred to in this section, is compiled in the United States Code as Tit. 42, secs. 2000d to 2000d-4.

**Repealing Clause**

Section 8 of Ch. 246, Laws 1967 repealed all acts and parts of acts in conflict therewith.

**80-2410. Mental health centers established—staffing.** (a) The board of institutions shall establish mental health centers in Miles City and Glasgow for the care and treatment of mentally ill persons residing in Montana. Each center shall be staffed with at least one of each of the following:

- (1) Psychiatrist.
- (2) Psychologist.
- (3) Psychiatric nurse or social worker.
- (b) Each center shall provide the following services:
  - (1) Short term inpatient service.
  - (2) Partial inpatient service.
  - (3) Rehabilitation.
  - (4) Communities education.

**History:** En. Sec. 1, Ch. 255, L. 1967.

**Title of Act**

An act requiring the board of institutions to establish mental health centers in Miles City and Glasgow for care and treatment of mentally ill persons, providing staff and service requirements to be under supervision and regulations of the board; requiring the board to establish,

construct, equip, maintain and staff a mental retardation center at Glendive, providing for residential and outpatient care of mentally retarded persons as an extension of the state training school and hospital under supervision and regulations of the board, not to exceed two hundred bed units; and providing for temporary transfers to state training school and hospital at Boulder.

**80-2411. Supervision of mental health centers.** The mental health centers shall be established, organized and supervised by the board of institutions, under rules and regulations of the board authorized in section 80-145 [80-1405].

**History:** En. Sec. 2, Ch. 255, L. 1967.

## TITLE 81—STATE LANDS

### Chapter

1. Department of state lands and investments—general provisions, 81-103.
2. Commissioner of state lands and investments, 81-209.
3. Selection—classification, appraisal and exchange of lands, 81-304.
5. Coal mining leases and permits, 81-502.
11. State lands and investments—miscellaneous provisions, 81-1115 to 81-1121.
14. State forests—forester—timber sales—firewardens, 81-1403, 81-1411.
24. Development of state land resources, 81-2401 to 81-2408.

### CHAPTER 1—DEPARTMENT OF STATE LANDS AND INVESTMENTS— GENERAL PROVISIONS

#### Section

81-103. Powers and duties of state board of land commissioners.

**81-103. (1805.3) Powers and duties of state board of land commissioners.** The state board of land commissioners, consisting of the governor, superintendent of public instruction, secretary of state and attorney general, as provided by the constitution, shall be the governing board of the department of state lands and investments; it shall have and exercise general authority, direction and control over the care, management and disposition of all state lands and the funds arising from the leasing, use, sale and disposition of such lands or otherwise coming under its administration. In the exercise of these powers, the guiding rule and principle shall be that these lands and funds are held in trust for the support of education, and for the attainment of other worthy objects helpful to the well-being of the people of this state; and that it is the duty of the board so to administer this trust as to secure the largest measure of legitimate and reasonable advantage to the state. It is the duty of the board to manage these lands under the multiple-use management concept defined as: The management of all the various resources of the state-owned lands so that they are utilized in that combination best meeting the needs of the people and the beneficiaries of the trust, making the most judicious use of the land for some or all of those resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources, and harmonious and co-ordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources. The enumeration in this act of specific powers conferred upon the board shall not be so construed as to deprive the board of other powers not enumerated but inherent in the general and discretionary powers conferred by the constitution, and necessary for the proper discharge of its duties; but there can be no such implied powers inconsistent with any part of the constitution, nor shall any inherent powers be assumed to exist which would be inconsistent with any statutory provision or with the general rule and principle herein stated.

**History:** En. Sec. 3, Ch. 60, L. 1927; amd. Sec. 1, Ch. 113, L. 1969.

#### **Amendments**

The 1969 amendment inserted the third sentence providing for management of state-owned lands under the multiple-use concept.

#### **Leasing State-owned Land**

State board of land commissioners had discretion to award ten-year lease to bidder at 33 1/3 per cent crop share, rather than to another who bid 50 per cent, especially where lessee had farmed the land before and the board was taking less risk. State ex rel. Thompson v. Babcock, 147 M 46, 409 P 2d 808.

### **CHAPTER 2—COMMISSIONER OF STATE LANDS AND INVESTMENTS**

#### **Section**

81-209. Salary and compensation.

#### **81-201. (1805.5) Appointment of commissioner, etc.**

##### **Cross-References**

Bonds of state officers and employees, sec. 6-105 et seq.

#### **81-206. (1805.10) Repealed.**

##### **Repeal**

Section 81-206 (Sec. 10, Ch. 60, L. 1927), relating to the biennial report of the

commissioner of state lands and investments, was repealed by Sec. 44, Ch. 93, Laws 1969.

#### **81-208. (1805.13) Oath of office.**

##### **Cross-References**

Bonds of state officers and employees, sec. 6-105 et seq.

**81-209. (1805.14) Salary and compensation.** The salary of the commissioner shall be payable monthly. The salary of the commissioner shall be in such amount as may be specified by the legislative assembly in the appropriation to the commissioner of state land and investments. If the legislative assembly does not specify a maximum salary for the commissioner, it shall be fixed by the state board of land commissioners after approval by the board of examiners. Before approving any salary increase, the board of examiners shall review the salaries of comparable positions in Montana state government, other states, and private industry. The commissioner of state lands and investments shall be paid actual and necessary expenses while engaged in the performance of official duties outside of the state capitol.

**History:** En. Sec. 14, Ch. 60, L. 1927; amd. Sec. 1, Ch. 176, L. 1949; amd. Sec. 1, Ch. 164, L. 1951; amd. Sec. 1, Ch. 119, L. 1953; amd. Sec. 4, Ch. 225, L. 1963; amd. Sec. 8, Ch. 237, L. 1967.

##### **Amendments**

The 1967 amendment deleted "not more than ten thousand dollars (\$10,000) per annum" before "payable monthly" in the first sentence; and inserted the second, third and fourth sentences.

### **CHAPTER 3—SELECTION—CLASSIFICATION, APPRAISAL AND EXCHANGE OF LANDS**

#### **Section**

81-304. Exchange of lands with United States and counties—validation of prior actions.

**81-304. (1805.19) Exchange of lands with United States and counties—validation of prior actions.** The state board of land commissioners of the



state of Montana is hereby authorized and empowered to enter into contracts or agreements with the United States, or any department thereof having jurisdiction for the waiving and relinquishment to the United States of any and all rights of the state of Montana in and to sections sixteen (16) and thirty-six (36) of any township and to any other sections of state lands, provided that the state of Montana shall in lieu of the rights so waived and relinquished receive from the United States other lands of equal or greater value.

The state board of land commissioners of the state of Montana is hereby authorized to accept on behalf of the state of Montana title in fee simple to any land owned by a county in the state of Montana and to convey in exchange therefor state-owned land of approximately the same area and of a value not higher than the land received from the county whenever such exchange will result in consolidating the state-owned lands into more compact bodies.

All contracts and agreements heretofore entered into between the state board of land commissioners and the United States, or any department thereof, waiving and relinquishing the rights of the state of Montana to sections sixteen (16) and thirty-six (36) in any township in this state, and the selection of lands in lieu or [of] those so relinquished by the state are hereby ratified, confirmed and validated. The current user of the land transferred to the United States will continue to enjoy such use of such terms and conditions as may be required by the federal government and in accordance with the Multiple Use Act and the current user on the land received from the United States will continue to utilize the land on the terms and conditions imposed by law or the state board of land commissioners.

**History:** En. Sec. 19, Ch. 60, L. 1927; amd. Sec. 1, Ch. 151, L. 1933; amd. Sec. 1, Ch. 117, L. 1951; amd. Sec. 1, Ch. 257, L. 1965; amd. Sec. 1, Ch. 39, L. 1967.

#### Compiler's Notes

The Multiple Use Act, referred to in the last paragraph of this section, is compiled in the United States Code as Tit. 43, secs. 1411 to 1418.

#### Amendments

The 1967 amendment deleted the last

sentence of the first paragraph, which read "The amount of state land relinquished under this section in any one year shall not exceed six sections"; and substituted the last sentence of the third paragraph for "The land received from the United States, under this provision, must be located in the same county as the relinquished land, and the present lessees or permittees must be recognized for the continuance of their use of the land on such terms as may be required by the respective agencies."

### CHAPTER 4—LEASING OF AGRICULTURAL LANDS—GRAZING LANDS AND CITY AND TOWN LOTS

#### 81-401. Policy of state as to appraisal and leasing state land.

##### References

State ex rel. Thompson v. Babcock, 147 M 46, 409 P 2d 808.

#### 81-402. (1805.20) Lease of state lands—crops share rental basis used.

##### References

State ex rel. Thompson v. Babcock, 147 M 46, 409 P 2d 808.

**81-405. (1805.21) Renewal leases—preference right of lessee.****References**

State ex rel. Thompson v. Babcock, 147  
M 46, 409 P 2d 808.

**CHAPTER 5—COAL MINING LEASES AND PERMITS****Section**

81-502. Maximum term of lease—form—fee.

**81-502. (1805.39) Maximum term of lease—form—fee.** No coal mining lease shall be issued for a longer term than twenty (20) years, but the board may establish such rules and regulations for the renewal of a lease at the expiration of the term as it may deem proper and necessary. The board shall prescribe the form of the lease; the fee for issuing the lease and approving the bond hereinafter provided shall be five dollars (\$5.00) payable to the commissioner.

**History:** En. Sec. 39, Ch. 60, L. 1927;  
amd. Sec. 5, Ch. 257, L. 1965; amd. Sec.  
1, Ch. 121, L. 1967.

**Amendments**

The 1967 amendment increased the maximum term for leases on state lands from 10 to 20 years, and increased the fee from \$2 to \$5.

**CHAPTER 11—STATE LANDS AND INVESTMENTS—MISCELLANEOUS PROVISIONS****Section**

- 81-1115. State land equalization payments to counties—list of lands transmitted to county assessor.  
81-1116. Computation of state land equalization payment.  
81-1117. Form to be completed by county assessor—method of computation shown.  
81-1118. County statement on equalization payments examined by commissioner—claim filed with controller.  
81-1119. Warrant for state land equalization payments to counties.  
81-1120. County distribution of state land equalization payments.  
81-1121. School district use of state land equalization proceeds.

**81-1115. State land equalization payments to counties—list of lands transmitted to county assessor.** The commissioner of state lands and investments for the state of Montana shall, on or before the first Monday of April of every year, prepare and transmit a statement to the county assessor of each county in the state of Montana wherein the state of Montana has real property in excess of six per cent (6%) of the total land area of the county and from which the state of Montana derives grazing, agricultural or forest income. The statement shall contain the total number of acres owned by the state in that county and it shall list the acres separately as grazing, agricultural or forest land.

**History:** En. Sec. 1, Ch. 235, L. 1967.

**Title of Act**

An act providing for reimbursement to counties for loss of revenue because of tax exempt status of state owned land in excess of six per cent (6%) of the

total land area; providing for procedures to effectuate this purpose; prescribing the duties of the commissioner of state lands and investments, county assessors and the state controller; limiting the maximum payments; and providing an effective date.

**81-1116. Computation of state land equalization payment.** The county assessor shall compute the amount of taxes which would be payable on the

county assessments of said property as if it were owned by, and taxable to, a taxpayer of such county; provided that, if the land is not classified, the sum to be listed shall be determined by the average tax payment made on like property within the county where said land is situated, not to exceed twelve cents (\$.12) per grazing acre, thirty-five cents (\$.35) per agricultural acre, and twelve cents (\$.12) per forest acre. The average tax may be derived from the most recent biennial report of the state board of equalization. The total figure arrived at by this method shall be called the gross assessment figure. The county exemption factor shall be determined by dividing the percentage the state owned land bears to the total land area of the county into six per cent (6%). This quotient shall be multiplied by the gross assessment figure and the product is called the state exemption figure. The state exemption figure shall be subtracted from the gross assessment to give the state land equalization payment.

History: En. Sec. 2, Ch. 235, L. 1967.

**81-1117. Form to be completed by county assessor — method of computation shown.** The commissioner of state lands and investments shall provide a form to be followed and completed by the county assessor. The county assessor shall, on or before the first day of October, follow the form of the commissioner and make the computations required and shall submit to the commissioner the completed form which shall show the computations and method used in arriving at the state land equalization payment.

History: En. Sec. 3, Ch. 235, L. 1967.

**81-1118. County statement on equalization payments examined by commissioner—claim filed with controller.** The commissioner of state lands and investments shall examine the statement returned by the county assessor for accuracy, and in no case shall the state land equalization payment be approved unless the state exemption figure is deducted from the gross assessment figure in the statement. The commissioner of state lands and investments shall, on or before November 1 of each year, prepare and file a claim with the state controller for all counties who are eligible for state land equalization payments, and this claim shall show the amount of money each eligible county will receive.

History: En. Sec. 4, Ch. 235, L. 1967.

**81-1119. Warrant for state land equalization payments to counties.** The state controller shall, on or before the first day of December, approve and authorize the issuance of a warrant on the general fund of the state of Montana made payable to the county treasurer of the counties shown on the claim for the payment of the state land equalization payment.

History: En. Sec. 5, Ch. 235, L. 1967.

**81-1120. County distribution of state land equalization payments.** The county treasurer shall distribute the money received under this act within their county as hereinafter provided; sixty per cent (60%) of total payment shall be broken down into cents per acre of total state owned land within the county, and apportioned between the elementary school districts



in accordance with the amount of state owned land in each elementary district. Forty per cent (40%) shall be allotted to the county road fund.

History: En. Sec. 6, Ch. 235, L. 1967.

**81-1121. School district use of state land equalization proceeds.** The money received by any school district under this act shall be designated as district money for the general maintenance and operation of the elementary schools of the district. Such money may be used by the district as all other cash balances are used, in accordance with the provisions of section 75-3618, R.C.M. 1947.

History: En. Sec. 7, Ch. 235, L. 1967.

**Effective Date**

Section 8 of Ch. 235, Laws 1967 read  
"This act is effective January 1, 1968."

**CHAPTER 14—STATE FORESTS—FORESTER—TIMBER SALES—FIREWARDENS**

**Section**

81-1403. State forester—appointment—compensation—term—assistants.

81-1411. Duties of state forester.

**81-1403. (1830.3) State forester—appointment—compensation—term—assistants.** The governor, by and with the advice and consent of the senate, shall appoint a state forester to have general charge of all the state's forest. He shall be technically trained and experienced in forestry and a graduate of an accredited forestry school, and his salary shall be in such amount as may be specified by the legislative assembly in the appropriation to the state forester, together with the actual, necessary expenses while engaged in outside work in connection with his office and its duties as defined by law and the regulations of the state board of land commissioners and the state board of forestry. If the legislative assembly does not specify the maximum salary of the state forester, his salary shall be fixed by the state board of forestry after approval by the board of examiners. Before approving any salary increase, the board of examiners shall review the salaries of comparable positions in Montana state government, other states, and private industry. Such expenses shall be payable monthly from the state's general fund and/or the appropriations made to those other boards to which he, by law, has been designated secretary or executive officer. His term of office shall be for four (4) years. With the consent and approval of the state board of land commissioners the state forester shall appoint and fix the salaries and expenses of such office help, district foresters, firewardens, cruisers, scalers, slash disposal men, and such other trained and qualified assistants as may be necessary in the administration of the state forests and the forested lands within the state. Provided, however, that consent and approval of such appointments by any board shall be restricted to those appointments made for the purposes of that board as defined by law.

History: En. Sec. 3, Ch. 179, L. 1925; amd. Sec. 1, Ch. 161, L. 1949; amd. Sec. 1, Ch. 192, L. 1953; amd. Sec. 1, Ch. 28, L. 1955; amd. Sec. 1, Ch. 94, L. 1957; amd. Sec. 5, Ch. 225, L. 1963; amd. Sec.

39, Ch. 177, L. 1965; amd. Sec. 9, Ch. 237, L. 1967.

**Amendments**

The 1967 amendment substituted "be in such amount as may be specified by the

legislative assembly in the appropriation to the state forester" for "not be more than ten thousand eighty dollars (\$10,080) per annum, at the discretion of the state land board" after "his salary shall"

in the second sentence; and inserted the third and fourth sentences.

#### Cross-References

Bonds of state officers and employees, sec. 6-105 et seq.

**81-1411. (1831) Duties of state forester.** The state forester shall, under the direction and control of the state board of land commissioners, do all the field work in the selection, location, examination, appraisement, and reappraisement of state timberlands, whether now belonging to the state or hereafter granted to the state; he shall do all acts required of him to be performed by the said board, and under the direction of said board shall have general charge of the timberlands of the state. He shall act as secretary of the forestry board. He shall, under the supervision of the state board of land commissioners, execute all matters pertaining to forestry within the jurisdiction of the state; have charge of all firewardens of the state and direct and aid them in their duties; direct the protection, improvement and condition of state forests; take such action as is authorized by law to prevent and extinguish forest, brush and grass fires; enforce the laws pertaining to forest and brushcover lands, and prosecute for any violation of such laws. He shall report as provided in section 2 [82-4002] of this act. He shall furnish notices, printing in large letters, calling attention to the danger from forest fires, and to the forest fire and trespass laws, and their penalties. Such notices shall be posted by the firewarden in conspicuous places in the several counties of the state, and particularly in brush and forest-covered country, at frequent intervals along streams and lakes frequented by tourists, hunters, and fishermen, at established camping sites, and in every post office in the forested region.

**History:** En. Sec. 10, Ch. 147, L. 1909; amd. Sec. 2, Ch. 118, L. 1911; re-en. Sec. 1831, R. C. M. 1921; amd. Sec. 1, Ch. 218, L. 1955; amd. Sec. 34, Ch. 93, L. 1969.

#### Amendments

The 1969 amendment substituted reporting requirements of section 82-4002 for former provision requiring annual reports in the fourth sentence.

### CHAPTER 17—OIL AND GAS ON STATE LANDS—DISPOSAL OF

#### 81-1702.4. Repealed.

##### Repeal

Section 81-1702.4 (L. 1965, Ch. 251, Sec. 2), relating to reservation of royalties to

state in oil and gas leases granted by state, was repealed by Sec. 44, Ch. 93, Laws 1969.

#### 81-1709. (1882.9) Repealed.

##### Repeal

Section 81-1709 (Sec. 9, Ch. 108, L. 1927; Sec. 1, Ch. 186, L. 1957), relating

to bonds of lessees of state oil and gas leases, was repealed by Sec. 1, Ch. 164, Laws 1969.

### CHAPTER 24—DEVELOPMENT OF STATE LAND RESOURCES

#### Section

81-2401. Policy of state.

81-2402. Definition of terms.

81-2403. Development account in earmarked revenue fund—purposes for which used.

81-2404. Restriction on use of income from school and institutional lands.

- 81-2405. Deductions from income for development account—maximum percentage.  
 81-2406. Crediting of deductions from land income.  
 81-2407. Investment of moneys in development account.  
 81-2408. Rules and regulations.

**81-2401. Policy of state.** It is in the best interest and to the great advantage of the state of Montana to seek the highest development of state-owned lands in order that they might be placed to their highest and best use and thereby derive greater revenue for the support of the common schools, the university system and other institutions benefiting therefrom and that in so doing the economy of the local community as well as the state is benefited as a result of the impact of such development.

**History:** En. Sec. 1, Ch. 295, L. 1967. revenue therefrom for the support of the common schools and other institutions and objects for which the lands are held in trust; and authorizing allowances from the income from the lands for the resource development account in the earmarked revenue fund.

**Title of Act**

An act relating to lands owned by the state of Montana; creating a resource development account in the earmarked revenue fund for the purpose of developing state-owned lands to increase the

**81-2402. Definition of terms.** Unless a different meaning is plainly required by the context, as used in this act:

“Account” means the resource development account in the earmarked revenue fund.

“Department” means the department of state lands and investments.

“Board” means the state board of land commissioners.

“Income” means all proceeds received for the use of state land except revenues required by law to be placed in the Montana trust and legacy fund.

**History:** En. Sec. 2, Ch. 295, L. 1967.

**81-2403. Development account in earmarked revenue fund—purposes for which used.** A resource development account in the earmarked revenue fund in the state treasury is hereby created to be used solely for the purpose of investing in the improvement and development of state-owned lands acquired by grant or foreclosure in order to increase the revenue to be derived therefrom for common school support and support of the other entities, institutions and objects for which the lands are held in trust. The developments contemplated may include those projects that will develop or conserve the various state land resources including; water, both surface and underground, grazing land, agricultural land and timber land to the benefit of the state of Montana. They may also include expenses necessary to perfect title to lands hereafter claimed by the state of Montana which are suitable for development and other expenses or costs which in the judgment of the board are desirable or necessary in order to develop or increase the value of the land or the revenue therefrom. Appropriations from the account shall be expended for no other purposes.

**History:** En. Sec. 3, Ch. 295, L. 1967.

**81-2404. Restriction on use of income from school and institutional lands.** Moneys in the account derived from the income from public school



lands, university lands, agricultural college lands, scientific school lands, normal school lands, capitol building lands, or institutional lands, shall be expended by the department solely for the purpose of defraying the costs and expenses necessarily incurred in developing public lands of the same trust.

History: En. Sec. 4, Ch. 295, L. 1967.

**81-2405. Deductions from income for development account—maximum percentage.** The board shall determine the amount or percentage of income, not to exceed two and one-half per cent (2½%) which is necessary to achieve the purposes of this act, and shall provide by rule for deductions of that amount or percentage from the income which is secured from the lands by the department for the trusts benefited by this act.

History: En. Sec. 5, Ch. 295, L. 1967.

**81-2406. Crediting of deductions from land income.** All deductions from gross proceeds made in accordance with section 4 [5] [81-2405] of this act shall be paid into the account and the balance of such proceeds not affected hereby shall be paid into the state treasury to the credit of the account otherwise entitled thereto.

History: En. Sec. 6, Ch. 295, L. 1967.

**Compiler's Notes**

The compiler inserted the bracketed reference to section 5 and the corresponding reference to section 81-2405.

**81-2407. Investment of moneys in development account.** The board shall invest the moneys in the resource development account in safe interest-bearing securities for the benefit of the account.

History: En. Sec. 7, Ch. 295, L. 1967.

**81-2408. Rules and regulations.** The board shall adopt such rules as it deems necessary and proper for the purpose of carrying out the provisions of this act.

History: En. Sec. 8, Ch. 295, L. 1967.

**Separability Clause**

Section 9 of Ch. 295, Laws 1967 read "It is the intent of the legislative assembly that if a part of this act is invalid,

all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."



## TITLE 82—STATE OFFICERS, BOARDS AND DEPARTMENTS

### Chapter

1. State controller, 82-109.2 to 82-111.
3. Athletic commission, state, 82-302.
4. Attorney general, 82-414 to 82-420.
5. Clerk of supreme court, 82-503.
8. Entomologist, state—duties as to agriculture, 82-804.1, 82-804.2, 82-804.4.
10. Examiner, state, 82-1002, 82-1005, 82-1007, 82-1009, 82-1011.
11. Examiners, state board of—printing contract and supplies, 82-1149.
12. Fire marshal, state, 82-1201, 82-1202, 82-1202.1, 82-1202.2, 82-1208, 82-1209, 82-1211, 82-1218, 82-1231.
13. Governor—powers—records—secretary, 82-1311 to 82-1314.
15. Hail insurance, state board of, 82-1516, 82-1519.
19. Purchasing department and agent, 82-1910, 82-1916, 82-1924 to 82-1925.1, 82-1926 to 82-1928.
20. Reporters of decisions of supreme court—publication and distribution of reports, 82-2002.
27. Co-ordinator of Indian affairs, 82-2701 to 82-2703.
30. Natural resources and development council, 82-3001 to 82-3003.
32. State records, 82-3207 to 82-3209.
33. Department of administration, 82-3303, 82-3306, 82-3316, 82-3317.
35. Commission on problems of aging, 82-3501 to 82-3505.
36. Montana arts council, 82-3601 to 82-3609.
37. Planning and Economic Development Act, 82-3701 to 82-3707, 82-3709.
38. Post-enemy-attack continuity in government, 82-3801 to 82-3809.
39. Teletypewriter communications system for law enforcement, 82-3901 to 82-3906.
40. Biennial reports to governor, 82-4001, 82-4002.
41. Public contractor's deposits for withdrawal of retained payments, 82-4101 to 82-4104.

### CHAPTER 1—STATE CONTROLLER

#### Section

- 82-109.2. Pre-audit of liquidated or settled claims—transmittal of unliquidated or unsettled claims.
- 82-110. Controller to prescribe uniform accounting system.
- 82-111. Assistance of controller to legislative assembly—reports of controller.

### 82-107. Controller's oath of office.

#### Cross-References

Bonds of state officers and employees,  
sec. 6-105 et seq.

### 82-109. Duties of controller—expenditure control.

#### Cross-References

Governor-elect, duties of state controller, secs. 82-1312, 82-1313 and 82-1314.

**82-109.2. Pre-audit of liquidated or settled claims—transmittal of unliquidated or unsettled claims.** The state controller may pre-audit liquidated or settled claims against the state, including claims by transportation companies arising from state transportation requests, ascertaining that (1) the proper authorizing signature is present, (2) the claim and supporting documents are mathematically and clerically accurate, (3) the proper appropriation and fund is charged and (4) the expenditure is not illegal.



The state controller shall not make any charge against any appropriation unless the balance of the appropriation is available and adequate. If no appropriation is available for the payment of a settled or liquidated claim, the controller shall audit it and, if it is a valid claim, transmit it to the governor through the office of director of the budget for presentation to the legislative assembly.

Any unliquidated or unsettled claims submitted to the state controller shall be transmitted to the state board of examiners to be processed as provided by law.

**History:** En. Sec. 2, Ch. 97, L. 1961; amd. Sec. 29, Ch. 271, L. 1963; amd. Sec. 1, Ch. 91, L. 1969.

#### Amendments

The 1969 amendment, in the first sentence, substituted "controller may pre-audit liquidated or settled claims" for "controller shall pre-audit all liquidated or settled claims"; in item (3), deleted "and that the appropriation is available and adequate" after "fund is charged"; and substituted the present second sen-

tence for the former second and third sentences, reading, "If the volume of claims will not permit such audit of each claim, item (2) above may be accomplished on a spot-check basis. The pre-auditing conducted by the state controller shall be concerned only with the form and accuracy of the claim and supporting documents, and the availability of the funds and in no event shall the state controller interpose his judgment regarding the wisdom or expediency of any item or items of expenditure."

**82-110. Controller to prescribe uniform accounting system.** (a) The controller shall prescribe and install uniform accounting and reporting for the several state boards, bureaus, departments, commissions and institutions showing the receipt, use and disposition of all public money and property, and shall develop plans for improvements and economies in the organization and operation thereof which shall be submitted to the respective heads of such boards, bureaus, departments, commissions and institutions. Copies of all such plans shall be delivered to the governor and additional copies shall be retained in the office of the controller for inspection by the members of the legislative assembly.

(b) The controller shall have the power and it shall be his duty to examine into all financial affairs of every state board, commission, bureau, department and institution for the purpose of developing plans for improvements and economies in the organization and operation thereof, and for the purpose of enabling him to properly perform any of the duties imposed upon him by this act.

(c) and (d). \* \* \* [Same as parent volume.]

**History:** En. Sec. 6, Ch. 194, L. 1951; amd. Sec. 9, Ch. 153, L. 1959; amd. Sec. 18, Ch. 249, L. 1967.

#### Amendments

The 1967 amendment deleted "acting with the state examiner" after "controller" near the beginning of subsection (a) and deleted "in addition to those

enumerated in section 82-102 hereof" after "institutions"; and deleted "shall receive copies of all audits and reports of the state examiner relating to all state departments, boards, bureaus, institutions and agencies and, without duplicating work done in preparing such audits and reports" after "The controller" near the beginning of subsection (b).

**82-111. Assistance of controller to legislative assembly—reports of controller.** It shall be the duty of the controller to make all such reports and to submit all such information and data as the legislative assembly may request, and he shall, when requested so to do, attend all meetings

of the appropriations committee of the house of representatives and of the finance and claims committee of the senate, and the controller shall, during the consideration of appropriation measures by the house and senate, devote so much of his time thereto as may be required by the above-named committees, under the direction of the respective chairmen of said committees.

**History:** En. Sec. 11, Ch. 194, L. 1951;  
amd. Sec. 35, Ch. 93, L. 1969.

#### Amendments

The 1969 amendment deleted the subsection designation "(a)" in the first paragraph and deleted former subsection (b). For previous text, see parent volume.

### CHAPTER 3—ATHLETIC COMMISSION, STATE

#### Section

82-302. Secretary of commission—duties—limitation on salary and expense—report of commission to governor.

**82-302. (4552) Secretary of commission—duties—limitation on salary and expense—report of commission to governor.** The commission shall appoint, and at its pleasure remove, a secretary to the commission, whose duty it shall be to keep a full and true record of all its proceedings, preserve at its general office all its books, documents and papers, prepare for service such notices and other papers as may be required of him by the commission and to perform such other duties as the commission may prescribe; and he may under the direction of the commission issue subpoenas for the attendance of witnesses before the commission and may, under direction of the commission, administer oaths in all matters pertaining to the duties of his office or connected with the administration of the affairs of the commission. The necessary traveling and other necessary expenses, including the salary of the secretary not exceeding twenty-five dollars (\$25) per month, which shall be determined by the commission, shall be paid monthly by the state treasurer on warrant properly drawn out of the proceeds of the tax to be collected as herein provided. The commission shall report as provided in section 2 [82-4002] of this act.

**History:** En. as Ch. 190, L. 1919; app. by people on ref. Nov. 2, 1920, effective under governor's proclamation Dec. 6, 1920; re-en. Sec. 4552, R. C. M. 1921; amd. Sec. 2, Ch. 103, L. 1927; amd. Sec. 36, Ch. 93, L. 1969.

#### Amendments

The 1969 amendment substituted the reporting requirements of section 82-4002 for former provision requiring annual reports.

### CHAPTER 4—ATTORNEY GENERAL

#### Section

82-414. Criminal investigator position created—appointment and qualifications.  
82-415. Definition of term.  
82-416. Powers and duties of criminal investigator.  
82-417. Access to files of criminal investigator.  
82-418. Criminal investigator's office covered by retirement program.  
82-419. State agencies to co-operate with criminal investigator.  
82-420. Location of criminal investigator's office.

**82-414. Criminal investigator position created—appointment and qualifications.** (1) There is hereby created a permanent position of criminal investigator within the office of the state attorney general.

(2) The attorney general shall appoint the investigator and other necessary assisting personnel and fix their compensation.

(3) The investigator shall be a person qualified by experience, training and high professional competence in criminal investigation. Qualifications shall be equal to those of similarly assigned federal bureau of investigation personnel.

**History:** En. Sec. 1, Ch. 176, L. 1967. investigator within the department of the attorney general and defining the duties of said position.

**Title of Act**

An act creating the position of criminal

**82-415. Definition of term.** As used in this act:

"Investigator" means the person appointed to the position of criminal investigator within the attorney general's office.

**History:** En. Sec. 2, Ch. 176, L. 1967.

**82-416. Powers and duties of criminal investigator.** The investigator shall have the power and duty to:

(1) Assist city, county, state and federal law enforcement agencies at their request by providing expert and immediate aid in investigation and solution of felonies committed in the state;

(2) Assist various law enforcement schools held in the state for law officers when requested;

(3) Co-operate with the bureau of criminal identification and investigation.

**History:** En. Sec. 3, Ch. 176, L. 1967.

**82-417. Access to files of criminal investigator.** A person with a known criminal record shall not be permitted access to the files of the investigator, nor shall anyone else, without the order of a district judge or a supreme court justice.

**History:** En. Sec. 4, Ch. 176, L. 1967.

**82-418. Criminal investigator's office covered by retirement program.** The investigator and assisting personnel shall be covered by the public employees' retirement system.

**History:** En. Sec. 5, Ch. 176, L. 1967.

**82-419. State agencies to co-operate with criminal investigator.** All state departments and agencies shall co-operate with the investigator in providing transportation, educational and laboratory facilities for his use when so requested.

**History:** En. Sec. 6, Ch. 176, L. 1967.

**82-420. Location of criminal investigator's office.** The office of the criminal investigator shall be located in Deer Lodge, Montana.

**History:** En. Sec. 7, Ch. 176, L. 1967.

## CHAPTER 5—CLERK OF SUPREME COURT

### Section

### 82-503. Fees.

**82-503. (372) Fees.** He must collect in advance the following fees: For filing the transcript on appeal, in each civil case appealed to the supreme



court, twenty dollars (\$20) payable by the appellant, and ten dollars (\$10) payable by respondent, at the time of his appearance, in full for all services rendered in each case, up to the remittitur to the court below; for filing petition for any writ, twenty dollars (\$20), in full for all services rendered in each case; for certificate of admission as attorney and counselor, five dollars (\$5); for making transcripts, copies of papers or record, fifteen cents (\$.15) per folio; for comparing any document requiring a certificate, five cents (\$.05) per folio; for each certificate under seal, one dollar (\$1).

Three-fourths ( $\frac{3}{4}$ ) of all fees collected by him must be paid into the state treasury, which shall be credited to the credit of the general fund, one-fourth ( $\frac{1}{4}$ ) of all fees collected by him shall be paid to the secretary of the public employees' retirement system board to be credited to the judges' retirement fund.

**History:** En. Sec. 872, Pol. C. 1895; re-en. Sec. 301, Rev. C. 1907; re-en. Sec. 372, R. C. M. 1921; amd. Sec. 1, Ch. 156, L. 1939; amd. Sec. 1, Ch. 112, L. 1943; amd. Sec. 87, Ch. 147, L. 1963; amd. Sec. 3, Ch. 218, L. 1967.

#### Amendments

The 1967 amendment increased filing fees on appeals to the supreme court, payable by the appellant, from \$10 to \$20, and by the respondent, from \$5 to \$10 and increased fees for filing petition for any writ from \$10 to \$20 in the first paragraph; added "Three-fourths ( $\frac{3}{4}$ ) of" at the beginning of the second paragraph; added the passage beginning "and one-fourth ( $\frac{1}{4}$ ) of all fees collected" at the end of the second paragraph; and made minor changes in style.

#### Compiler's Notes

The last paragraph of section 3, Chapter 218, Laws 1967, read: "This act shall be in full force and effect from and after its passage and approval." The act was approved March 1, 1967.

### CHAPTER 6—DEPUTIES—APPOINTMENT BY CERTAIN OFFICERS— CLERKSHIP OF CONSOLIDATED BOARDS

#### 82-601. (122) Deputy state officers.

##### Cross-References

Bonds of state officers and employees, sec. 6-105 et seq.

### CHAPTER 8—ENTOMOLOGIST, STATE—DUTIES AS TO AGRICULTURE

#### Section

- 82-804.1. State entomologist of Montana.
- 82-804.2. Duties of the state entomologist.
- 82-804.4. Expenses.

#### 82-801 to 82-804. (913 to 916) Repealed.

##### Repeal

These sections (Secs. 1 to 4, Ch. 59, L. 1903; Secs. 1 to 4, Ch. 103, L. 1907; Sec.

1, Ch. 114, L. 1925), relating to the state entomologist, were repealed by Sec. 5, Ch. 75, Laws 1967.

**82-804.1. State entomologist of Montana.** The state entomologist of Montana shall be an entomologist who is a member of the resident faculty of the Montana agricultural experiment station at Bozeman, Montana, and who shall be appointed by the dean of the college of agriculture of Montana state university.

**History:** En. Sec. 1, Ch. 75, L. 1967.

**Title of Act**

An act providing for the appointment, qualifications and duties of the state en-

tomologist; providing that expenses be paid out of the legislative appropriation for his office; and repealing sections 82-801, 82-802, 82-803 and 82-804, R. C. M. 1947.

**82-804.2. Duties of the state entomologist.** It shall be the duty of the state entomologist to conduct investigations pertaining to insects and other arthropods which affect or may affect plants and animals. When an injurious infestation of an insect or other arthropod occurs in any part of the state, it shall be his duty, so far as it is possible without conflicting with his other duties, to go to the scene of the infestation or send a suitably qualified assistant. The state entomologist or said assistant shall determine the extent and seriousness of the infestation and make public the best remedies to be employed.

**History:** En. Sec. 2, Ch. 75, L. 1967.

**82-804.3. Repealed.**

**Repeal**

Section 82-804.3 (Sec. 3, Ch. 75, L. 1967), relating to biennial report of the

state entomologist, was repealed by Sec. 44, Ch. 93, Laws 1969.

**82-804.4. Expenses.** The state entomologist shall receive no compensation for his services other than that which he may receive from the Montana agricultural experiment station and Montana state university, but such office and laboratory expenses and such salaries of necessary assistants, together with such travel and per diem expenses for himself and assistants incurred in the course of performing the duties prescribed by this act, shall be paid out of sums appropriated from time to time by the legislative assembly of the state of Montana to the state entomologist. Payment shall be made on claims certified by the state entomologist and presented to the appropriate state agency.

**History:** En. Sec. 4, Ch. 75, L. 1967.

**Effective Date**

**Repealing Clause**

Section 5 of Ch. 75, Laws 1967 read "Sections 82-801, 82-802, 82-803 and 82-804, R. C. M. 1947, are repealed."

Section 6 of Ch. 75, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved February 20, 1967.

CHAPTER 10—EXAMINER, STATE

**Section**

82-1002. Duties of state examiner.

82-1005. Power to examine books and papers.

82-1007. Access to accounts of public officers—actions to compel.

82-1009. Laws applicable to such examinations.

82-1011. Salary and expenses.

**82-1002. (210) Duties of state examiner.** The duties of the state examiner and his assistants are:

1. To examine at least once in each year the books and accounts of the state treasurer, clerk of the supreme court, county treasurers, county clerks, county assessors, district court clerks, county auditors, sheriffs, public ad-

ministrators, boards of county commissioners of each county, and all other county and municipal officers, boards and institutions.

2. To prescribe the general methods and details of accounting for the receipt and disbursement of all moneys belonging to the counties, cities, towns, or school districts, and to establish in all such offices such general methods and details of accounting as are required by law or are prescribed by the state examiner, and all county, city, town or school district officers are hereby compelled to conform therewith.

3. To visit each and every office of the officers, boards and institutions named in this act at least once in each year; and at such time to examine the books, accounts and vouchers in said office, to verify statements of receipts and expenditures, and indebtedness, and to examine and pass upon the character and amounts of any commissions, percentage, or charges for services, exacted by any officer, and of all claims allowed by any of said officers, boards or institutions.

4. To visit twice each year, or oftener, without previous notice, each of the banks, banking corporations and saving banks, building and loan associations, investment and loan companies incorporated under the laws of this state, or doing business under any law of the state concerning corporations, and to examine into their affairs and ascertain their financial condition; to inspect and verify the value and the amount of their securities and assets, and to inquire into any violation of laws governing such banks, institutions, building and loan associations.

5. The state examiner, after examination of the affairs of any officer or board of county commissioners, must make report to the governor and to the attorney general of the result of such examination, within sixty days thereafter; and if any violation of law or nonperformance of duty is found on the part of any such officer or board, they must be proceeded against by the attorney general or county attorney as provided by law.

6. The state examiner, or his assistants, after the examination of the affairs of any county officers, must make report of such examination to the board of county commissioners and to the county attorney of such county, within thirty days after such examination; and if any violations of law or nonperformance of duty is found on the part of any county officer or board, such officer or board must be proceeded against by the county attorney of the county as provided by law.

7. The state examiner must report as provided in section 2 [82-4002] of this act.

8. It shall be the duty of the county attorneys of the various counties of the state of Montana and the city attorneys of the various cities and towns of the state of Montana to make report to the state examiner within thirty days after receiving from the state examiner the report of any examination of any county, city or town, as to what proceedings he has instituted or is intending to institute relating to violations of law and nonperformance of duty, as set forth in the report of the state examiner.

9. If any county or city attorney refuses or neglects to notify the state examiner within thirty days after receiving the report of any examination of any county, city or town, as to what proceedings he has instituted or



is about to institute against any officer for violations of law or nonperformance of duty, as evidenced by matters of record, and as set forth in the state examiners report; the state examiner may withhold the salary of such county or city attorney by filing notice with the proper officials, until proper and satisfactory explanation has been made to the state examiner for such nonperformance of duty, provided further, that should the county or city attorney fail or refuse to prosecute such cases, the state examiner may employ an attorney to prosecute such case at the expense of the county, city, or town.

**History:** Ap. p. Sec. 491, Pol. C. 1895; amd. Sec. 1, p. 105, L. 1897; amd. Sec. 491, Ch. 100, L. 1903; re-en. Sec. 209, Rev. C. 1907; re-en. Sec. 210, R. C. M. 1921; amd. Sec. 1, Ch. 78, L. 1923; amd. Sec. 14, Ch. 249, L. 1967; amd. Sec. 37, Ch. 93, L. 1969.

#### Amendments

The 1967 amendment, in subdivision 1, deleted "state auditor, secretary of state" after "treasurer"; deleted "state game warden, register of state land office, and all other state officers having the collection or handling of state money" after "supreme court"; inserted "county and municipal" after "all other"; deleted "and" before "boards"; and added "and institutions" after "boards"; in subdivision 2, deleted "and the educational, charitable, penal, and reformatory institutions of the state of Montana" after "school districts"; deleted "and officers of educational, charitable, penal and reformatory

institutions of the state of Montana" after "district officers"; deleted old subdivision 3, which read, "To examine at least once each year the books and accounts of the treasurer and secretary of each and all of the educational, charitable, penal, and reformatory institutions of the state of Montana, and to examine into the financial affairs and conditions of each and all of said institutions"; redesignated old subdivisions 4 through 10 as new subdivisions 3 through 9; in new subdivision 5, which was old subdivision 6, substituted "officer or" for "state officer, board, or institution" after "affairs of any"; and in new subdivision 7, which was old subdivision 8, deleted "but such report must not be printed unless the printing thereof be ordered by the state board of examiners" at the end of the subdivision.

The 1969 amendment, in subdivision 7, substituted reporting requirements of section 82-4002 for former provision requiring annual reports.

**82-1005. (212) Power to examine books and papers.** The state examiner or his assistant has power to examine any books, papers, accounts, and documents in the office or possession of any county or banking or other institution referred to in this act, and to send for persons or papers and to examine under oath any and all persons concerning the same.

**History:** Ap. p. Sec. 494, Pol. C. 1895; amd. Sec. 493, p. 107, L. 1897; amd. Sec. 493, Ch. 100, L. 1903; re-en. Sec. 211, Rev. C. 1907; re-en. Sec. 212, R. C. M. 1921; amd. Sec. 15, Ch. 249, L. 1967.

#### Amendments

The 1967 amendment deleted "or state officer" after "any county."

**82-1007. (214) Access to accounts of public officers—actions to compel.**  
(1). \* \* \* [Same as parent volume.]

(2) Any county, city, town or school district officer who shall refuse to accord the state examiner access during an examination of such officer's accounts, to his cash, bank accounts, or any of the papers, vouchers or records of his office, or if the state examiner, after counting the cash and verifying the bank accounts of such officer shall find that a shortage exists in the accounts of said officer, the state examiner shall forthwith file a verified preliminary report showing the refusal of such officer to accord to him access to the examination of such accounts, cash, bank accounts, papers, vouchers or records, or the existence of such shortage, and the

amount or approximate amount thereof with the board of county commissioners of the proper county if the officer be a county or school district officer, and with the city or town council if the officer be a city or town officer; upon the filing of such verified statement, such officer shall immediately be suspended from the duties and emoluments of his office, and the board of county commissioners of the county in case of county or school district officers, and the city or town council in case of a city or town officer, shall appoint some qualified person to such office, pending the completion of such examination.

(3) Upon the completion of the audit or examination of the accounts of such officer by the state examiner, if a shortage shall be found to have existed in the accounts of such officer on the date of the commencement of such examination, the state examiner shall file, in the office of the board of county commissioners of the proper county in the case of a county or school district officer, and with the city or town council in the case of a city or town officer, a verified final report of the examination or audit, showing such shortage, whereupon the right of such officer to such office shall be forfeited, and such office shall thereupon become vacant as of the date of the suspension of such officer as hereinabove provided, and the person appointed to such office upon the suspension of said officer shall hold said office until the election and qualification of his successor, as provided by law.

(4). \* \* \* [Same as parent volume.]

**History:** En. Sec. 1, Ch. 84, L. 1915; re-en. Sec. 214, R. C. M. 1921; amd. Sec. 1, Ch. 179, L. 1939; amd. Sec. 16, Ch. 249, L. 1967.

#### Amendments

The 1967 amendment deleted "state" after "Any" at the beginning of subsec-

tion (2); deleted "with the secretary of state if such officer shall be a state officer" after "amount thereof"; deleted "and the governor, in the case of a state officer" after "of his office"; and, in subdivision (3), deleted "the secretary of state in case of a state officer, and" after "in the office of."

**82-1009. (216) Laws applicable to such examinations.** That all laws now in force relative to the examination of the books and accounts of county officers, are, and the same are hereby declared to be applicable to the examination of the books and accounts of incorporated cities and towns, and to the books and accounts of school districts of the first and second class.

**History:** En. Sec. 2, Ch. 84, L. 1913; re-en. Sec. 216, R. C. M. 1921; amd. Sec. 17, Ch. 249, L. 1967.

#### Amendments

The 1967 amendment deleted "state and" after "accounts of."

**82-1011. (218) Salary and expenses.** The salary of the state examiner, for all services rendered in any capacity whatever, shall be in such amount as may be specified by the legislative assembly in the appropriation to the state examiner, and in addition thereto the state shall pay the necessary office and travel expenses of himself and assistants. If the legislative assembly does not specify the maximum salary of the state examiner an increase in the salary of the state examiner must be approved by the board of examiners. Before approving any salary increase, the board of examiners

shall review the salaries of comparable positions in Montana state government, other states, and private industry.

**History:** En. Sec. 1, Ch. 149, L. 1907; Sec. 213, Rev. C. 1907; amd. Sec. 1, Ch. 93, L. 1911; re-en. Sec. 218, R. C. M. 1921; amd. Sec. 1, Ch. 98, L. 1953; amd. Sec. 7, Ch. 225, L. 1963; amd. Sec. 10, Ch. 237, L. 1967.

#### Amendments

The 1967 amendment substituted "in such amount \* \* \* to the state examiner" for "not more than ten thousand dollars (\$10,000) per year" in the first sentence, and added the last two sentences.

### 82-1014 to 82-1016. Repealed.

#### Repeal

These sections (Sees. 1 to 3, Ch. 279, L. 1959; Sees. 1, 2, Ch. 81, L. 1961; Sec. 91, Ch. 199, L. 1965), relating to the

examination of accounts of state institutions, were repealed by Sec. 23, Ch. 249, Laws 1967.

## CHAPTER 11—EXAMINERS, STATE BOARD OF—PRINTING CONTRACT AND SUPPLIES

### Section

82-1149. Establishment of prices for state printing.

### 82-1137. (260) State printing—union label, etc.

#### Cross-References

Printing defined, sec. 19-103.1.

**82-1149. (276) Establishment of prices for state printing.** Hereafter in all cases and instances where any publication is required by law, or is duly authorized, to be made, executed or accomplished by or for or on behalf of the state of Montana, or any of the institutions of said state or any of the departments, boards, bureaus, or commissions thereof, of any of the officers, agents or employees of the state when acting within the scope of their lawful authority and for the benefit of the state of Montana, the same shall be published in a newspaper printed and published in the state of Montana, and of general bona fide and paid circulation with second class mailing privilege, and having been printed and published continuously in the state of Montana for at least twelve (12) months immediately preceding such publication; the price for such publication and by whomsoever accomplished shall not exceed the following rate and standard hereby established and prescribed as the maximum rate and standard for all publications as aforesaid.

(a) For every folio of one hundred (100) words, or any fraction thereof, two dollars and twenty-five cents (\$2.25) for the first insertion, and one dollar and twenty-five cents (\$1.25) for each subsequent insertion thereof required by law to be made.

(b) For rule and figure work, three dollars and seventy-five cents (\$3.75), for every folio of one hundred (100) words or any fraction thereof, for the first insertion, and one dollar and twenty-five cents (\$1.25) for each subsequent insertion thereof required by law to be made.

**History:** En. Sec. 1, Ch. 157, L. 1921; re-en. Sec. 276, R. C. M. 1921; amd. Sec. 1, Ch. 137, L. 1951; amd. Sec. 1, Ch. 307, L. 1969.

#### Amendments

The 1969 amendment, in subdivision (a), raised the maximum price per folio from \$2 to \$2.25 for the first insertion and from



90¢ to \$1.25 for each subsequent insertion; and, in subdivision (b), raised the maximum price from \$3 to \$3.75 for the first insertion and from 90¢ to \$1.25 for each subsequent insertion.

#### Repealing Clause

Section 2 of Ch. 307, Laws 1969 repealed all acts and parts of acts in conflict therewith.

#### Cross-References

Printing defined, sec. 19-103.1.

### 82-1157. (283.1) Preference of Montana printers, etc.

#### Cross-References

Printing defined, sec. 19-103.1.

## CHAPTER 12—FIRE MARSHAL, STATE

### Section

- 82-1201. Creation of office of state fire marshal—fire prevention advisory commission.
- 82-1202. Powers of the state fire marshal.
- 82-1202.1. Rules promulgated by state fire marshal—adoption of other standards—providing for a penalty for violation.
- 82-1202.2. Notice of public hearing—publication—adoption of rules—effective date.
- 82-1208. Special deputy fire marshals—acting fire marshal—fire marshal's employees.
- 82-1209. Investigation of fires.
- 82-1211. Penalty for violation of law.
- 82-1218. Entering of buildings for purpose of examination.
- 82-1231. Tax on fire insurance premiums for maintenance of state fire marshal's office.

**82-1201. (2737) Creation of office of state fire marshal—fire prevention advisory commission.** (1) There is an office of state fire marshal, which is under the supervision and control of the commissioner of insurance.

(2) The state fire marshal shall be appointed by the commissioner of insurance and shall serve at his pleasure.

(3) A person appointed state fire marshal shall:

(a) have at least ten (10) years of progressively responsible experience in fire protection; or

(b) a degree in engineering from a recognized institution of higher education and two (2) years' experience in fire protection; or

(c) a degree from a recognized institution of higher education in fire protection engineering or fire protection technology.

(4) Not later than thirty (30) days after this act becomes effective the commissioner of insurance shall appoint a fire prevention advisory commission composed of the following members:

(a) One person representing the fire insurance industry whose initial term shall be for one (1) year;

(b) One person representing industry whose initial term shall be for one (1) year;

(c) One person representing full-time paid fire departments whose initial term shall be for two (2) years;

(d) One person representing volunteer fire departments whose initial term shall be for two (2) years;

(e) One person representing architects of the state whose initial term shall be for three (3) years;

(f) One person representing the public whose initial term shall be for four (4) years;

(g) The commissioner of insurance.

After termination of the initial term, all members shall be appointed for four (4) year terms. Appointed members of the commission shall be reimbursed for meetings at the rate of twenty dollars (\$20) per day plus actual expenses including mileage, food, and lodging. The commissioner of insurance shall serve as chairman, and the state fire marshal shall serve as secretary of the commission.

**History:** En. Sec. 1, Ch. 148, L. 1911; re-en. Sec. 2737, R. C. M. 1921; amd. Sec. 1, Ch. 229, L. 1967.

#### Amendments

The 1967 amendment completely re-wrote this section. Prior to amendment,

it read, "There is hereby created and established the office of state fire marshal, which shall be a department of and under the supervision and control of the state auditor and commissioner of insurance ex officio."

**82-1202. (2737.1) Powers of the state fire marshal.** The state fire marshal shall:

(1) Make at least one inspection during every year, of each state institution, and submit a copy of the report to the state department of institutions with recommendations in regard to fire prevention, fire protection and to the public safety.

(2) Make at least one inspection during every year, of each unit of the Montana university system, and submit a copy of the report to the executive secretary of the university system with recommendations in regard to fire prevention, fire protection and to the public safety.

(3) Inspect public, business, or industrial buildings and require conformance to law or rules promulgated under the provisions of this act.

(4) Do all things necessary and convenient for carrying into effect the fire prevention laws of this state governing this act and may, adopt necessary rules for safeguarding lives and property from the hazards of fire and explosion after consultation with the fire prevention advisory commission and approval by the commissioner of insurance. No rule shall become effective until after a public hearing held in the manner described in section 82-1202.2, R. C. M. 1947. If fire prevention rules are violated, the fire marshal may maintain an action to enjoin the use of all or a portion of a building or facility, or restrain a specific activity, until there is compliance with the rules.

(5) Rules relating to building and equipment standards covered by the state or a municipal building code are effective after approval by the state building code council and filing with the secretary of state.

**History:** En. Sec. 1, Ch. 124, L. 1929; amd. Sec. 1, Ch. 18, L. 1943; amd. Sec. 1, Ch. 278, L. 1947; amd. Sec. 93, Ch. 199, L. 1965; amd. Sec. 2, Ch. 229, L. 1967; amd. Sec. 24, Ch. 366, L. 1969.

#### Compiler's Notes

The compiler deleted the number "4" after "section" in the second sentence of subdivision (4) as superfluous.

#### Amendments

The 1967 amendment substantially re-

wrote this section. For previous text, see parent volume.

The 1969 amendment, in the first sentence in subdivision (4), substituted "adopt" for "promulgate" before "necessary rules"; in the second sentence, inserted "R. C. M. 1947" after "82-1202.2"; and, in the last sentence, deleted "promulgated by the fire marshal" after "fire prevention rules" and substituted "the fire marshal" for "he" before "may maintain"; and added subdivision (5).

**82-1202.1. Rules promulgated by state fire marshal—adoption of other standards—providing for a penalty for violation.** (1) Rules promulgated by the state fire marshal by authority of section 82-1202, R. C. M. 1947, shall be reasonable and calculated to effect the purposes of this act. They shall include but not be limited to requirements for design, construction, installation, operation, storage, handling, maintenance or use of the following: structural requirements for various types of construction; building restrictions within congested districts; exit facilities from structures; fire alarm systems and fire extinguishing systems; fire emergency drills; flue and chimney construction; heating devices; electrical wiring and equipment; air conditioning, ventilating and other duct systems; refrigeration systems; flammable liquids; oil and gas wells; application of flammable finishes; explosives, acetylene, liquefied petroleum gas and similar products; calcium carbide and acetylene generators; flammable motion picture film, combustible fibres; hazardous chemicals; rubbish, open flame devices; parking of vehicles; dust explosions; lightning protection; and other special fire hazards.

(2) If rules relate to building and equipment standards covered by the state or a municipal building code, the rules are effective upon approval of the state building code council and filing with the secretary of state.

(3) Standards of the National Fire Protection Association, United States Bureau of Standards, American Insurance Association Standards may be adopted in whole or in part by reference.

(4) Any person violating any rule made under the provisions of this section shall be guilty of a misdemeanor.

**History:** En. 82-1202.1 by Sec. 3, Ch. 229, L. 1967; amd. Sec. 1, Ch. 120, L. 1969; amd. Sec. 25, Ch. 366, L. 1969.

#### **Amendments**

Chapter 120 of Laws 1969 substituted a requirement that rules promulgated by the state fire marshal "be reasonable and calculated to effect the purpose of this act" for a requirement that rules promulgated by the state fire marshal "establish minimum standards of fire protection requirements" in subsection (1), and added subsection (4).

Chapter 366 of Laws 1969 inserted subsection (2) and renumbered former subsection (2) as subsection (3).

#### **Compiler's Notes**

This section was amended twice in 1969, once by Ch. 120 and once by Ch. 366. Neither amendatory act mentioned nor included the changes made by the other. Since the two amendments do not appear to conflict, the compiler has made a composite section incorporating both amendments. In the composite section the subsection added by Ch. 120 has been designated as (4) rather than (3).

**82-1202.2. Notice of public hearing—publication—adoption of rules—effective date.** Notice of the time and place of public hearing required by section 82-1202, R.C.M. 1947, shall be published at least five (5) times in at least two (2) newspapers of general circulation throughout the state. The last published notice shall appear not less than fifteen (15) days prior to the public hearing. A copy of the notice of public hearing shall be furnished by mail to any person who files his address with the fire marshal together with a request for such notification. Any person may appear before the state fire marshal and present testimony on proposed rules in the manner prescribed by the marshal. Following the public



hearing, the state fire marshal may approve, approve in modified form, or disapprove a proposed rule. The state fire marshal shall specify the date when any new rule or change in an existing rule becomes effective. A new rule or change in an existing rule relating to building and equipment standards covered by the state or a municipal building code is effective upon approval of the state building code council and filing with the secretary of state.

**History:** En. 82-1202.2 by Sec. 4, Ch. 229, L. 1967; amd. Sec. 26, Ch. 366, L. 1969.

#### **Amendments**

The 1969 amendment added the last sentence.

#### **Repealing Clause**

Section 27 of Ch. 366, Laws 1969 read "Sections 66-2424, 66-2818, 69-2101 through 69-2103, 69-3701 through 69-3719, and 75-3103, R. C. M. 1947, are repealed."

### **82-1203, 82-1204. (2737.2, 2738) Repealed.**

#### **Repeal**

These sections (Sec. 2, Ch. 148, L. 1911; Sec. 2, Ch. 124, L. 1929), relating to the

appointment of the state fire marshal and to violations of section 82-1202, were repealed by Sec. 14, Ch. 229, Laws 1967.

**82-1208. (2742) Special deputy fire marshals—acting fire marshal—fire marshal's employees.** (1) In an emergency, or during the absence or disability of the state fire marshal, the commissioner of insurance may appoint an acting fire marshal, who shall perform the duties of the office, or any duty which may be assigned to him, such appointment to cease when the necessity therefor has been relieved.

(2) The state fire marshal may appoint special deputy state fire marshals throughout the state and define their duties. When performing these duties or attending a training course conducted by the state fire marshal, special deputy fire marshals may be paid at a rate not to exceed twenty dollars (\$20) per day plus per diem allowance for expenses and mileage at the same rates specified for state employees.

(3) The fire marshal may appoint assistants and clerical employees to perform duties as specified by the marshal to assist in carrying out the duties assigned him by law.

**History:** En. Sec. 5, Ch. 148, L. 1911; amd. Sec. 1, Ch. 95, L. 1913; re-en. Sec. 2742, R. C. M. 1921; amd. Sec. 5, Ch. 229, L. 1967.

#### **Amendments**

The 1967 amendment substantially rewrote this section. For previous text, see parent volume.

**82-1209. (2743) Investigation of fires.** (1) The cause, origin, and circumstances of each fire, by which property has been destroyed or damaged, shall be investigated to determine whether the fire was the result of carelessness or design. The state fire marshal may superintend and direct the investigation if he deems it necessary.

(2) If the fire occurs within a municipality or organized fire district, the chief of the fire department shall make the investigation. If the fire occurs outside a municipality or organized fire district, the county sheriff shall make the investigation. If it appears that the fire was of suspicious origin, or if there was a loss of human life, the official responsible for the investigation shall notify the state fire marshal within twenty-four (24) hours, and shall file a written report of the cause with the state fire marshal within ten (10) days.

(3) If it appears that the fire was of suspicious origin, if there was a loss of human life, or if the property loss exceeded one hundred dollars (\$100) as soon as any adjustment has been made, a person representing the insurance company shall notify the official responsible for investigating the fire of the amount of adjustment and the apparent cause and circumstances of the fire.

(4) On or before February 15 of each year, each official responsible for investigating fires shall file a fire loss report for the immediately preceding calendar year with the state fire marshal. Reports shall be on forms, and shall contain information, prescribed by the state fire marshal.

**History:** En. Sec. 6, Ch. 148, L. 1911;  
re-en. Sec. 2743, R. C. M. 1921; amd. Sec.  
6, Ch. 229, L. 1967.

#### **Amendments**

The 1967 amendment substantially re-wrote this section. For previous text, see parent volume.

### **82-1210. (2744) Repealed.**

#### **Repeal**

This section (Sec. 7, Ch. 148, L. 1911), relating to fire marshal's investigations,

was repealed by Sec. 14, Ch. 229, Laws 1967.

**82-1211. (2745) Penalty for violation of law.** Any person who fails to comply with the requirements of section 82-1209, R.C.M. 1947, shall be fined not less than twenty-five dollars (\$25) nor more than two hundred dollars (\$200).

**History:** En. Sec. 8, Ch. 148, L. 1911;  
re-en. Sec. 2745, R. C. M. 1921; amd. Sec.  
7, Ch. 229, L. 1967.

#### **Amendments**

The 1967 amendment substituted "Any person who fails to comply with the re-

quirements of section 82-1209, R. C. M. 1947" for "An officer named in the last two preceding sections who neglects to comply with any requirements of this chapter"; and made minor changes in style.

**82-1218. (2752) Entering of buildings for purpose of examination.** The state fire marshal, his deputies and subordinates, the chief of the fire department of each municipality or district where a fire department is established, or the county sheriff where no fire department exists, at all reasonable hours may enter into all buildings and upon all premises within their jurisdiction for the purpose of determining whether the building or premise conforms to laws and rules relating to fire hazards and fire safety.

**History:** En. Sec. 15, Ch. 148, L. 1911;  
re-en. Sec. 2752, R. C. M. 1921; amd. Sec.  
8, Ch. 229, L. 1967.

#### **Amendments**

The 1967 amendment substituted "municipality or district" for "city or village" before "where a fire"; substituted "county sheriff" for "mayor of a city or village"

before "where no fire"; deleted "or the justice of the peace of a township in territory without the limits of a city or village" before "at all reasonable hours"; and substituted "determining whether the building or premise conforms to laws and rules relating to fire hazards and fire safety" for "examination" at the end of the section.

### **82-1227, 82-1228. (2757, 2758) Repealed.**

#### **Repeal**

These sections (Secs. 20, 21, Ch. 148, L. 1911), relating to the compensation of

fire department officials, were repealed by Sec. 14, Ch. 229, Laws 1967.

**82-1230. (2760) Oath of marshal and deputy.****Cross-References**

Bonds of state officers and employees,  
sec. 6-105 et seq.

**82-1231. (2761) Tax on fire insurance premiums for maintenance of state fire marshal's office.** Each insurer authorized to effect insurance on risks enumerated in subsection two of section 11-1919, doing business in this state shall pay to the state auditor and commissioner of insurance ex officio, during the month of February or March in each year, in addition to the taxes on premiums required by law to be paid by it, a tax of one-half of one per cent ( $\frac{1}{2}$  of 1%) on the fire portion of the direct premiums on such risks received during the calendar year next preceding, after deducting cancellations and return premiums.

**History:** En. Sec. 24, Ch. 148, L. 1911; re-en. Sec. 2761, R. C. M. 1921; amd. Sec. 1, Ch. 83, L. 1941; amd. Sec. 1, Ch. 162, L. 1947; amd. Sec. 1, Ch. 182, L. 1959; amd. Sec. 1, Ch. 312, L. 1969.

**Amendments**

The 1969 amendment raised the tax from "one-fourth of one per cent ( $\frac{1}{4}$  of 1%)" to "one-half of one per cent ( $\frac{1}{2}$  of 1%)."

**CHAPTER 13—GOVERNOR—POWERS—RECORDS—SECRETARY****Section**

82-1311. "Governor-elect" defined.

82-1312. Duties of state controller.

82-1313. State employees chosen by governor-elect—compensation—employees of the department of administration to assist governor-elect.

82-1314. Funds—state controller to request an appropriation.

**82-1301. (124) Powers and duties of governor.****Compiler's Notes**

Chapter 293, Laws 1969 created and funded (in part with matching federal funds) a commission on the reorganization of the executive branch of the state gov-

ernment. The act provided for the commission's composition and procedures and required that any recommendations be reported no later than December 1, 1970.

**82-1309. Enemy attack upon United States and governor, etc.****Cross-References**

Line of succession extended to legislators, sec. 82-3802.

**82-1310. Emergency temporary seat of government—designation.****Cross-References**

Moving seat of government after attack, sec. 82-3807.

**82-1311. "Governor-elect" defined.** As used in this act, unless the context clearly indicates otherwise:

(1) "Governor-elect" means the person elected at a general election to the office of governor who is not the incumbent governor.

**History:** En. Sec. 1, Ch. 47, L. 1969.

**Title of Act****Compiler's Notes**

As enacted, this section contained no subdivision (2).

An act to provide for orderly transition of state government after the election of a new governor by providing funds and other necessary assistance for the governor-elect.



**82-1312. Duties of state controller.** The state controller shall provide the governor-elect and his necessary staff with suitable office space in the capitol building, together with furnishings, supplies, equipment, and telephone service for the period between the general election and the inauguration.

**History:** En. Sec. 2, Ch. 47, L. 1969.

**82-1313. State employees chosen by governor-elect—compensation—employees of the department of administration to assist governor-elect.** The governor-elect may obtain the assistance of persons of his own choosing, between the general election and inauguration, and they shall receive reasonable compensation for their services. These persons shall be state employees, but they shall not be subject to any civil service or personnel laws or rules of the state. In addition, the governor-elect may request that the state controller assign one (1) or more employees of the department of administration to assist the governor-elect and his staff in the study and interpretation of information. Employees of the department of administration shall be assigned for the time necessary between the general election and the inauguration.

**History:** En. Sec. 3, Ch. 47, L. 1969.

**82-1314. Funds — state controller to request an appropriation.** The funds necessary to carry out the provisions of this act shall be included in the appropriation request of the state controller to the legislative assembly meeting in regular session immediately prior to a general election when a governor will be chosen.

**History:** En. Sec. 4, Ch. 47, L. 1969.

#### CHAPTER 15—HAIL INSURANCE, STATE BOARD OF

##### Section

82-1516. Appointment of appraisers in case of dissatisfaction with official adjustment.

82-1519. Compensation of chairman and officers—report.

**82-1516. (360) Appointment of appraisers in case of dissatisfaction with official adjustment.** (1) In case the party that has sustained the loss is dissatisfied with and refuses to accept the adjustment made by the official appraiser then he shall have the right to appeal to the state board of hail insurance, provided however, he shall make such appeal by registered mail within ten (10) days after receiving the adjustment offer of the state board in writing. Also it is further provided that the state board of hail insurance may require the posting of a cash bond of ten dollars (\$10) with the request for reappraisal of the first adjustment. In cases where the board requires the posting of the ten dollar (\$10) bond, the board may retain it if no increase is allowed. If an increase is obtained, the board will return the bond to the claimant. In case the adjuster who makes the second appraisal fails to secure an agreement the claimant may at his option submit the matter to arbitration as herein provided or sue the state board of hail insurance in the district court of the county where

the loss occurred within ninety (90) days from the date of receipt of written notice of the second appraisal. Such actions shall be trials de novo and the Montana Rules of Civil Procedure shall apply. If the claimant elects to submit the matter to arbitration he shall then appoint one disinterested person as appraiser, and the official appraiser shall appoint another person as appraiser, and the two shall select a third disinterested person and the three shall then proceed to adjust the loss in the same manner as specified in section 82-1515 and the judgment of the majority shall be the judgment of said appraisers and shall be binding upon both parties as the final determination of said loss; provided, however, that if the insured does not recover a greater sum than allowed by the official appraiser in the first instance, he shall pay the expenses of the said three appraisers and their witnesses in making said adjustment, but if he is awarded a larger sum then the same shall be paid by the state board of hail insurance.

(2) and (3). \* \* \* [Same as parent volume.]

History: En. Sec. 9, Ch. 169, L. 1917; amd. Sec. 6, Ch. 34, L. 1919; re-en. Sec. 360, R. C. M. 1921; amd. Sec. 10, Ch. 40, L. 1923; amd. Sec. 4, Ch. 33, L. 1949; amd. Sec. 1, Ch. 69, L. 1963; amd. Sec. 76, Ch. 147, L. 1963; amd. Sec. 1, Ch. 170, L. 1967.

#### Amendments

The 1967 amendment added "within ninety (90) days from the date of receipt of written notice of the second appraisal" at the end of the fifth sentence of subsection (1).

**82-1519. (363) Compensation of chairman and officers—report.** It shall be the duty of all public officers to perform the duties relative to hail insurance under this act, without other compensation than that allowed by law. The chairman of the state board of hail insurance shall receive a salary in such amount as may be specified by the legislative assembly in the appropriation to the board of hail insurance and all appointed officers and employees under this act shall be allowed the per diem and mileage allowed state employees. The compensation of all appointed officers and employees of the board shall be fixed by the state board of hail insurance. If the legislative assembly does not specify the maximum salary for the head of the agency, the salary shall be fixed by the state board of hail insurance after approval by the board of examiners. Before approving any salary increase, the board of examiners shall review the salaries of comparable positions in Montana state government, other states, and private industry.

The chairman of the state board of hail insurance shall report as provided in section 2 [82-4002] of this act.

History: En. Sec. 12, Ch. 169, L. 1917; amd. Sec. 2, Ch. 183, L. 1921; re-en. Sec. 363, R. C. M. 1921; amd. Sec. 12, Ch. 40, L. 1923; amd. Sec. 1, Ch. 165, L. 1929; amd. Sec. 1, Ch. 53, L. 1951; amd. Sec. 1, Ch. 165, L. 1961; amd. Sec. 1, Ch. 188, L. 1965; amd. Sec. 11, Ch. 237, L. 1967; amd. Sec. 38, Ch. 93, L. 1969.

#### Amendments

The 1967 amendment substituted "in such amount \* \* \* of hail insurance" for "not in excess of six hundred dollars (\$600) per month" in the second sentence, and added the last two sentences in the first paragraph.

The 1969 amendment substituted the reporting requirements of section 82-4002 for former provision requiring annual financial reports in the second paragraph.

## CHAPTER 19—PURCHASING DEPARTMENT AND AGENT

## Section

- 82-1910. Supervision of public printing.  
 82-1916. Printing and publications.  
 82-1924. State contracts to be awarded to lowest responsible resident bidder.  
 82-1925. Residence defined—domestic corporations.  
 82-1925.1. State board of equalization to determine residency of contractor—endorsement upon license—applications for redetermination of residency—furnishing lists—board's determination as prima facie evidence.  
 82-1926. Contract provision for preference to Montana products—failure to comply—federal-aid projects.  
 82-1927. Restriction on submitting additional bids when working beyond contract time.  
 82-1928. Excusable delays not considered working beyond contract time.

**82-1906. (289) Contracts for printing and supplies.****Cross-References**

Printing defined, sec. 19-103.1.

**82-1910. (293) Supervision of public printing.** (1) The state purchasing agent shall supervise and attend to all public printing and shall prevent duplication and unnecessary printing; all forms, blanks, and documents printed for distribution to the departments of state government or state institutions shall be serially numbered and indexed by the state purchasing agent and sample copies of each thereof permanently retained in his library; and the state purchasing agent shall from time to time furnish to the public general information as to the nature, description, and official numbers of such reports as are available for public distribution.

(2) The state controller shall not approve a claim for printing submitted by any state officer, agency, or institution unless:

(a) a purchase order has been prepared and approved by the state purchasing agent prior to ordering the printing; or

(b) written approval has been given by the state purchasing agent to order the printing without preparation of a purchase order.

**History:** En. Sec. 10, Ch. 197, L. 1921; re-en. Sec. 293, R. C. M. 1921; amd. Sec. 1, Ch. 15, L. 1969. paragraph as subsection (1), deleted "the" before "state government," and added subsection (2).

**Amendments**

The 1969 amendment designated the first

**Cross-Reference**

Printing defined, sec. 19-103.1.

**82-1916. (293.6) Printing and publications.** The state purchasing agent shall have exclusive power, subject to the consent and approval of the governor, to contract for all printing for any purpose used by the state of Montana in any state office, elective or appointive or by any state board, commission, bureau, state institution or department except the printing of the decisions of the supreme court as provided in section 82-2004, and shall supervise and attend to all public printing of the state of Montana in the manner in this act provided, and shall prevent duplication and unnecessary printing; all forms, blanks and documents printed for distribution to the departments of the state government or state institutions shall be serially numbered and indexed by the state purchasing agent and sample copies of each thereof permanently retained in his office; and the state purchasing agent shall from time to time furnish to the



public general information as to the nature, description and official numbers of such reports as are available for public distribution.

Unless otherwise provided by law, the state purchasing agent in letting contracts as provided in this act, for the printing, binding and publishing of all laws, journals and reports of the various offices, departments, boards, commissions and institutions of the state, shall have the power to determine the quantity, quality, style and grade of all such printing, binding and publishing.

**History:** En. Sec. 6, Ch. 66, L. 1923; amd. Sec. 7, Ch. 80, L. 1961; amd. Sec. 9, Ch. 261, L. 1967; amd. Sec. 43, Ch. 93, L. 1969.

#### Compiler's Notes

Section 82-2004, referred to in the first paragraph of this section, was repealed by Sec. 2, Ch. 305, Laws 1967. For present law dealing with the style and publication of supreme court reports, see sec. 82-2002.

#### Amendments

The 1967 amendment, in the subparagraph beginning "To the librarian," substituted "two (2) copies of each report" for "forty (40) copies of printed reports and a minimum of four (4) copies of mimeographed or carbon reports"; and deleted the following two paragraphs which read, "The historical society of Montana shall distribute publications so received to the public libraries, and other educational, scientific, library or art institutions of the state, which may apply to be put on the mailing list for all or a portion of the state publications; and to

such libraries and other institutions outside this state with which the historical society of Montana may have established exchange relations" and "The historical society of Montana shall transmit to the United States Library of Congress, two (2) copies of every administrative report or study"; and added the last subparagraph.

The 1969 amendment deleted the final three paragraphs concerning the governor's certification of reports for publication and the printing and distribution of such reports.

#### Repealing Clause

Section 44 of Ch. 93, Laws 1969 read "Sections 40-2712, 41-1607, 41-1608, 46-106, 46-242, 66-2106, 72-138, 75-1309, 75-1310, 81-206, 81-1702.4, 82-804.3, 82-2704, 82-3506, and 82-3708, R. C. M. 1947, are repealed."

#### Cross-References

Printing defined, sec. 19-103.1.

State publications distribution center, secs. 44-132 to 44-139.

**82-1924. State contracts to be awarded to lowest responsible resident bidder.** In order to provide for an orderly administration of the business of the state of Montana in awarding contracts for materials, supplies, equipment, construction, repair and public works of all kinds, it shall be the duty of each board, commission, officer or individual charged by law with the responsibility for the execution of the contract on behalf of the state, board, commission, political subdivision, agency, school district or a public corporation of the state of Montana, to award such contract to the lowest responsible bidder who is a resident of the state of Montana and whose bid is not more than three per cent (3%) higher than that of the lowest responsible bidder who is a nonresident of this state. In awarding contracts for purchase of products, materials, supplies or equipment such board, commission, officer or individual shall award the contract to any such resident whose offered materials, supplies or equipment are manufactured or produced in this state by Montana industry and labor and whose bid is not more than three per cent (3%) higher than that of the lowest responsible resident bidder whose offered materials, supplies or equipment are not so manufactured or produced, provided that such products, materials, supplies and equipment are comparable in quality and performance. This requirement shall prevail whether the law requires

advertisement for bids or does not require advertisement for bids and it shall apply to contracts involving funds obtained from the federal government unless expressly prohibited by the laws of the United States or regulations adopted pursuant thereto.

**History:** En. Sec. 1, Ch. 183, L. 1961; amd. Sec. 1, Ch. 197, L. 1969.

#### Amendments

The 1969 amendment substituted "three per cent (3%)" for "two per cent (2%)" before "higher" in the first sentence; in-

serted the second sentence; substituted "requires" for "required" before "advertisement for bids" in the present third sentence and added "and it shall apply to \* \* \* adopted pursuant thereto" at the end.

**82-1925. Residence defined—domestic corporations.** For the purpose of this act the word "resident" shall include actual residence of an individual within this state for a period of more than one (1) year immediately prior to bidding; in a partnership enterprise or an association, the majority of all partners or association members shall have been actual residents of the state of Montana for more than one (1) year immediately prior to bidding; domestic corporations organized under the laws of the state of Montana are prima facie eligible to bid as residents but this qualification may be set aside and a successful bid disallowed where it is shown to the satisfaction of the board, commission, officer or individual charged with the responsibility for the execution of such contract that said corporation is a wholly owned subsidiary of a foreign corporation or that said corporation was formed for the purpose of circumventing the provisions of this act relating to residence. Notwithstanding the foregoing, any individual, partnership or corporation, foreign or domestic and regardless of ownership thereof, whose offered materials, supplies or equipment are manufactured or produced in this state by industry located in Montana and Montana labor shall be deemed to be a resident for the purpose of this act.

**History:** En. Sec. 2, Ch. 183, L. 1961; amd. Sec. 2, Ch. 197, L. 1969.

#### Amendments

The 1969 amendment, in the latter portion of the first sentence, deleted "(a) composed of resident organizers or directors of this state who have no substantial

interest or investment in the corporation for which they are acting and that the ownership and control of said company is vested in nonresidents"; deleted item designations (b) and (c); added the second sentence; and made minor changes in style.

**82-1925.1. State board of equalization to determine residency of contractor—endorsement upon license—applications for redetermination of residency—furnishing lists—board's determination as prima facie evidence.** It shall be the duty of the state board of equalization of the state of Montana, at the time that a public contractor makes application for a license under the provisions of chapter 35, Title 84 of this code, to determine whether or not such contractor is a "resident" of the state of Montana within the meaning of sections 82-1924 and 82-1925. The board shall endorse upon the contractor's license whether or not such contractor is a "resident" as aforesaid. If a contractor is not a "resident" at the time such license is issued, but thereafter qualifies as such, he may apply to the board of equalization for a redetermination of his residency, and, if found to qualify as a "resident," the board shall endorse such fact upon

his license, together with the date of such qualification. It shall be the duty of the state board of equalization, upon written request of any board, commission, officer or individual charged by law with the responsibility for the execution of any contract subject to the provisions of section 82-1924 on behalf of the state, board, commission, political subdivision, agency, school district or public corporation of the state of Montana, to furnish a list of contractors who have qualified as "residents," as aforesaid, to such requesting body. The determination of the board of equalization that a public contractor is or is not a "resident" within the meaning of sections 82-1924 and 82-1925 shall be prima facie evidence of such fact.

**History:** En. Sec. 1, Ch. 217, L. 1967.

#### Separability Clause

#### Title of Act

An act providing for the determination by the board of equalization of the state of Montana of whether a bidder on public contracts is a "resident" within the meaning of sections 82-1924 and 82-1925, Revised Codes of Montana, 1947.

Section 2 of Ch. 217, Laws 1967 read "If any part of this act shall be held to be unconstitutional or invalid by a court of competent jurisdiction, it is the intent of the legislative assembly that all valid parts that are severable from the invalid part remain in effect."

**82-1926. Contract provision for preference to Montana products—failure to comply—federal-aid projects.** Each contract awarded by any political subdivision, school district, public corporation or agency of the state of Montana shall contain among its provisions a requirement that in all instances products manufactured or produced in this state by Montana industry and labor shall be preferred for use in all projects and in all materials, supplies and equipment, if such products, materials, equipment and supplies are comparable in price and quality. Further, in this connection, it is the intent of this act that wherever possible products manufactured and produced in this state which are suitable substitutes for products manufactured or produced outside the state and comparable in price, quality and performance, shall be preferred for use in all projects and in all state institutions.

Failure to comply with the law in this respect shall disqualify such contractor as a qualified bidder for future contracts with the state of Montana, any legal subdivision of the state of Montana, any school district, public corporation or agency for a period of two (2) years.

The preference herein given to Montana products shall apply to contracts involving funds obtained from the federal government unless expressly prohibited by the laws of the United States or regulations adopted pursuant thereto.

**History:** En. Sec. 3, Ch. 183, L. 1961; amd. Sec. 3, Ch. 197, L. 1969.

#### Amendments

The 1969 amendment rewrote the final paragraph which formerly provided that

no preference should be given on contracts where federal aid had been obtained except as provided for by federal laws and that section 82-1157 was not amended or repealed by the act enacting 82-1926.

**82-1927. Restriction on submitting additional bids when working beyond contract time.** A public contractor, as defined in section 84-3501, R.C.M. 1947, who has been awarded a contract by the state of Montana, or any board, commission or department thereof, or by any board of county commissioners, or by any city or town council, or agency thereof,



for the construction or reconstruction of a public work, and is working beyond the contract time (including any authorized time extensions) shall not submit any additional bids or proposals, nor enter into any additional contract with any public agency of the state of Montana, county, or city thereof, until he has completely executed the contract upon which he is working beyond contract time, and all supplemental agreements thereto.

**History:** En. Sec. 1, Ch. 141, L. 1967.

#### **Title of Act**

An act to provide that a public contractor who is working over the contract time on a previously awarded contract from the state of Montana, or any board, commission or department thereof, or from any

board of county commissioners, or from any city or town council, or agency thereof, may not submit any additional bids or proposals to any of the above-mentioned agencies until he has completely executed the present contract upon which he is working beyond contract time; amending section 84-3507, R. C. M. 1947.

**82-1928. Excusable delays not considered working beyond contract time.** A public contractor shall not be considered to be working beyond contract time if the delay is caused by an accident or casualty produced by physical cause which is not preventable by human foresight, i.e., any of the misadventures termed an "Act of God."

**History:** En. Sec. 2, Ch. 141, L. 1967.

### CHAPTER 20—REPORTERS OF DECISIONS OF SUPREME COURT— PUBLICATION AND DISTRIBUTION OF REPORTS

#### **Section**

82-2002. Duties of reporters.

**82-2002. (379) Duties of reporters.** The reporters of the decisions of the supreme court shall make careful and accurate reports of the cases decided by the supreme court. The reports of such cases shall be made under the supervision of, and pursuant to rules and regulations promulgated by the justices of the supreme court. Reports of all cases shall be furnished to the West Publishing Company for inclusion in their publication, the Pacific Reporter, and to any other private printing or duplicating concern requesting such reports for publication. The board of examiners, on request of the supreme court, shall contract with a publishing house to publish volumes of reports, the style, size and format thereof to be determined by the justices, and such board shall in such event prepare and issue a call for bids and in accordance with the terms and specifications of the call, enter into a contract with the lowest and best bidder.

**History:** En. Sec. 891, Pol. C. 1895; re-en. Sec. 307, Rev. C. 1907; re-en. Sec. 379, R. C. M. 1921; amd. Sec. 1, Ch. 174, L. 1947; amd. Sec. 1, Ch. 14, L. 1961; amd. Sec. 1, Ch. 305, L. 1967.

#### **Repealing Clause**

Section 2 of Ch. 305, Laws 1967 read "Sections 82-2003, 82-2004, 82-2005 and 82-2006, Revised Codes of Montana, 1947, are hereby repealed."

#### **Amendments**

The 1967 amendment added the last two sentences.

### **82-2003 to 82-2006. (380 to 383) Repealed.**

#### **Repeal**

These sections (Secs. 892 to 895, Pol. C. 1895; Secs. 1 to 3, Ch. 1, L. 1925; Sec. 1, Ch. 111, L. 1943; Sec. 1, Ch. 139, L. 1947;

Sec. 2, Ch. 14, L. 1961), relating to the style and title of supreme court reports, were repealed by Sec. 2, Ch. 305, Laws 1967.

## CHAPTER 27—CO-ORDINATOR OF INDIAN AFFAIRS

## Section

82-2701. Legislative policy.

82-2702. Office of state co-ordinator of Indian affairs created—appointment of co-ordinator—term—salary—office.

82-2703. Duties of co-ordinator.

**82-2701. Legislative policy.** Whereas, a considerable portion of the citizens of the state of Montana are members of the Indian race, and,

Whereas, in the course of the past eighty years these Indian citizens of the state of Montana have been driven from their native valleys and plains and are at present living and residing upon reservations set apart for such purposes by the United States of America, and by virtue of said isolation and supervision by the federal government, great problems of economic and social significance have arisen and presently exist, and that no suitable progress has been made to solve such problems by reason of the fact that the Indians and those who are attempting to aid them in the solution of their problems have never been able to present a co-ordinated and united effort in solving such problems, and

Whereas, it is hereby declared that it is the legislative policy of this state that the best interests of the Indians will be served by the fostering of a program which is designed to establish and place our Indian citizens in a position whereby they will be able to take their rightful place in our society, and assume the rights, duties and privileges of full citizenship, it is therefore necessary that a state office of the co-ordinator of Indian affairs be established so that the problems of the Indians of Montana can be approached and reconciled from a state level in co-operation with the United States of America, and

Whereas, agencies of the federal government retain jurisdiction on Indian reservations in the state of Montana in the administration of economic, social, health, education and welfare programs for Indians, and

Whereas, such Indians as who reside off of said reservations do not generally qualify for participation in such federal programs, and are often prohibited from voting on tribal affairs and for tribal officers, and

Whereas, there are sizeable numbers of off-reservation Indians residing in our state of both enrolled and unofficial tribal descent (landless) whose needs for environmental assistance are borne by state and local agencies, and that these needs are derived from problems shared by all Indians, whether they reside on reservations or not, and in consideration of their desire for official voice and representation in seeking solutions to their problems, and

Whereas, programs of the state of Montana should not duplicate those supported by agencies of the federal government as regards jurisdiction of Indian people, and since state responsibility is effected with off-reservation Indians, and since such Indians require assistance to co-ordinate their affairs with various tribal groups and federal agencies where they have no official recognition,

Then therefore, let it be resolved that the co-ordinator of Indian affairs should assess the problems of all Indians to include those who reside off of known reservations, and who seek ways and means of communicating

their opinions and needs to agencies of responsibility, and that the co-ordinator should actively assist such people in organizing such efforts and that he act as representative and spokesman for such organized bodies of Indian people whether reservation or off-reservation classification, whenever such assistance is required.

**History:** En. Sec. 1, Ch. 203, L. 1951;  
amd. Sec. 1, Ch. 319, L. 1969.

#### Amendments

The 1969 amendment made a minor style change at the end of the third paragraph and added the last five paragraphs.

**82-2702. Office of state co-ordinator of Indian affairs created—appointment of co-ordinator—term—salary—office.** The office of the state co-ordinator of Indian affairs is hereby created. The co-ordinator shall be appointed by the governor from a list of five (5) qualified persons agreed upon by the tribal councils of the respective Indian tribes of the state of Montana. He shall hold such office for a term of four (4) years and shall be paid a salary in such amount as may be specified by the legislative assembly in the appropriation to the co-ordinator of Indian affairs. If the legislative assembly does not specify the maximum salary for the co-ordinator, any increase in the salary of the co-ordinator must be approved by the board of examiners. He shall maintain his office at the state capitol in Helena, Montana.

**History:** En. Sec. 2, Ch. 203, L. 1951;  
amd. Sec. 12, Ch. 237, L. 1967; amd. Sec. 2,  
Ch. 319, L. 1969.

#### Amendments

The 1967 amendment substituted "salary in such amount \* \* \* and private industry" for "salary of one dollar (\$1.00) per year."

The 1969 amendment deleted a former fifth sentence, which read "Before approving any salary increase the board of examiners shall review the salaries of comparable positions in Montana state government, other states and private industry."

**82-2703. Duties of co-ordinator.** It shall be the duty of the state co-ordinator of Indian affairs to do all necessary and proper things to carry out the legislative policy set forth in section 82-2701. He shall solicit rehabilitation loans, educational funds, economic, health, and housing funds from various sources for the purpose of enabling deserving Indians to become self-sufficient. Interest rates on such loans shall not exceed four per cent (4%) and such loans shall be disbursed through various federal programs established for these purposes.

He shall also do everything possible to bring about adequate housing and sanitation for Indians, whether they reside on reservations or not, and will co-ordinate such activities whenever necessary with the department of Indian affairs of the United States, the United States government and the state of Montana.

He shall acquaint himself with the problems confronting the Indians of Montana and he shall advise the legislative and executive branches of the state of Montana of such problems and shall make recommendations for the alleviation thereof. He shall also serve the Montana delegation in the federal Congress as an adviser and intermediary in the field of Indian affairs, and shall act as spokesman for representative Indian organizations and groups, public and private, whenever such support is solicited.



**History:** En. Sec. 3, Ch. 203, L. 1951; amd. Sec. 3, Ch. 319, L. 1969.

#### Amendments

The 1969 amendment, in the second sentence of the first paragraph, inserted "educational funds, economic, health, and housing funds" after "rehabilitation loans" and substituted "various federal programs established for these purposes" for "Indian

loan associations to be established on the various reservations" at the end of the third sentence; in the second paragraph, substituted "and sanitation \* \* \* whenever necessary" for "on Indian reservations and in general to promote the welfare of our Indian citizens, and in doing these things he will co-ordinate"; and in the third paragraph, added "and shall act \* \* \* whenever such support is solicited."

### 82-2704. Repealed.

#### Repeal

Section 82-2704 (Sec. 4, Ch. 203, L. 1951), relating to reports by the state co-

ordinator of Indian affairs, was repealed by Sec. 44, Ch. 93, Laws 1969.

## CHAPTER 30—NATURAL RESOURCES AND DEVELOPMENT COUNCIL

#### Section

82-3001. Creation of interdepartmental advisory council.

82-3002. Organization of the council.

82-3003. Powers and duties of the council.

**82-3001. Creation of interdepartmental advisory council.** There is hereby created an interdepartmental advisory council, to be known as the council on natural resources and development (hereinafter referred to as the "council"). It shall be composed of the following: The commissioner of state lands and investments, director of the department of state fish and game, state forester, secretary of the grass conservation commission, director of the Montana water resources board, executive secretary of the oil and gas conservation commission, director of the state bureau of mines and geology, state highway engineer, commissioner of agriculture, executive officer of the state board of health, director of planning and economic development, executive secretary of the state soil conservation committee, chairman of the outdoor recreation advisory committee, a member of the water well contractor's examining board, the secretary of the water pollution council and a member of the sanitarians registration council.

**History:** En. Sec. 1, Ch. 95, L. 1953; amd. Sec. 4, Ch. 280, L. 1965; amd. Sec. 1, Ch. 230, L. 1967; amd. Sec. 1, Ch. 269, L. 1969.

#### Amendments

The 1967 amendment substituted "director of the department of state fish and game" for "state game warden"; substituted "director of the Montana water resources board" for "a person designated by the state water conservation board";

substituted "the oil and gas conservation commission" for "the oil conservation board"; deleted "and" after "geology"; added "commissioner of agriculture \* \* \* soil conservation committee" at the end of the section; and made a minor change in punctuation.

The 1969 amendment added "chairman of the outdoor recreation advisory committee \* \* \* sanitarians registration council" at the end.

**82-3002. Organization of the council.** The council shall organize within thirty (30) days after this act shall take effect by the election of a secretary and such other officers as it may deem necessary; the director of the Montana water resources board shall be the permanent chairman of the council. Thereafter, it shall hold meetings at least once every sixty (60) days at the seat of government in Helena, Montana, and shall hold

additional meetings if and when the governor shall require it to do so. Notice of the meetings shall be given to the governor and representatives of the press by the secretary of the council.

**History:** En. Sec. 2, Ch. 95, L. 1953; amd. Sec. 2, Ch. 269, L. 1969.

#### Amendments

The 1969 amendment, in the first sentence, deleted "chairman" before "secre-

tary" and added "the director \* \* \* shall be permanent chairman of the council"; in the second sentence, substituted "meetings at least once every sixty (60) days" for "quarterly meetings" after "it shall hold"; and added the last sentence.

**82-3003. Powers and duties of the council.** The duties of the council shall be

(a) and (b). \* \* \* [Same as parent volume.]

(c) The preparation of reports and recommendations in regard to matters which the governor shall bring to their attention or which, in their judgment, ought to be brought to the attention of the governor.

(d) At each regular meeting of the council, each member of the council shall make a written summary report of the programs or activities of his state agency with regard to water problems in the state. A copy of each report shall be delivered to the governor and to the secretary of the council prior to its regular meetings.

(e) Said meetings shall be open to interested members of the legislature.

(f) Immediately following each meeting, the secretary of the council shall prepare summary minutes and send copies to each member and to the governor.

**History:** En. Sec. 3, Ch. 95, L. 1953; amd. Sec. 3, Ch. 269, L. 1969.

#### Amendments

The 1969 amendment substituted "governor shall bring" for "governor may bring" in subdivision (e); and added subdivisions (d) through (f).

## CHAPTER 31—STATE AGENCY FOR SURPLUS PROPERTY

### 82-3105. Superintendent of public instruction, etc.

#### Cross-References

Bonds of state officers and employees, sec. 6-105 et seq.

## CHAPTER 32—STATE RECORDS

#### Section

82-3207. Declaration of public policy as to preservation of state records.

82-3208. State archives created—appointment of archivist—duties and compensation.

82-3209. Archivist to preserve noncurrent records of permanent value—programs for management of records.

### 82-3207. Declaration of public policy as to preservation of state records.

The legislative assembly declares that it is the public policy of the state of Montana that noncurrent records of permanent value to the state should be preserved and protected; that the operations of state government should be made more efficient, more effective, and more economical through current records management; and that to the end that the people may receive

maximum benefit from a knowledge of state affairs, the state should preserve its noncurrent records of permanent value for study and research.

**History:** En. Sec. 1, Ch. 108, L. 1969.

**Title of Act**

An act creating a state archives in the Montana historical society; providing for

appointment of a state archivist to preserve noncurrent records of permanent value to the state and to assist state officers and agencies in records management.

**82-3208. State archives created—appointment of archivist—duties and compensation.** There is a state archives in the Montana historical society for the preservation of noncurrent records of permanent value to the state and for records management. The director of the Montana historical society shall appoint a state archivist who serves at the pleasure of the director, define his duties, and fix his compensation with the approval of the board of trustees of the Montana historical society.

**History:** En. Sec. 2, Ch. 108, L. 1969.

**82-3209. Archivist to preserve noncurrent records of permanent value—programs for management of records.** The state archivist shall preserve noncurrent records of permanent value and shall establish and administer an active, continuing program for the economical and efficient management of state records. Upon request, he shall assist and advise in the establishment of records management programs in the executive, legislative, and judicial branches of state government with due regard to the functions of the officers and agencies involved.

**History:** En. Sec. 3, Ch. 108, L. 1969.

## CHAPTER 33—DEPARTMENT OF ADMINISTRATION

### Section

82-3303. Divisions within department.

82-3306. Supervision of mailing facilities—data processing, computer, duplicating, copying, and automatic typing facilities.

82-3316. Authority to construct buildings.

82-3317. Supervision of construction of buildings.

**82-3303. Divisions within department.** The department shall consist of the following divisions:

(1) to (4). \* \* \* [Same as parent volume.]

(5) Budget

Each division shall be administered by a division head who shall be appointed by, and serve at the pleasure of the controller.

**History:** En. Sec. 3, Ch. 271, L. 1963;  
amd. Sec. 2, Ch. 101, L. 1969.

### Amendments

The 1969 amendment added "(5) Budget" to the list of divisions.

**82-3306. Supervision of mailing facilities—data processing, computer, duplicating, copying, and automatic typing facilities.** (1) The controller shall maintain and supervise any central mailing facilities for state agencies in the capitol area.



(2) The controller shall establish regulations governing the procurement of data processing equipment, duplicating and copying equipment, and equipment generally prescribed for automatic typing. The regulations of the state controller shall be formulated with the advice of a committee consisting of a representative of the board of regents, a representative of the state highway commission, and two (2) members appointed by the other two, and one (1) of the appointed members shall have special knowledge or experience with data processing equipment and one (1) shall have special knowledge or experience with the other named office equipment. Within these regulations the controller shall supervise the procurement and location of the herein named equipment for all state agencies, other than the department of public instruction.

**History:** En. Sec. 6, Ch. 271, L. 1963; amd. Sec. 1, Ch. 298, L. 1967; amd. Sec. 3, Ch. 101, L. 1969.

#### Amendments

The 1967 amendment numbered the original paragraph of the section "(1)"; and added subsection (2).

The 1969 amendment deleted "the budget director" after "committee consisting of" and substituted "two" for "three" after "members appointed by the other" in the second sentence of subsection (2).

**82-3316. Authority to construct buildings.** (1) Except as provided in subsection (2) of this section, a building costing more than twenty-five thousand dollars (\$25,000) may not be constructed without the consent of the legislative assembly. When a building costing more than twenty-five thousand dollars (\$25,000) is to be financed in such a manner as not to require legislative appropriation of moneys, such consent may be in the form of a joint resolution.

(2) (a) The governor may authorize the emergency repair or alteration of a building.

(b) The regents of the Montana university system may authorize the construction of revenue-producing facilities referred to in section 75-216, if they are to be financed wholly from the revenues therein described.

(c) The regents of the Montana university system, with the consent of the governor, may authorize the construction of a building that is financed wholly with federal or private moneys, if the construction of such a building will not result in any new programs.

**History:** En. Sec. 16, Ch. 271, L. 1963; amd. Sec. 2, Ch. 13, L. 1967.

#### Amendments

The 1967 amendment substituted "may" for "shall" after "such consent" near the end of subsection (1); substituted "Montana university system" for "university of Montana" near the beginning of subsection (2)(b); substituted "revenue producing facilities referred to in section 75-216" for "residence halls, dormitories, apartments and other student housing fa-

cilities; dining rooms and halls and other food service facilities; and student union building and facilities" in subsection (2) (b); and added "if they are to be financed wholly from the revenue therein described" at the end of subsection (2)(b).

#### Effective Date

Section 3 of Ch. 13, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved February 2, 1967.

**82-3317. Supervision of construction of buildings.** (1) For the construction of a building costing more than ten thousand dollars (\$10,000.00) the state controller shall:

(a) to (e). \* \* \* [Same as parent volume.]

(f) Concur in construction projects where the proposed cost is less than ten thousand dollars (\$10,000.00), but more than three thousand dollars (\$3,000.00), provided that before any contract is approved for construction, alteration or improvement no less than three (3) separate informal bids shall be procured from bona fide contractors duly licensed as such in the state of Montana.

(g) Not require the provisions of Montana law relating to advertising, bidding or supervision where proposed construction costs are less than three thousand dollars (\$3,000.00).

(2). \* \* \* [Same as parent volume.]

**History:** En. Sec. 17, Ch. 271, L. 1963;      **Amendments**  
amd. Sec. 2, Ch. 264, L. 1969.

The 1969 amendment added subdivisions  
(f) and (g) to subsection (1).

#### CHAPTER 35—COMMISSION ON PROBLEMS OF AGING

##### Section

- 82-3501. Commission created.
- 82-3502. Composition of commission—appointment and terms of members.
- 82-3503. Quorum of commission—officers—meetings.
- 82-3504. Functions of commission.
- 82-3505. Grants and gifts to commission—deposit and availability.

**82-3501. Commission created.** There is hereby created the commission on aging, hereafter called "the commission."

**History:** En. Sec. 1, Ch. 73, L. 1965;      mission on aging" for "committee on  
amd. Sec. 1, Ch. 12, L. 1967.      problems of aging" near the beginning of  
the section and substituted "commission"  
for "committee" at the end of the section.

##### **Amendments**

The 1967 amendment substituted "com-

**82-3502. Composition of commission—appointment and terms of members.** The commission shall consist of fifteen (15) members appointed by the governor as follows: One (1) member each from the following offices: state board of health, department of public institutions, Montana medical association, public employees' retirement system, department of public welfare, Montana nurses association, Montana nursing home association, the legislative assembly. Seven (7) citizen members shall be selected on the basis of active interest, experience and ability, none of whom shall be employees of the state. Five (5) commission members shall be appointed initially for terms of one (1) year; five (5) shall be appointed initially for terms of two (2) years, five (5) shall be appointed initially for terms of three (3) years. An appointment to replace a member whose term has expired shall be for three (3) years. An appointment to replace a member whose term has not expired shall be for the remainder of the term.

**History:** En. Sec. 2, Ch. 73, L. 1965;      **Amendments**  
amd. Sec. 2, Ch. 12, L. 1967.

The 1967 amendment substituted "com-  
mission" for "committee" wherever it ap-  
pears in the section.

**82-3503. Quorum of commission—officers—meetings.** A majority of the members of the commission shall constitute a quorum for the trans-

action of business. The commission shall elect a chairman, a vice-chairman, a secretary and such other officers as it deems necessary. The commission shall meet on call of the chairman of the commission or the governor.

History: En. Sec. 3, Ch. 73, L. 1965;      Amendments  
amd. Sec. 3, Ch. 12, L. 1967.

The 1967 amendment substituted "commission" for "committee" wherever it appears in the section.

**82-3504. Functions of commission.** The commission shall: 1. to 4.

\* \* \* [Same as parent volume.]

History: En. Sec. 4, Ch. 73, L. 1965;      Amendments  
amd. Sec. 4, Ch. 12, L. 1967.

The 1967 amendment substituted "The commission" for "The committee" at the beginning of the section.

**82-3505. Grants and gifts to commission—deposit and availability.** The commission may receive on behalf of the state any grant from the federal government or any grant or gift from any source and accept the same so that the title shall pass to the state. All grants, grants-in-aid, or gifts shall be deposited with the state treasurer and shall be continuously available to the commission.

History: En. Sec. 5, Ch. 73, L. 1965;      Amendments  
amd. Sec. 5, Ch. 12, L. 1967.

The 1967 amendment substituted "commission" for "committee" wherever it appears in the section.

**82-3506. Repealed.**

**Repeal**

Section 82-3506 (Sec. 6, Ch. 73, L. 1965; Sec. 6, Ch. 12, L. 1967), relating to the re-

port of the commission on aging, was repealed by Sec. 44, Ch. 93, Laws 1969.

CHAPTER 36—MONTANA ARTS COUNCIL

Section

- 82-3601. Montana arts council created—purposes.
- 82-3602. Appointment of council members—qualifications.
- 82-3603. Terms of council members—chairman and vice-chairman—vacancies—expenses of members.
- 82-3604. Executive committee—functions.
- 82-3605. Employment of officers and employees—compensation.
- 82-3606. Duties of council.
- 82-3607. Gifts and donations received—deposit and use.
- 82-3608. Contracts for services and co-operative endeavors.
- 82-3609. Fund-raising drives—deposit and use of proceeds.

**82-3601. Montana arts council created—purposes.** In recognition of the increasing importance of the arts in the lives of the citizens of Montana, of the need to provide opportunity for our young people to participate in the arts and to contribute to the great cultural heritage of our state and nation, and of the growing significance of the arts as an element which makes living and vacationing in Montana desirable to the people of other states, the Montana arts council is hereby created as an agency of state government.

History: En. Sec. 1, Ch. 2, L. 1967.      Title of Act

An act creating the Montana arts council and prescribing its powers and duties.



**82-3602. Appointment of council members—qualifications.** The Montana arts council shall consist of fifteen (15) members appointed by the governor, by and with the consent of the senate. In so far as possible, the governor shall appoint members from the various geographical areas of the state who have a keen interest in one or more of the arts and a willingness to devote time and effort in the public interest without compensation.

**History:** En. Sec. 2, Ch. 2, L. 1967.

**82-3603. Terms of council members—chairman and vice-chairman—vacancies—expenses of members.** The term of office of each member shall be five (5) years; provided, however, that of the members first appointed, five (5) shall be appointed for terms of one (1) year, five (5) for terms of three (3) years, and five (5) for terms of five (5) years. The governor shall designate a chairman and a vice-chairman from the members of the council to serve as such at the pleasure of the governor. The chairman shall be the chief executive officer of the council. Other than the chairman, no member of the council who serves a full five (5) year term shall be eligible for reappointment during a one (1) year period following the expiration of his term. Each vacancy shall be filled for the balance of the unexpired term in the same manner as the original appointment. The members of the council shall not receive any compensation for their services, but shall be reimbursed for their actual and necessary expenses incurred in the performance of their duties as members of the council.

**History:** En. Sec. 3, Ch. 2, L. 1967.

**82-3604. Executive committee—functions.** The council may select an executive committee of five (5) members and delegate to the committee such functions in aid of the efficient administration of the affairs of the council as the council deems advisable.

**History:** En. Sec. 4, Ch. 2, L. 1967.

**82-3605. Employment of officers and employees—compensation.** The chairman may employ, and at pleasure remove, administrative officers and other employees as may be needed and fix their compensation within the amounts made available for such purposes.

**History:** En. Sec. 5, Ch. 2, L. 1967.

**82-3606. Duties of council.** The duties of the council shall be:

(1) To encourage throughout the state the study and presentation of the arts and to stimulate public interest and participation therein;

(2) To co-operate with public and private institutions engaged within the state in artistic and cultural activities, including but not limited to, music, theatre, dance, painting, sculpture, architecture and allied arts and crafts and to make recommendations concerning appropriate methods to encourage participation in and appreciation of the arts to meet the legitimate needs and aspirations of persons in all parts of the state;

(3) To foster public interest in the cultural heritage of our state and to expand the state's cultural resources;

(4) To encourage and assist freedom of artistic expression essential for the well-being of the arts;

(5) To report as provided in section 2 [82-4002] of this act.

**History:** En. Sec. 6, Ch. 2, L. 1967; am. Sec. 39, Ch. 93, L. 1969. erence to the reporting requirements of section 82-4002 for former provision requiring reports to governor and legislature in even-numbered years.

**Amendments**

The 1969 amendment substituted the ref-

**82-3607. Gifts and donations received—deposit and use.** The council may acquire, accept, receive, dispose and administer in the name of the council any gifts, donations, properties, securities, bequests and legacies that may be made to it. Moneys received by donation, gift, bequest or legacy, unless otherwise provided by the donor, shall be deposited in the earmarked revenue fund of the state treasury and used for the general operation of the council. The council is the official agency of the state to receive and disburse any funds made available by the National Foundation on the Arts.

**History:** En. Sec. 7, Ch. 2, L. 1967.

**82-3608. Contracts for services and co-operative endeavors.** The council may contract with individuals, organizations and institutions for services or co-operative endeavors furthering the objectives of the council's programs.

**History:** En. Sec. 8, Ch. 2, L. 1967.

**82-3609. Fund-raising drives—deposit and use of proceeds.** The council may engage in such fund-raising drives and public contribution campaigns as will contribute to its continued development and support. All revenues received in such manner shall be deposited in the earmarked revenue fund of the state treasury and may not be used for any purposes other than the improvement, development and operation and programs of the council.

**History:** En. Sec. 9, Ch. 2, L. 1967. the act should be in effect from and after its passage and approval. Approved January 19, 1967.

**Effective Date**

Section 10 of Ch. 2, Laws 1967 provided

## CHAPTER 37—PLANNING AND ECONOMIC DEVELOPMENT ACT

**Section**

- 82-3701. Short title.
- 82-3702. Declaration of necessity and public policy.
- 82-3703. Planning and economic development commission.
- 82-3704. Executive head of department—appointment—compensation.
- 82-3705. Functions of department.
- 82-3706. Contracts and agreements for projects and programs—co-operation with other agencies.
- 82-3707. Administrators of sections of department—appointment of personnel.
- 82-3709. Planning board abolished—records, property and moneys transferred.

**82-3701. Short title.** This act shall be known and may be cited as the "Montana Planning and Economic Development Act of 1967."

**History:** En. Sec. 1, Ch. 19, L. 1967. of state government to foster planning, growth and diversification of industry and commerce; abolishing the planning board; and repealing sections 89-301 through 89-309, R. C. M. 1947.

**Title of Act**

An act creating a planning and economic development commission and a department

**82-3702. Declaration of necessity and public policy.** It is hereby declared to be a necessity and the public policy of the state of Montana to promote, stimulate and encourage the planning and development of the economy of the state in order to provide for the social and economic prosperity of its citizens. Such promotion and development of industry, commerce, agriculture, labor and natural resources of the state requires that cognizance be taken of the continuing migration of people to the urban areas in search of job opportunities, and the fact that Montana is making a needed transition to a diversified economy. Community planning, greater diversification and attraction of additional industry, accelerated development of natural resources, expansion of existing industry, creation of new uses for agricultural products, greater emphasis on scientific research, development of new markets for the products of the state and the attainment of a proper balance in the over-all economic base are all necessary in order to create additional employment opportunities, increase personal income and promote the general welfare of the people of this state. The planning and economic development commission and department hereinafter created shall be regarded as performing a governmental function in carrying out the provisions of this act.

**History:** En. Sec. 2, Ch. 19, L. 1967.

**82-3703. Planning and economic development commission.** There is hereby created a department of state government to be known as the "department of planning and economic development," of which the governing board shall be a commission designated as the "planning and development commission." The commission shall consist of seven (7) members, and the governor shall be an ex officio member thereof. The governor shall appoint a chairman of the commission as provided hereafter. The other five (5) members of the commission shall be appointed by the governor, shall represent various community and economic interests, and shall be residents and qualified electors of the state. On or before the effective date of this act, the governor shall appoint one (1) member whose term of office shall expire on May 1, 1968, one (1) member whose term of office shall expire on May 1, 1969, one (1) member whose term of office shall expire on May 1, 1970, one (1) member whose term of office shall expire on May 1, 1971, and one (1) member whose term of office shall expire on May 1, 1972. Except appointments to fill unexpired terms, each appointment thereafter shall be for a period of five (5) years. Members of the commission may be removed by the governor, and any vacancy caused by death, removal, disqualification or resignation shall be filled by appointment as hereinabove provided.

The commission shall select from its membership a vice-chairman, a secretary, and such other officers as it may determine to be necessary. The commission shall adopt such rules and regulations for the discharge of its



duties as it may from time to time deem necessary, and each member except the governor and the chairman of the commission shall receive the sum of fifteen dollars (\$15.00) per day for each day actually engaged in the performance of the duties of office, and shall be reimbursed for actual and necessary expenses incurred in the performance of the duties of office. The commission is empowered to exercise general supervision of the department, shall establish policy, and shall approve programs undertaken.

History: En. Sec. 3, Ch. 19, L. 1967.

**82-3704. Executive head of department—appointment—compensation.**

The executive head of the department is the chairman of the commission, who shall be appointed by the governor, with the consent of the senate, and shall hold office at the pleasure of the governor. The chairman of the commission shall receive such compensation as is fixed by the legislature.

History: En. Sec. 4, Ch. 19, L. 1967.

**82-3705. Functions of department.** The department shall serve as the agency of state government in developing the full potential of the state's human and natural resources. To this end the department shall perform the following functions:

(A) State Planning.

(1) Develop and adopt a comprehensive plan for the physical development of the state of Montana.

(2) Make such economic and social studies as may be needed to accomplish the purposes of this act.

(3) Co-ordinate and assist regional development groups in the comprehensive development of the resources of the region to the betterment of Montana.

(4) Assemble and correlate information for the purpose of making long-range plans for economic and resource development of the state and its subdivisions relating to all of the factors which influence the development of new and existing economic enterprises, including taxes and the regulation of industry.

(5) Provide advice and assistance to Montana business and labor in the field of economic development and bring to the attention of the governor those significant problems adversely affecting economic development which may be relieved by state action.

(6) Locate and maintain information on prime sites for industrial, agricultural, mineral, forestry, commercial, and residential development and on sites of historical importance, and make recommendations for protecting and preserving such sites.

(7) Apply for, accept and administer grants from the federal government or other public or private sources to accomplish the objectives of this act, and enter into contracts, including agreements with adjoining states, with respect to planning involving adjoining states.

(8) Serve as the consultative, co-ordinating, and advisory agency for state departments, officials, and agencies in state planning and for en-

couraging and aiding local planning bodies, either directly or by securing planning assistance, consulting services and technical aid, which may include land use, demographic and economic studies and surveys, and comprehensive plans.

(B) Community Development.

(1) Co-operate with and provide technical assistance to county, municipal, state and regional planning commissions, zoning commissions, parks or recreation boards, community development groups, community action agencies, and similar agencies created for the purposes of aiding and encouraging orderly productive and co-ordinated development of the communities of the state.

(2) Assist the governor in co-ordinating the activities of state agencies which have an impact on solution of community development problems and implementation of community plans.

(3) Serve as a clearinghouse for information, data, and other materials which may be helpful or necessary to local governments to discharge their responsibilities and provide information on available federal, state financial and technical assistance.

(4) Carry out continuing studies and analyses of the problems faced by communities within the state and develop such recommendations for administrative or legislative action as appear necessary. In carrying out such studies and analyses, the department shall pay particular attention to the problems of metropolitan, suburban, and other areas in which economic and population factors are rapidly changing.

(C) Recreational Development.

(1) Exercise state responsibility for that part of recreational planning and development which is directly related to private investment in recreational facilities.

(2) Assemble and correlate information which may influence the development of recreational enterprises and disseminates the same to persons, firms or corporations with bona fide interest in constructing or maintaining recreational facilities open to the public.

(D) Economic Development.

(1) Provide co-ordinating services to aid state and local groups in the promotion of new economic enterprises and conduct publicity and promotional activities in connection therewith.

(2) Collect and disseminate information regarding the advantages of developing agricultural, recreational, commercial and industrial enterprises within this state.

(3) Serve as the state's official liaison between persons interested in locating new economic enterprises in Montana and state and local groups seeking new enterprises.

(4) Aid communities interested in obtaining new business or expanding existing business.

(5) Study and promote means of expanding markets for Montana products.

(6) Encourage and co-ordinate public and private agencies or bodies in publicizing the facilities and attractions of the state.

History: En. Sec. 5, Ch. 19, L. 1967.

**82-3706. Contracts and agreements for projects and programs—co-operation with other agencies.** The department may contract for consulting services for the purpose of undertaking and conducting planning and study projects. It may make agreements with other state agencies in order to effectuate its own research programs. It may initiate research, but when possible shall make full use of and strengthen the research resources of other state agencies, including the university system. Other state agencies are directed to provide the department with such information as will assist it in carrying out the purposes of this act.

The department shall assist and co-operate with other state agencies and officials, with official organizations of elected officials in the state, with local governments and officials, and with federal agencies and officials, in carrying out the functions and duties of the department.

It may consult with private groups and individuals, and if the department deems it desirable, hold public hearings to obtain information for the purposes of carrying out this act.

History: En. Sec. 6, Ch. 19, L. 1967.

**82-3707. Administrators of sections of department—appointment of personnel.** Each division or section of the department may be under the management of an administrator, responsible to the chairman of the commission, and such administrators and all subordinate personnel of the department shall be appointed by the chairman of the commission, with the consent of the commission.

History: En. Sec. 7, Ch. 19, L. 1967.

## 82-3708. Repealed.

### Repeal

Section 82-3708 (Sec. 8, Ch. 19, L. 1967), relating to the annual report of the

planning and development commission, was repealed by Sec. 44, Ch. 93, Laws 1969.

**82-3709. Planning board abolished—records, property and moneys transferred.** The state planning board is abolished. All records, property and moneys of the state planning board are transferred to the planning and economic development commission.

History: En. Sec. 9, Ch. 19, L. 1967.

"Sections 89-301, 89-302, 89-303, 89-304, 89-305, 89-306, 89-307, 89-308, and 89-309, R. C. M. 1947 are repealed."

### Repealing Clause

Section 10 of Ch. 19, Laws 1967 read

## CHAPTER 38—POST-ENEMY-ATTACK CONTINUITY IN GOVERNMENT

### Section

- 82-3801. Citation of act—constitutional basis.
- 82-3802. Succession to governorship.
- 82-3803. Succession to boards of county commissioners.
- 82-3804. Succession in city or town governing bodies.
- 82-3805. Succession for city or town executives.
- 82-3806. Provision for quorum.
- 82-3807. Moving seat of state government.
- 82-3808. Moving seat of local government.
- 82-3809. Duration of operation of act.



**82-3801. Citation of act—constitutional basis.** This act may be cited as “The Post-Enemy-Attack Continuity in Government Act” and is in implementation of section 46, article V of the Montana constitution.

**History:** En. Sec. 1, Ch. 268, L. 1967.

**Title of Act**

An act to provide for post-enemy-attack continuity in government.

**82-3802. Succession to governorship.** Following an enemy attack, the line of succession to the office of governor, as set forth in section 16, article VII of the constitution of Montana, shall be extended to members of the legislative assembly in the order of their seniority. For purposes of this section the term “seniority” means the member who has served in the legislature for the longest continuous period of time up to and including his current term. If two (2) or more members of the legislative assembly have equal seniority, the line of succession among them shall be from eldest to youngest in age.

**History:** En. Sec. 2, Ch. 268, L. 1967.

**82-3803. Succession to boards of county commissioners.** In case of a vacancy on any board of county commissioners occurring during or following an enemy attack if the judge or judges of the judicial district in which the vacancy occurs be not available to make the appointment as provided in section 4, article XVI of the Montana constitution then the district judges of all other judicial districts shall be authorized to make such appointment, provided, however, that of the available judges in the state of Montana that judge who holds court in the county seat closest to the county seat where the vacancy occurs shall be responsible for making the appointment to fill the vacancy.

**History:** En. Sec. 3, Ch. 268, L. 1967.

**82-3804. Succession in city or town governing bodies.** In the event that no members of a city or town council or commission are available following an enemy attack then the board of county commissioners of the county in which such city or town is located shall appoint successors to act in place of the unavailable members.

**History:** En. Sec. 4, Ch. 268, L. 1967.

**82-3805. Succession for city or town executives.** In the event that the executive head of any city or town is unavailable, following an enemy attack, to exercise the powers and discharge the duties of his office, then those members of the city or town council or commission available shall, by majority vote, choose a successor to act as the executive head of such city or town.

**History:** En. Sec. 5, Ch. 268, L. 1967.

**82-3806. Provision for quorum.** If, following an enemy attack, the legislature or any state or local government council, board, or commission is unable to assemble a quorum as defined by the constitution of Montana or by statute then those legislators or members of the council, board, or commission available for duty shall constitute the legislature or board,

or commission; and aforesaid quorum requirements shall be suspended; and, where the affirmative vote of a specified proportion of members for the approval of any action would otherwise be required, the same proportion of those voting thereon shall be sufficient.

**History:** En. Sec. 6, Ch. 268, L. 1967.

**82-3807. Moving seat of state government.** Following an enemy attack in which the seat of state government at Helena has been rendered unsuitable for use in that capacity the seat of state government may be moved to an alternate location within the boundaries of the state of Montana by proclamation of the governor. He shall consider other Montana cities in order of their population in the last federal census, giving consideration to available communications, office space and such other factors as may seem to him pertinent. Such move of the seat of government shall be effective until it is again moved by proclamation of the governor or action by the legislature.

**History:** En. Sec. 7, Ch. 268, L. 1967.

**82-3808. Moving seat of local government.** Following an enemy attack in which the seat of local government of any political subdivision of the state shall have been rendered unsuitable for use in that capacity, in the opinion of the governing body of that political subdivision, such seat of government may be moved by said governing body to such other location as they deem most suitable.

**History:** En. Sec. 8, Ch. 268, L. 1967.

**82-3809. Duration of operation of act.** The provisions of this act shall become inoperative at the time of the convening of the first legislative assembly following the emergency which originally made such provisions operative.

**History:** En. Sec. 9, Ch. 268, L. 1967.

#### CHAPTER 39—TELETYPEWRITER COMMUNICATIONS SYSTEM FOR LAW ENFORCEMENT

Section

- 82-3901. Establishment of communications system—inclusion of other state agencies.
- 82-3902. Appointment of communications committee—members—term of office—vacancies—meetings—compensation—duties.
- 82-3903. Powers of attorney general in carrying out provisions of act—operational charges—assessments.
- 82-3904. Participation in system by local and other agencies.
- 82-3905. Co-operation with federal law enforcement agencies—attorney general to enter agreements.
- 82-3906. Attorney general's report.

**82-3901. Establishment of communications system—inclusion of other state agencies.** The attorney general is hereby authorized to establish a permanent law enforcement teletypewriter communications system for the purpose of connecting federal, state, county, and city law enforcement agencies by teletype, and is further authorized to bring into the network, should he and they so desire, any department of Montana state government or its subdivisions outside of law enforcement activities when, in the

opinion of the attorney general and the state department or subdivision, such inclusion will materially aid the law enforcement agencies of the state of Montana or its subdivisions in the fight against crime.

**History:** En. Sec. 1, Ch. 1, Ex. L. 1967; amd. Sec. 1, Ch. 145, L. 1969.

#### Compiler's Notes

Chapter 145, Laws 1969 made permanent the law enforcement teletypewriter communications system. This chapter is identical to Ch. 1, Ex. Laws 1967 except for the insertion of "permanent" after "authorized to establish a" in section 1 (82-3901).

#### Title of Act

An act creating a state law enforcement teletypewriter communications system;

providing for an administrative committee to administer the provisions of the act; providing for duties of the state attorney general in administering the act; providing for charges to be established and providing for disposition of moneys collected; providing for an appropriation to carry out the provisions of the act.

#### Amendments

The 1969 amendment inserted "permanent" before "law enforcement teletypewriter communications system" near the beginning of the section.

**82-3902. Appointment of communications committee—members—term of office—vacancies—meetings—compensation—duties.** To carry out the provisions of the act, the governor shall appoint a state law enforcement teletypewriter communications committee consisting of seven (7) members, each member representing a governmental entity which is participating in the communications system. Membership in the committee shall be as follows:

One (1) county sheriff from a county of the first class.

One (1) county sheriff from a county other than a first class county.

One (1) chief of police from a city of the first class.

One (1) chief of police from a city other than a first class city.

One (1) county commissioner from a county not otherwise represented.

One (1) city mayor from a city not otherwise represented.

One (1) officer or employee of a state department or agency which participates in the communications system.

The term of office of members appointed to the committee shall be as follows: Three (3) of the original appointees shall serve three (3) year terms, such terms to be determined by lot or drawing among the members present at the initial meeting of the committee, and the balance of the members of the committee shall serve for two (2) years each. Vacancies on the committee shall be filled immediately by the governor. The committee shall meet at such times and at such locations as the attorney general may require and may elect officers. Members shall serve without committee compensation since, by the nature of their duties and official capacities, they are full-time, paid, state or subdivision employees subject to compensation and certain travel and per diem allowances in connection with their positions. The committee shall advise the attorney general as to the operation of the state law enforcement teletypewriter communications system, and shall suggest such changes as determined are necessary, and the attorney general shall, within the limits of the funds available under the provisions of this act, make every effort to effectuate the changes suggested, and shall work toward refinement of the system at all levels.

**History:** En. Sec. 2, Ch. 1, Ex. L. 1967; amd. Sec. 2, Ch. 145, L. 1969.

#### Amendments

The 1969 amendment made no change in this section.



**82-3903. Powers of attorney general in carrying out provisions of act—operational charges—assessments.** To carry out the provisions of this act, the attorney general is:

(a) Authorized to purchase, lease, or otherwise acquire facilities and equipment necessary to accomplish the purposes of this act, but only after consultation with the committee, and only upon approval of the committee regarding actual physical equipment to be purchased or leased as herein provided.

(b) The attorney general is authorized to employ such personnel as may be necessary to operate such facilities, within the framework of any funds budgeted or prorated on a charge basis against participating agencies as herein identified, but only after approval of the committee.

(c) The attorney general is hereby authorized to establish a monthly operational charge for the teletypewriter communications network, exclusive of personnel services, and such charge shall be prorated among all the various agencies using the system. Such charge shall be approved by the communications committee and shall be billed monthly to the agencies, and payments made as a result of the billing shall be remitted to the attorney general and shall be deposited by him in a special account in the state treasurer's office, and the state auditor is hereby authorized to draw warrants on this account upon request of the attorney general when such moneys are needed to pay any of the costs of keeping the system operative. A strict accounting shall be kept of all receipts and disbursements and shall be available as a matter of record to members of the appropriations committee of the house of representatives as they may require in the performance of their duties. Law enforcement agencies, other than state of Montana or any of its subdivisions, that become ninety (90) days delinquent in payment of any fees approved and assessed hereunder shall be notified that they will be removed from the network, and the committee herein provided shall take the necessary steps to carry out this provision.

(d) A special assessment pro rata shall be made against all participating agencies for personnel necessary to assist in the operation at one central location or key point at which there is a federal intertie, and this assessment shall be made monthly as is the operational assessment, and the same shall be transmitted and deposited and drawn by warrant as are other warrants as previously provided under (c) above, except that the assessment shall not be levied against the one central station for which the assessment is made. Assessments made under the provisions of this act shall be approved by the committee.

**History:** En. Sec. 3, Ch. 1, Ex. L. 1967;  
amd. Sec. 3, Ch. 145, L. 1969.

**Amendments**

The 1969 amendment made no change in this section.

**82-3904. Participation in system by local and other agencies.** Any county, city, or other law enforcement agency may, with approval of the committee and the attorney general, connect to the system and participate

in it upon payment of, or agreement to pay, those costs established by the committee.

History: En. Sec. 4, Ch. 1, Ex. L. 1967;  
amd. Sec. 4, Ch. 145, L. 1969.

#### Amendments

The 1969 amendment made no change in this section.

**82-3905. Co-operation with federal law enforcement agencies—attorney general to enter agreements.** The attorney general is hereby directed to contact federal law enforcement agencies or officials relative to federal cost sharing in the teletypewriter communications system, and if such funds are available from federal sources, the attorney general is hereby authorized to sign agreements with the federal agencies, subject to approval of the communications committee, and any federal funds received in any biennium for which Montana funds have been appropriated shall be deposited to the credit of the communication fund and shall be used, if at all possible, to reduce the spending of moneys as herein appropriated from the general fund.

History: En. Sec. 5, Ch. 1, Ex. L. 1967;  
amd. Sec. 5, Ch. 145, L. 1969.

#### Amendments

The 1969 amendment made no change in this section.

**82-3906. Attorney general's report.** The attorney general shall prepare a report in detail covering the operations of the communications network, the actions of the committee, the accounting of all moneys received and expended, and the need to expand or improve the system, and shall submit such report to the appropriations committee of every legislative assembly at the time funds are requested for the administration of this act.

History: En. Sec. 6, Ch. 1, Ex. L. 1967;  
amd. Sec. 6, Ch. 145, L. 1969.

#### Appropriation

Section 7 of Ch. 1, Ex. Laws 1967 appropriated money for the 1967-1969 biennium.

#### Amendments

The 1969 amendment made no change in this section.

## CHAPTER 40—BIENNIAL REPORTS TO GOVERNOR

### Section

82-4001. Definitions.

82-4002. Biennial reports by state agencies—contents—public inspection—governor's duties—pamphlets—copies.

**82-4001. Definitions.** As used in this act, unless the context clearly indicates otherwise:

(1) "State agency" means any elective official, office, department, board, bureau, or commission which is of the executive branch of state government.

(2) "Elective official" means the superintendent of public instruction, board of railroad commissioners, secretary of state, attorney general, state auditor, and state treasurer.

History: En. Sec. 1, Ch. 93, L. 1969.

#### Title of Act

An act to establish uniform reporting requirements for all state executive agen-

cies; amending sections 1-202, 3-106, 3-2914, 4-227, 5-902, 12-404, 26-124, 27-306, 32-2409, 41-803, 41-906, 44-403, 46-2306, 60-127, 62-504, 66-109, 66-408, 66-513, 66-904, 66-1009, 66-1311, 66-1410, 66-1504, 66-2203,

66-2334, 69-4106, 70-111, 71-209, 75-107, 77-120, 80-1405, 81-1411, 82-111, 82-302, 82-1002, 82-1519, 82-3606, 87-120, 92-118, 94-9824, and 82-1916, R. C. M. 1947; and repealing sections 40-2712, 41-1607, 41-1608, 46-106, 46-242, 66-2106, 72-138, 75-1309, 75-1310, 81-206, 81-1702.4, 82-804.3, 82-2704, 82-3506, and 82-3708, R. C. M. 1947.

**82-4002. Biennial reports by state agencies—contents—public inspection—governor's duties—pamphlets—copies.** (1) Before September 1 of each even-numbered year, each state agency shall submit a written report to the governor of its activities during the immediately preceding fiscal biennium.

(2) Each report shall contain information prescribed by the governor describing fully the activities of the state agency. Reports shall contain recommendations from each state agency for improvements in programs administered by it.

(3) State agency reports shall be filed in the governor's office and are open for inspection by any person.

(4) From the reports submitted to him the governor shall:

(a) delete extraneous or duplicated data;

(b) standardize the presentation of data to the extent feasible and desirable;

(c) request pertinent additional information he wishes included in the report;

(d) prepare a report for submission to the legislative assembly before the fifth legislative day of any regular session.

(5) Except as provided in subsection (6) of this section, the governor may authorize the publication of a state agency report in pamphlet form. The report in pamphlet form shall be published and distributed by the state agency responsible for reporting.

(6) An elective official may publish a biennial report in pamphlet form, in addition to the report to the governor required by subsection (1) of this section, without permission from the governor.

(7) Copies of each report published as provided in subsections (4), (5) and (6) of this section shall be distributed as follows:

(a) two (2) copies to the secretary of state;

(b) two (2) copies to the legislative council;

(c) two (2) copies to the legislative auditor;

(d) one (1) copy to each member of the legislative assembly;

(e) two (2) copies to the director of the budget;

(f) two (2) copies to the librarian of the state historical society;

(g) at least four (4) copies to the state publications distribution center of the state library and additional copies as requested by the state library;

(h) additional distribution in the discretion of the governor or state agency.

History: En. Sec. 2, Ch. 93, L. 1969.



CHAPTER 41—PUBLIC CONTRACTOR'S DEPOSITS FOR WITHDRAWAL OF  
RETAINED PAYMENTS

## Section

- 82-4101. Contractor may withdraw funds retained by state upon depositing certain governmental obligations with state treasurer—obligations that may be deposited.
- 82-4102. Treasurer authorized to contract for custodial care and servicing of deposited obligations.
- 82-4103. Interest or income on obligations to be paid to contractor—coupon bonds.
- 82-4104. Priority of deductions from retained payments and proceeds of deposited obligation.

**82-4101. Contractor may withdraw funds retained by state upon depositing certain governmental obligations with state treasurer—obligations that may be deposited.** The contractor under any contract heretofore or hereafter made or awarded by the state of Montana, or any department, agency or political subdivision thereof, including any contract for the construction, improvement, maintenance or repair of any road or highway or the appurtenances thereto, may, from time to time, withdraw the whole or any portion of the sums otherwise due to the contractor under such contract which are retained by the state of Montana, or any department, agency or political subdivision thereof, pursuant to the terms of such contract provided the contractor shall deposit with the treasurer of the state of Montana (1) United States treasury bonds, United States treasury notes, United States treasury certificates of indebtedness or United States treasury bills; or (2) bonds or notes of the state of Montana; or (3) bonds of any political subdivision of the state of Montana, of a market value not exceeding par, at the time of deposit, but at least equal in value to the amount so withdrawn from payments retained under such contract.

**History:** En. Sec. 1, Ch. 194, L. 1969.

**Title of Act**

An act to allow contractors under contracts with the state of Montana, or any department, agency or political subdivision thereof, to deposit certain governmental obligations with the treasurer of the state

of Montana in substitution for that portion of the payments otherwise due to such contractors under state contracts which are retained by the state of Montana, or any department, agency or political subdivision thereof, pursuant to the terms of such state contracts.

**82-4102. Treasurer authorized to contract for custodial care and servicing of deposited obligations.** The treasurer of the state of Montana shall have the power to enter into a contract or agreement with any national bank, state bank, trust company or safe deposit company located in the state of Montana, designated by the contractor, after notice to the owner and surety, to provide for the custodial care and servicing of any obligations deposited with him pursuant to this act. Such services shall include the safekeeping of said obligations and the rendering of all services required to effectuate the purposes of this act.

**History:** En. Sec. 2, Ch. 194, L. 1969.

**82-4103. Interest or income on obligations to be paid to contractor—coupon bonds.** The treasurer of the state of Montana or any national bank, state bank, trust company or safe deposit company located in the state of Montana, designated by the contractor to serve as custodian for the obliga-

tions pursuant to section 2 [82-4102] hereof, shall collect all interest or income when due on the obligations so deposited and shall pay the same, when and as collected, to the contractor who deposited the obligation. If deposited in the form of coupon bonds, the treasurer of the state of Montana shall deliver each such coupon as it matures to the contractor.

**History:** En. Sec. 3, Ch. 194, L. 1969.

**82-4104. Priority of deductions from retained payments and proceeds of deposited obligation.** Any amount deducted by the state of Montana, or by any department, agency or political subdivision thereof, pursuant to the terms of a contract, from the retained payments otherwise due to the contractor thereunder, shall be deducted first from that portion of the retained payments for which no obligation has been substituted, then from the proceeds of any deposited obligation. In the latter case, the contractor shall be entitled to receive the interest, coupons or income only from those obligations which remain on deposit after such amount has been deducted.

**History:** En. Sec. 4, Ch. 194, L. 1969.





## TITLE 83—STATE SOVEREIGNTY AND JURISDICTION

### Chapter

9. Assignment of claims against state, 83-901 to 83-904.

### CHAPTER 1—SOVEREIGNTY AND TERRITORIAL JURISDICTION OF THE STATE

#### 83-108. (25) Jurisdiction over lands purchased by United States.

##### References

State ex rel. Parker v. District Court,  
147 M 151, 410 P 2d 459.

### CHAPTER 9—ASSIGNMENT OF CLAIMS AGAINST STATE

#### Section

- 83-901. Notice to state auditor.
- 83-902. Limitations on assignment.
- 83-903. Power of state auditor to promulgate rules.
- 83-904. Effect of assignment.

**83-901. Notice to state auditor.** All transfers and assignments made of any claim against the state of Montana, or any part thereof, or interest thereon, except as hereinafter provided, shall be absolutely null and void and unenforceable against the state of Montana unless the assignee thereof files written notice of the assignment on such forms as may be required by the state auditor, together with a true copy of the instrument of assignment.

**History:** En. Sec. 1, Ch. 44, L. 1967.

##### Title of Act

An act to require assignees of moneys due from the state of Montana to file written notice of assignment and a copy of the assignment instrument with the

state auditor; restricting multiple assignments; authorizing promulgation of rules and regulations for such assignments by the state auditor; and allowing deductions to be made from salaries of employees of the state for specified purposes.

**83-902. Limitations on assignment.** Unless otherwise expressly permitted by the state auditor, no more than one assignment of a claim shall be effective at one time, and no assignment shall be made to more than one party, except that an assignment may be made to one party as agent or trustee for two (2) or more parties. An assignment shall not be subject to further assignment.

**History:** En. Sec. 2, Ch. 44, L. 1967.

**83-903. Power of state auditor to promulgate rules.** The state auditor may promulgate rules and regulations regarding the form of assignment, the procedures for filing assignments, and the submission of claims covering assigned funds.

**History:** En. Sec. 3, Ch. 44, L. 1967.

**83-904. Effect of assignment.** Nothing contained herein shall in any way impair the negotiability of state warrants, nor preclude employees of the state of Montana from authorizing deductions from salaries for employees group insurance programs authorized by law, union dues, or purchase of U.S. government savings bonds.

**History:** En. Sec. 4, Ch. 44, L. 1967.

# REVISED CODES OF MONTANA

## VOLUME 5

### Part 2

### 1969 Cumulative Pocket Supplement

#### *Containing*

AMENDMENTS TO ACTS AND NEW LAWS ENACTED BY THE  
LEGISLATIVE ASSEMBLY SINCE PUBLICATION OF  
REPLACEMENT VOLUME 5 (PART 2) OF  
THE 1947 REVISED CODES

#### AND

ANNOTATIONS SUPPLEMENTING REPLACEMENT VOLUME 5  
(PART 2) THROUGH VOLUME 447, PACIFIC  
REPORTER (2ND SERIES)

#### *Edited by*

LARRY E. EDMONSON, A.B., J.D.

#### and

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## NEW LAWS IN VOLUME 5 (Part 2)

For index see pocket supplement to Replacement Volume 9

### ENACTED IN 1967

Bank exemption from corporate license tax, 84-1501.4.  
Banks with offices in more than one county, assessment, 84-4606.  
Corporate tax liens, release, 84-1505.1.  
Extraordinary levies, 84-4701.6.  
Jeopardy assessments, income tax, 84-4923.1.  
Mobile homes, registration when out-of-state, 84-6606, 84-6607.  
Public contractors, withholding tax from payments, 84-3513 to 84-3516.  
University support, increase of tax levy, 84-3804.

### ENACTED IN 1969

Cigarette tax, 84-5606.2 to 84-5606.31.  
Income tax surtax, 84-4902.1.  
License taxes,  
    Corporations, 84-1501.5, 84-1505.2.  
    Gasoline, 84-1845 to 84-1861.  
    Special fuel, 84-1832.1.  
Multistate Tax Compact, 84-6701 to 84-6704.  
Privilege tax on possession or use of tax-exempt property, 84-207 to 84-211.  
Tobacco tax (cigarettes excluded), 84-6801 to 84-6807.

## AMENDMENTS IN VOLUME 5 (Part 2)

Airline flight property assessment, 84-6401, 84-6404.  
Assessment of property, time, 84-406.  
Cigarette tax, 84-5606.  
Classification of property, 84-301.  
Definition of terms, 84-101.  
Equalization, state board, 84-702.  
Freight lines, taxation of, 84-4819, 84-4820.  
General property taxes, collection of, 84-4130, 84-4191.  
House trailers, 84-6601, 84-6604, 84-6605.  
Income tax, 84-4901, 84-4902, 84-4903.5, 84-4908, 84-4913, 84-4914, 84-4920.1, 84-4924, 84-4931, 84-4938, 84-4946.  
Initiative No. 54, 84-5606.  
Licenses, public contractors, 84-3501, 84-3505, 84-3507, 84-3510.  
License taxes,  
    Corporations, 84-1501, 84-1503, 84-1505, 84-1508.2, 84-1509, 84-1515, 84-1517.  
    Electrical energy producers, 84-1601, 84-1602.  
    Gasoline, 84-1836 to 84-1838, 84-1840, 84-1842.  
    Metalliferous mines, 84-2004.  
    Natural gas distributors, 84-2102.  
    Oil producers, 84-2202, 84-2209.  
    Special fuel, 84-1832, 84-1833, 84-1835.  
    Telephone companies, 84-2601, 84-2602.  
Migratory property, 84-6008.  
Mines taxation, general proceeds tax, 84-5402, 84-5405.  
Municipal taxation, 84-4701 to 84-4701.2.  
Natural gas or petroleum taxation—net proceeds tax, 84-6202, 84-6213.  
Property Tax,  
    Basis for imposition, 84-302.  
    Time for assessing vehicle tax, 84-406.  
Strip coal mines license tax, 84-1302, 84-1303, 84-1304.  
Tax records, destruction of, 84-724.





# MONTANA REVISED CODES

## TITLE 84—TAXATION

### Chapter

1. Definition of terms, 84-101.
2. Property subject to taxation—basis for taxation, 84-207 to 84-211.
3. Classification of property for taxation—basis for taxation, 84-301, 84-302.
4. Assessment of property—powers, duties and liability of county assessor, 84-406.
7. Equalization of taxes and administration and supervision of all tax laws by state board of equalization, 84-702, 84-713, 84-724.
13. License taxes—coal mines, 84-1302 to 84-1304.
15. License taxes—corporation license tax, 84-1501, 84-1501.4, 84-1501.5, 84-1503, 84-1505 to 84-1505.2, 84-1508.2, 84-1509, 84-1515, 84-1517.
16. License taxes—electrical energy producers, 84-1601, 84-1602.
18. License taxes—gasoline dealers and distributors—special fuel tax, 84-1832, 84-1832.1, 84-1833, 84-1835 to 84-1838, 84-1840, 84-1842, 84-1845 to 84-1861.
20. License taxes—metalliferous mines, 84-2004.
21. License taxes—natural gas distributors, 84-2102.
22. License taxes—oil producers, 84-2202, 84-2209.
26. License taxes—telephone companies, 84-2601, 84-2602.
35. Licenses—public contractors, 84-3501, 84-3505, 84-3507, 84-3510, 84-3513 to 84-3516.
39. Uniform Federal Tax Lien Registration Act, Repealed—Section 8, Chapter 228, Laws of 1967.
41. Collection of general property taxes—tax sales—redemption—tax deeds—sale of tax deed lands, 84-4130, 84-4191.
46. Banks—taxation, 84-4606.
47. Cities and towns—taxation and license, 84-4701 to 84-4701.2, 84-4701.6.
48. Freight line companies—taxation, 84-4819, 84-4820.
49. Income tax, 84-4901 to 84-4902.1, 84-4903.5, 84-4908, 84-4913, 84-4914, 84-4920.1, 84-4924, 84-4928.1, 84-4931, 84-4938, 84-4946.
54. Mines taxation—general property and net proceeds tax, 84-5402, 84-5405.
56. Cigarette tax—licenses—stamps, 84-5606, 84-5606.2 to 84-5606.31.
60. Migratory personal property—taxation, 84-6008.
62. Mines or wells producing natural gas or petroleum—net proceeds tax, 84-6202, 84-6213.
64. Flight property of airline companies—assessment and taxation, 84-6401, 84-6404.
65. License taxes—racing associations, Repealed—Section 6, Chapter 216, Laws of 1967.
66. Property tax on house trailers, 84-6601, 84-6604 to 84-6607.
67. Multistate tax compact, 84-6701 to 84-6704.
68. Tobacco tax (cigarettes excluded), 84-6801 to 84-6807.

## CHAPTER 1—DEFINITION OF TERMS

### Section

#### 84-101. Definition of terms.

**84-101. (1996) Definition of terms.** Whenever the terms mentioned in this section are employed in dealing with the subject of taxation, they are employed in the sense hereafter affixed to them.

First and Second. \* \* \* [Same as parent volume.]

Third—The term “improvements” includes all buildings, structures, mobile homes, fixtures, fences, and improvements, including mobile homes,

situated upon, erected upon or affixed to the land, whether title has been acquired to said land or not.

Fourth to Sixth. \* \* \* [Same as parent volume.]

Seventh—The term “mobile home” means forms of housing known as “trailers,” “house trailers” or “trailer coaches” exceeding eight (8) feet in width or thirty-two (32) feet in length designed to be moved from one place to another by an independent power connected thereto.

**History:** En. Sec. 4, p. 74, L. 1891; re-en. Sec. 3680, Pol. C. 1895; re-en. Sec. 2501, Rev. C. 1907; re-en. Sec. 1996, R. C. M. 1921; amd. Sec. 1, Ch. 99, L. 1939; amd. Sec. 1, Ch. 296, L. 1967. Cal. Pol. C. Sec. 3617.

#### Amendments

The 1967 amendment, in the paragraph beginning “Third,” inserted “mobile homes” after “structures”; inserted “including mobile homes, situated upon” after “improvements”; and added the paragraph beginning “Seventh.”

## CHAPTER 2—PROPERTY SUBJECT TO TAXATION—BASIS FOR TAXATION

### Section

- 84-207. Privilege tax upon possession and use of tax-exempt property—exceptions.
- 84-208. Rate of tax same as ad valorem property tax—credit against tax on use of federally owned property.
- 84-209. Assessment—collection and distribution—taxes shall not become a lien against property.
- 84-210. Failure to pay tax—remedies of county.
- 84-211. Exemptions granted in the constitution of the state of Montana.

## 84-202. (1998) Exemptions from taxation.

### “Educational Purposes”

The term “educational purposes,” as used in section 2, article XII of the constitution and this section, exempting property used exclusively for “educational purposes” from taxation, is not defined in terms of common scholastic institutions of grammar school, high school and university or college. Organizations for the social, intellectual, physical, or religious welfare of the children are exempt equally. Flathead Lake Methodist Camp v. Webb, 144 M 565, 399 P 2d 90.

Religious education is exempt as an “educational purpose” and not as “actual religious worship” even though elements of the latter may be present and may serve to strengthen the exemption of all the property. Flathead Lake Methodist Camp v. Webb, 144 M 565, 399 P 2d 90.

### “Exclusive Use” Defined

The words “exclusive use” consistently have been held to mean the primary and inherent use and not the mere secondary or incidental uses of the property. Flathead Lake Methodist Camp v. Webb, 144 M 565, 399 P 2d 90.

### Exemption of Church Camp

Where church summer camp, containing twenty-two acres of land and twenty-eight improvements, was “exclusively used for

educational purposes” within the meaning of this section and section 2, article XII of the Montana constitution, it was exempt from taxation. Flathead Lake Methodist Camp v. Webb, 144 M 565, 399 P 2d 90.

### Extent of Exemption

When exempting an institution of charity, sufficient residence and recreation area may also be exempt. Flathead Lake Methodist Camp v. Webb, 144 M 565, 399 P 2d 90.

### Limits of Public Charity

An institution of purely public charity, which is exempt from taxation under section 2, article XII of the constitution and this section, may be devoted to bringing people under religious influence, the beneficiaries of the charity may pay a small portion of the cost, and the activity may be limited to a particular class so long as the numbers who may participate remain somewhat indefinite. Flathead Lake Methodist Camp v. Webb, 144 M 565, 399 P 2d 90.

### Nonprofit Foundation

Nonprofit foundation operating and maintaining home for aged was entitled to tax exemption under statute granting exemption to institutions of purely public

charity, notwithstanding evidence that foundation charged fees and imposed admission requirements. *Bozeman Deaconess Foundation v. Ford*, 151 M 143, 439 P 2d 915.

**84-207. Privilege tax upon possession and use of tax-exempt property—exceptions.** From and after the effective date of this act there is imposed and there shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation. No tax shall be imposed upon the possession or other beneficial use of public lands occupied under the terms of mineral, timber or grazing leases or permits issued by the United States or the state of Montana or upon any easement unless the lease, permit or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit or easement relates.

**History:** En. Sec. 1, Ch. 370, L. 1969.

**Compiler's Notes**

This act became effective March 17, 1969.

**Title of Act**

An act to provide a privilege tax upon

possession and use of tax-exempt property; providing exceptions thereto; fixing the rate of such tax and credit against tax; providing for assessment, collection and distribution of said taxes; providing penalties for failure to pay the tax and preserving constitutional exemption, and providing an effective date.

**84-208. Rate of tax same as ad valorem property tax—credit against tax on use of federally owned property.** The tax imposed upon such possession or other beneficial use of tax-exempt property shall be in the same amount and to the same extent as the ad valorem property tax would be if the possessor or user were the owner thereof; provided that there shall be credited against the tax so imposed upon the beneficial use of property owned by the federal government the amount of payments which are made in lieu of taxes.

**History:** En. Sec. 2, Ch. 370, L. 1969.

**84-209. Assessment—collection and distribution—taxes shall not become a lien against property.** The tax imposed hereunder shall be assessed to such possessors or users of the tax-exempt property upon the same forms, and shall be collected and distributed at the same time and in the same manner as taxes assessed to owners, possessors, or other claimants of property which is subject to ad valorem taxation, except that such taxes shall not become a lien against the property, and no such tax-exempt property may be attached, encumbered, sold or otherwise affected for the collection of the tax imposed hereunder.

**History:** En. Sec. 3, Ch. 370, L. 1969.

**84-210. Failure to pay tax—remedies of county.** A tax due and unpaid under this act shall constitute a debt due the county for and on behalf of the various taxing units concerned in the tax. If the tax imposed by this act or any portion thereof is not paid at the time the same becomes delinquent the county auditor may issue a warrant in the name of the county directed to the clerk of the district court in his county and thereupon the clerk shall enter in the judgment docket, in the column for judgment



debtors, the name of the delinquent taxpayer mentioned in the warrant and, in the appropriate columns, the amount of tax, penalties, interest and other costs for which the warrant is issued and the date when such warrant is filed, and thereupon the warrant so docketed shall have the force and effect of a judgment duly rendered by a district court and docketed in the office of the clerk thereof, and the county shall have the same remedies against the possessor user as any other judgment docket.

**History:** En. Sec. 4, Ch. 370, L. 1969.

**84-211. Exemptions granted in the constitution of the state of Montana.** Nothing contained herein shall be construed as limiting or repealing the exemptions granted in article XII, section 2 of the constitution of the state of Montana.

**History:** En. Sec. 5, Ch. 370, L. 1969.

the act should be in effect from and after its passage and approval. Approved March 17, 1969.

**Effective Date**

Section 6 of Ch. 370, Laws 1969 provided

### CHAPTER 3—CLASSIFICATION OF PROPERTY FOR TAXATION— BASIS FOR TAXATION

**Section**

84-301. Classification of property for taxation.

84-302. Basis for imposition of taxes.

**84-301. (1999) Classification of property for taxation.** For the purpose of taxation the taxable property in the state shall be classified as follows:

Class One. \* \* \* [Same as parent volume.]

Class Two. All household goods and furniture, including clocks, musical instruments, sewing machines, wearing apparel of members of the family, and all personal property actually used by the owner for personal and domestic purposes, or for the furnishing or equipment of the family residence; all agricultural and other tools, implements and machinery, gas and other engines and boilers, threshing machines and outfits used therewith, automobiles, motor trucks and other power-driven cars, vehicles of all kinds except mobile homes, boats and all watercraft, harness, saddlery and robes and except as provided in Class Five [b] of this section, all poles, lines, transformers, transformer stations, meters, tools, improvements, machinery and other property used and owned by all persons, firms, corporations, and other organizations which are engaged in the business of furnishing telephone communications, exclusively to rural areas, or to rural areas and cities and towns provided that any such city or town has a population of eight hundred (800) persons or less; and provided further, that the average circuit miles for each station on the system is more than one and one-quarter ( $1\frac{1}{4}$ ) miles.

Class Three. Livestock, poultry and the unprocessed products of both; stocks of merchandise of all sorts, together with furniture and fixtures used therewith, except mobile homes; and all office or hotel furniture and fixtures.

Class Four. (a) All land, town and city lots, with improvements, and all trailers affixed to land owned, leased, or under contract or purchase by the trailer owner, manufacturing and mining machinery, fixtures and supplies, except as otherwise provided by the constitution of Montana, and except as such property may be included in Class Five or Class Seven.

(b) Mobiles homes without regard to the ownership of the land upon which they are situated, except those held by a distributor or dealer of mobile homes as part of his stock in trade.

Class Five. \* \* \* [Same as parent volume.]

Class Six. Property formerly included in this class is now classified by section 84-308 of the Revised Codes of Montana, 1947.

Class Seven. (a) All new industrial property. New industrial property shall mean any new industrial plant, including land, buildings, machinery and fixtures which, in the determination of the state board of equalization, is used by a new industry during the first three (3) years of operation not having been assessed prior to July 1, 1961 within the state of Montana. New industry shall mean any person, corporation, firm, partnership, association, or other group which establishes a new plant or plants in this state for the operation of a new industrial endeavor, as distinguished from a mere expansion, reorganization, or merger of an existing industry or industries. Provided, however, that new industrial property shall be limited to industries that manufacture, mill, mine, produce, process or fabricate materials, or do similar work in which capital and labor are employed and in which materials unserviceable in their natural state are extracted, processed or made fit for use or are substantially altered or treated so as to create commercial products or materials; and in no event shall the term new industrial property be included to mean property used by retail or wholesale merchants, commercial services of any type, agriculture, trades or professions. And provided further, that new industrial property shall not be included to mean property which is used or employed in any industrial plant which has been in operation in this state for three (3) years or longer. Any person, corporation, firm, partnership, association or other group seeking to qualify its property for inclusion in this class shall make application to the state board of equalization in such manner and form as may be required by said board.

(b) Freeport merchandise. Freeport merchandise means those stocks of merchandise manufactured or produced outside this state which are in transit through this state and consigned to a warehouse or other storage facility, public or private, within this state, for storage in transit prior to shipment to a final destination outside the state, and which have acquired a taxable situs within the state.

Stocks of merchandise do not lose their status as freeport merchandise because while in the storage facility they are assembled, bound, joined, processed, disassembled, divided, cut, broken in bulk, relabeled or repackaged.

Any person, corporation, firm, partnership, association, or other group seeking to qualify its property for inclusion in this class shall make application to the state board of equalization in such manner or form as may be required by said board.

The state board of equalization shall establish standards, rules and regulations for the guidance of county assessors and assessing freeport merchandise.

**Class Eight.** Any improvement on real property valued at not more than seventeen thousand five hundred dollars (\$17,500), which is owned and actually occupied by a widow, with or without minor or dependent children, or by:

(1) a widow sixty-two (62) years of age or older, whether with or without minor dependent children, or

(2) a widower sixty-five (65) years of age or older, whether with or without minor dependent children, or

(3) a widow with minor or dependent children regardless of age, or

(4) a recipient of retirement benefits whose income from all sources is not more than three thousand three hundred dollars (\$3,300) for a single person and four thousand five hundred dollars (\$4,500) for a married couple per annum. Provided, further, that one who applies for classification of property under this class must make an affidavit before the county assessor of the county in which said property is located, on a form as may be provided by the state board of equalization supplied without cost to the applicant, as to his income, if applicable, as to his retirement benefits, if applicable, or, as to his marital status, if applicable, and to the fact that he or she actually occupies such improvements with right of the county welfare board to investigate the applicant, on the completion of the form, as to answers given on the form. Provided, further, that the value of said property shall not increase during the life of the recipient of retirement benefits or widow or widower covered under this class.

**Class Nine.** All property not included in the eight (8) preceding classes.

**History:** En. Sec. 1, Ch. 51, L. 1919; amd. Sec. 1, Ch. 248, L. 1921; re-en. Sec. 1999, R. C. M. 1921; amd. Sec. 1, Ch. 130, L. 1937; amd. Sec. 1, Ch. 107, L. 1941; amd. Sec. 1, Ch. 286, L. 1947; amd. Sec. 1, Ch. 45, L. 1951; amd. Sec. 1, Ch. 178, L. 1951; amd. Sec. 1, Ch. 88, L. 1957; amd. Sec. 1, Ch. 103, L. 1961; amd. Sec. 2, Ch. 239, L. 1961; amd. Sec. 1, Ch. 168, L. 1965; amd. Sec. 1, Ch. 215, L. 1967; amd. Sec. 1, Ch. 294, L. 1967; amd. Sec. 2, Ch. 296, L. 1967; amd. Sec. 1, Ch. 292, L. 1969; amd. Sec. 1, Ch. 305, L. 1969.

#### Compiler's Notes

This section was amended three times in 1967, once by Ch. 215, once by Ch. 294 and once by Ch. 296. None of the amendatory acts referred to or incorporated the changes made by the others. Since the three amendments do not appear to conflict, the compiler has made a composite section embodying the amendments made by the three 1967 acts.

This section was amended twice in 1969, once by Ch. 292 and once by Ch. 305. Neither of the amendments mentioned the other and they were identical except for

minor differences in capitalization and the reference to "Class Five" in the Class Two paragraph. Chapter 292, effective March 10, 1969, included the bracketed "b"; Chapter 305, effective March 11, 1969, did not.

#### Amendments

Chapter 215, Laws of 1967 deleted "with none other than his or her spouse, minor or dependent children, or persons not responsible for all or any part of the financial support of the affiant, and that the improvements are not used for income-producing purposes other than such purposes as are normally permitted in or on such improvements" after "occupies such improvements" in the next to last sentence of subparagraph (4) under Class Eight.

Chapter 294, Laws of 1967, in the subsection beginning "Class Seven" designated the first paragraph as "(a)," and added subdivision (b); in the subsection beginning "Class Eight" deleted "or" before "dependent" in subdivision (2); and made minor changes in style.

Chapter 296, Laws of 1967 in the paragraph beginning "Class Two," inserted



"except mobile homes" after "vehicles of all kinds"; in the paragraph beginning "Class Three," inserted "except mobile homes" after "used therewith" and in the paragraph beginning "Class Four," designated the first paragraph as subparagraph (a), and added subparagraph (b).

Chapters 292 and 305, Laws of 1969, in the paragraph beginning "Class Two" added "and except \* \* \* one and one-quarter (1¼) miles"; in the paragraph beginning "Class Eight" substituted "\$17,500" for "\$15,000" in the introductory paragraph, and in subdivision (4), substituted "whose income from all sources \* \* \* married couple per annum" for "not exceeding one hundred fifty dollars (\$150) per month, if single, or two hundred fifty dollars (\$250) per month if married" and deleted a proviso which read, "Provided such owner and occupier is not gainfully employed to such an extent as would render him or her ineligible for social security benefits, should he or she be otherwise eligible for such benefits, and does not have income

from all sources, excluding retirement benefits as mentioned in (4) hereinabove, in excess of one thousand five hundred dollars (\$1,500) per year."

#### Repealing Clause

Section 2 of Ch. 292, Laws 1969 repealed all acts and parts of acts in conflict therewith.

#### Effective Dates

Section 2 of Ch. 215, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved March 1, 1967.

Section 3 of Ch. 292, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 10, 1969.

#### References

State ex rel. Schultz-Lindsay Constr. Co. v. State Board of Equalization, 145 M 380, 403 P 2d 635.

**84-302. (2000) Basis for imposition of taxes.** As a basis for the imposition of taxes upon the different classes of property specified in the preceding section, a percentage of the true and full value of the property of each class shall be taken as follows:

Classes 1. to 7. \* \* \* [Same as parent volume.]

Class 8. Fifteen per cent (15%) of its true and full value.

Class 9. \* \* \* [Same as parent volume.]

**History:** En. Sec. 2, Ch. 51, L. 1919; re-en. Sec. 2000, R. C. M. 1921; amd. Sec. 3, Ch. 239, L. 1961; amd. Sec. 2, Ch. 168, L. 1965; amd. Sec. 2, Ch. 305, L. 1969.

#### Amendments

The 1969 amendment substituted "fifteen per cent (15%)" for "twenty per cent (20%)" in Class 8.

#### Repealing Clause

Section 3 of Ch. 305, Laws 1969 repealed all acts and parts of acts in conflict therewith.

#### Effective Date

Section 4 of Ch. 305, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 11, 1969.

#### References

State ex rel. Schultz-Lindsay Constr. Co. v. State Board of Equalization, 145 M 380, 403 P 2d 635.

### CHAPTER 4—ASSESSMENT OF PROPERTY—POWERS, DUTIES AND LIABILITY OF COUNTY ASSESSOR

#### Section

84-406. Time of assessment—motor vehicles—mobile homes—livestock.

**84-406. (2002) Time of assessment—motor vehicles—mobile homes—livestock.** (1) The assessor must, between the first Monday of March and the second Monday of July in each year, ascertain the names of all taxable inhabitants, and assess all property in his county subject to taxation, except such as is required to be assessed by the state board of equalization, and must assess such property to the persons by whom it was owned

or claimed, or in whose possession or control it was at 12 m. of the first Monday of March next preceding. He must also ascertain and assess all mobile homes arriving in his county after 12 m. of the first Monday of March next preceding. The procedure provided by this section shall not apply to

(a) and (b). \* \* \* [Same as parent volume.]

(c) Property defined in section 53-642 as "special mobile equipment" shall be subject to assessment of personal property taxes either on the date that application is made for a special mobile equipment plate, if that date falls between the first day of January and the first Monday of March, or on the first Monday of March.

(d) Mobile homes held by a distributor or dealer of mobile homes as a part of his stock in trade.

(2) The assessor must ascertain and assess all motor vehicles, except mobile homes, in his county subject to taxation as of January 1 in each year, and the same shall be assessed to the persons by whom owned or claimed, or in whose possession or control such vehicle was at 12 m. of the first day of January in each year. Provided that such tax shall not be assessed against motor vehicles which constitute inventory of motor vehicle dealers as of January 1, but said vehicles, and all other motor vehicles brought into the state subsequent to January 1, as motor vehicle dealer's inventory, shall be assessed to their respective purchasers as of the dates said vehicles are registered by said purchasers, and purchasers means and includes dealers who apply for registration or re-registration of motor vehicles, except as otherwise provided by section 32-3315. Goods, wares and merchandise of motor vehicles dealers, other than new motor vehicles and new mobile homes, shall continue to be assessed at full and true value as of the first Monday of March.

Except that this paragraph shall not apply to an applicant for registration or re-registration of a mobile home, nothing herein contained shall relieve the applicant for registration or re-registration of any other motor vehicle so assessed or subject to assessment of the duty of paying taxes thereon as a condition precedent to registration or re-registration in the event said taxes have not been paid by any prior applicant or owner in all cases where required to be paid.

(3) The assessed value of livestock being fed in feeding pens or enclosures on the first Monday in March may be computed by adding the value of livestock more than six (6) months of age being fed on the last day of each month since the last assessment date and dividing the sum by twelve (12).

**History:** En. Sec. 13, p. 78, L. 1891; re-en. Sec. 3700, Pol. C. 1895; re-en. Sec. 2510, Rev. C. 1907; re-en. Sec. 2002, R. C. M. 1921; amd. Sec. 3, Ch. 158, L. 1933; amd. Sec. 1, Ch. 30, L. 1935; amd. Sec. 9, Ch. 72, L. 1937; amd. Sec. 2, Ch. 256, L. 1955; amd. Sec. 2, Ch. 245, L. 1963; amd. Sec. 1, Ch. 86, L. 1965; amd. Sec. 2, Ch. 232, L. 1967; amd. Sec. 3, Ch. 290, L. 1967; amd. Sec. 3, Ch. 296, L. 1967; amd. Sec. 1, Ch. 40, L. 1969; amd. Sec. 1, Ch. 180, L. 1969. Cal. Pol. C. Sec. 3628.

#### Compiler's Notes

This section was amended three times in 1967, once by Chapter 232, once by Chapter 290 and once by Chapter 296. None of the amendatory acts mentioned either of the others and none incorporated the changes in substance made by the others. However, the amendments do not appear to conflict except in matters of form; hence the compiler has made a composite section embodying the changes made by all three amendatory acts. In so doing,

the compiler has redesignated as (d) a paragraph (c) added to subsection (1) by Chapter 296, and has combined sentences added by Chapters 290 and 296 as the last sentence in the first paragraph of subsection (2).

This section was amended twice in 1969, once by Ch. 40 and once by Ch. 180. Neither amendatory act mentioned nor included the changes made by the other. Since the two do not appear to conflict, the compiler has made a composite section, incorporating both amendments.

#### Amendments

Chapter 232, Laws of 1967, added paragraph (c) to subsection (1) and made minor changes in style.

Chapter 290, Laws of 1967, added the second and third sentences to the first paragraph of subsection (2), except that Chapter 290 did not contain the words "and new mobile homes" now appearing in said third sentence; it also made minor style changes.

Chapter 296, Laws of 1967, inserted the second sentence in subsection (1); added to subsection (1) the paragraph now designated (d); inserted "except mobile homes" in the first sentence of subsection (2); added the sentence now appearing as the final sentence of the first paragraph of subsection (2), except that Chapter 296 did not contain the words "new motor vehicles and" now appearing therein; it

also inserted "Except that this paragraph shall not apply to an applicant for registration or re-registration of a mobile home" at the beginning of the second paragraph of subsection (2); inserted "other" before "motor vehicle so assessed" in the second paragraph of subsection (2); and made minor style changes.

Chapter 40, Laws of 1969, substituted "12 m." for "12 midnight" where used.

Chapter 180, Laws of 1969, in the second sentence of subsection (2), inserted "and purchasers means and includes dealers who apply for registration or re-registration of motor vehicles" before "except as otherwise provided by section 32-3315."

#### Effective Dates

Section 3 of Ch. 232, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved March 1, 1967.

Section 2 of Ch. 40, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved February 19, 1969.

Section 2 of Ch. 180, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved February 28, 1969.

#### References

Swartz v. Berg, 147 M 178, 411 P 2d 736.

### CHAPTER 7—EQUALIZATION OF TAXES AND ADMINISTRATION AND SUPERVISION OF ALL TAX LAWS BY STATE BOARD OF EQUALIZATION

#### Section

84-702. Qualification and compensation.

84-713. Determination of state rate of taxation—notice of.

84-724. Destruction of tax records authorized—procedure.

**84-702. (2122.2) Qualification and compensation.** The persons to be appointed as members of the board of equalization shall be such as are known to possess knowledge of the subject of taxation and skill in matters pertaining thereto. No person so appointed shall hold any other office under the laws of this state nor any other state, nor any office under government of the United States, or of any other state. He shall devote his entire time to the duties of the office and shall not hold any position of trust or profit, nor engage in any occupation or business interfering or inconsistent with his duties, or serve on or under any committee of any political party, or take part either directly or indirectly in any political campaign in the interest of any political party, or organization or candidate for office. Each member shall receive an annual salary in such amount as may be specified by the legislative assembly in the appropriation to the board of equalization. If the legislative assembly does not specify the maximum salary of board members, any increase in the salary of board



members must be approved by the board of examiners. Before approving any salary increase, the board of examiners shall review the salaries of comparable positions in Montana state government, other states, and private industry. The salary shall be payable in equal monthly installments. The member elected chairman as provided for in 84-703 shall receive additional compensation of not more than five hundred dollars (\$500) per annum payable in the same manner as the salary. He shall also be paid his actual traveling and other expenses when away from the capitol on official business.

**History:** En. Sec. 2, Ch. 3, L. 1923; amd. Sec. 1, Ch. 109, L. 1953; amd. Sec. 8, Ch. 225, L. 1963; amd. Sec. 13, Ch. 237, L. 1967.

#### **Amendments**

The 1967 amendment substituted the fourth, fifth and sixth sentences for a provision setting maximum salary at \$10,000; and made minor style changes.

### **84-713. (2122.13) Determination of state rate of taxation—notice of.**

Between the first and third Mondays of August of each year, the governor must determine the rate of state tax to be levied and collected upon the assessed valuation of the property in the state, which, after allowing twelve per cent (12%) for delinquencies in the collection of taxes, must be sufficient to raise the specific amount of the revenue required by the legislative assembly for state purposes. The state board of equalization must immediately thereafter transmit to the county clerk of each county a statement of such rate, and upon its receipt the county clerk must, in writing, notify the state board of equalization thereof.

**History:** En. Sec. 13, Ch. 3, L. 1923; amd. Sec. 1, Ch. 19, L. 1969.

#### **Amendments**

The 1969 amendment substituted "governor must determine" for "board must

determine" before "the rate of state tax" in the first sentence; and substituted "The state board of equalization" for "The board" at the beginning of the last sentence.

**84-724. Destruction of tax records authorized—procedure.** Notwithstanding the provisions of any other chapter of this code, the state board of equalization is authorized to destroy tax records more than three (3) years old, as shall be determined to be of no further value.

Authorization for destruction of tax records shall be by unanimous vote of the members of the state board of equalization entered upon an authenticated list of records authorized to be destroyed. A copy of the authorization and authenticated list shall be entered in the minutes of the board by its secretary.

**History:** En. Sec. 1, Ch. 187, L. 1963; amd. Sec. 1, Ch. 9, L. 1969.

#### **Amendments**

The 1969 amendment substituted "three (3) years old" for "five (5) years old" after "tax record more than" in the first paragraph.

#### **Effective Date**

Section 2 of Ch. 9, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved January 29, 1969.

CHAPTER 10—LICENSE TAXES—CARBON BLACK PRODUCERS

**84-1002. (2380.2) Amount of tax.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

CHAPTER 11—LICENSE TAXES—CEMENT DEALERS

**84-1102. (2368) License tax on sales of cement, etc.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

CHAPTER 12—LICENSE TAXES—CEMENT AND GYPSUM PRODUCERS

**84-1202. (2357) License tax on producers and importers of gypsum and cement.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

CHAPTER 13—LICENSE TAXES—COAL MINES

**Section**

84-1302. Strip coal mines license tax—amount—exceptions.

84-1303. Payment of annual license tax.

84-1304. Strip coal mine operators to file statements.

**84-1302. (2317) Strip coal mines license tax—amount—exceptions.**

Every person engaged in or carrying on the business of strip coal mining, or engaged in the business of working or operating any strip coal mine or strip coal mining property, in the state of Montana, from which marketable or merchantable coal of any kind is extracted or produced by means of strip mining, whether such person shall carry on such business or engage in such work or operations as owner, lessee, trustee, possessor, receiver, or in any other capacity, must for the year 1921, and each year thereafter, when engaged in or carrying on such business, work or operations, pay to the state treasurer, for the exclusive use and benefit of the state of Montana, a license tax for engaging in and carrying on such business, work and operations, in an amount equal to five cents per ton for each and every ton in excess of fifty thousand tons of marketable or merchantable coal extracted or produced by means of strip mining by such person in the state of Montana and shipped by such person during such year, or used by such person for any purpose except in connection with the operating of the strip coal mine or mining property from which the same was extracted or produced, by means of strip mining or delivered by such person to any other person for shipment, sale or use by such other person; provided, however, that nothing in this act shall be construed as requiring laborers or employees, hired or employed, by any person to mine coal, or to work in or about, or in connection with any strip coal mine to pay such license taxes, nor shall any work required to be done in prospecting for, or in developing, or in opening up any strip coal mine or

strip coal mining property, be deemed to be the carrying on of a strip coal mining business, or the engaging in the business of working or operating of a strip coal mine; provided, further, that if during any such work of developing or opening up any strip coal mine or strip coal mining property, any marketable or merchantable coal shall be extracted or produced by means of strip mining and sold, then the same shall be deemed the carrying on of a strip coal mining business and the engaging in the business of working and operating a strip coal mine.

**History:** En. Sec. 2, Ch. 155, L. 1921; re-en. Sec. 2317, R. C. M. 1921; amd. Sec. 1, Ch. 200, L. 1939; amd. Sec. 1, Ch. 244, L. 1967.

#### Amendments

The 1967 amendment inserted "strip" before "coal" in ten places; inserted "strip coal" before "mine" or "mining"

in four places; deleted "mined" before "extracted" in four places; inserted "by means of strip mining" after "produced" in four places; and deleted "or coal property or business" before "to pay such license taxes."

#### Cross-References

Multistate tax compact, sec. 84-6701.

**84-1303. (2318) Payment of annual license tax.** Such annual license tax shall be paid in quarterly installments for the quarters ending, respectively, March 31st, June 30th, September 30th, and December 31st in each year, beginning with the quarter ending March 31, 1921, and the amount of the license tax due for each such quarter shall be paid to the state treasurer within thirty days after the end of each such quarter provided that one-half ( $\frac{1}{2}$ ) of the amounts reported to the state treasurer by the bureau of mines and geology as being the reasonable value of reclamation work performed by a licensee on lands on which strip mining has been conducted shall be credited to such licensee on the first quarterly payment of the license tax due after such report is received and on such subsequent quarterly payments until the licensee has received credit for the full amount thus reported.

**History:** En. Sec. 3, Ch. 155, L. 1921; re-en. Sec. 2318, R. C. M. 1921; amd. Sec. 5, Ch. 245, L. 1967.

#### Amendments

The 1967 amendment added the proviso.

**84-1304. (2319) Strip coal mine operators to file statements.** Each and every person engaged in or carrying on the business of strip coal mining, or engaged in the business of working or operating any strip coal mine or strip coal mining property in the state of Montana, from which coal of any kind is extracted or produced by means of strip mining at the date when this act becomes effective, must, not later than the thirtieth day of April, 1921, and every person who shall, after the date this act becomes effective, engage in the business of strip coal mining or engage in working or operating any strip coal mine or strip coal mining property in the state of Montana, from which coal of any kind is extracted or produced by means of strip mining must, immediately upon engaging in such business, work or operations, file with the state board of equalization, a certificate and statement, on forms prescribed by such state board of equalization, which shall contain the name under which such person is engaging in and carrying on such business, work and operations, within this state, giving the place or places of business or location of the strip coal mine or strip coal mining property; the name and address of the



managing agent in this state, if an association, joint-stock company, or corporation, or if a firm or partnership, the names and addresses of the persons composing the same; if an association or corporation, under the laws of what state organized, its principal place of business and the names and addresses of its principal officers; and such other information as the board may deem necessary.

**History:** En. Sec. 4, Ch. 155, L. 1921; re-en. Sec. 2319, R. C. M. 1921; amd. Sec. 2, Ch. 244, L. 1967.

coal" before "mine" or "mining" in seven places; inserted "strip" before "coal" in two places; and substituted "extracted or produced by means of strip mining" for "mined" after "any kind is" in two places.

**Amendments**

The 1967 amendment inserted "strip

CHAPTER 14—LICENSE TAXES—COAL RETAILERS

**84-1402. (2328) License to retail coal—fees.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

CHAPTER 15—LICENSE TAXES—CORPORATION LICENSE TAX

**Section**

- 84-1501. Corporation license tax—organizations exempt therefrom.
- 84-1501.4. State banks exempt until national banks taxable.
- 84-1501.5. Minimum fee of corporations qualifying under section 84-1501.2 unaffected.
- 84-1503. Segregation of income within and without state.
- 84-1505. Assessment and collection of tax.
- 84-1505.1. Release of tax liens.
- 84-1505.2. Immediate payment of tax or deficiency due may be required if delay would jeopardize collection.
- 84-1508.2. Periods of limitation—limitations for notification of additional tax extended if taxpayer fails to report change in federal tax—waiver.
- 84-1509. Consolidated returns—computation and procedure on.
- 84-1515. Reviver of corporation after suspension or forfeiture.
- 84-1517. Failure to make return—estimate and investigation of net income—copy of federal return to be furnished on request—report of change in federal tax—copy of amended federal returns.

**84-1501. (2296) Corporation license tax—organizations exempt therefrom.** The term corporation includes associations, joint-stock companies, common-law trusts and business trusts which do business in an organized capacity whether created under and pursuant to state laws, agreements, declarations of trust. Every corporation, except as hereinafter provided and except as provided in section 40-2821 (5), R.C.M. 1947, organized and existing under the laws of the state of Montana and engaged in business therein, shall annually pay to the state treasurer, as a license fee for carrying on business in said state of Montana, such percentage or percentages of total net income received by such corporation in the preceding fiscal year from all sources within the state of Montana as hereinafter set forth; and every corporation, except as hereinafter provided, organized and existing under the laws of any other state or country, or the United States, and engaged in business in the state of Montana, shall annually pay for the exclusive use and benefit of the state of Montana a license fee for carrying on its business in the state of Montana of such percentage

or percentages of total net income received by such corporation in the preceding fiscal year from all sources within the state of Montana as hereinafter set forth.

The percentage of net income to be paid under this section shall be six and one-quarter per cent ( $6\frac{1}{4}\%$ ) of all net income for the taxable period. The rate set forth in this act shall be effective for taxable years ending on or after February 28, 1969. For taxable years ending on or after February 28, 1971, the percentage of net income to be paid under this act shall be five and one-half per cent ( $5\frac{1}{2}\%$ ) of all net income for the taxable period. Every corporation subject to taxation under this act shall, in any event, pay a minimum tax of not less than fifty dollars (\$50).

There shall not be taxed under this title any income received by any—  
(a) to (k). \* \* \* [Same as parent volume.]

**History:** En. Sec. 1, Ch. 79, L. 1917; Subd. 16 amd. Sec. 1, Ch. 64, L. 1921; re-en. Sec. 2296, R. C. M. 1921; amd. Sec. 1, Ch. 166, L. 1933; amd. Sec. 1, Ch. 29, L. 1937; amd. Sec. 1, Ch. 92, L. 1937; amd. Sec. 1, Ch. 232, L. 1957; amd. Sec. 1, Ch. 264, L. 1959; amd. Sec. 1, Ch. 155, L. 1961; amd. Sec. 1, Ch. 269, L. 1965; amd. Sec. 1, Ch. 4, Ex. L. 1967; amd. Sec. 1, Ch. 11, Ex. L. 1969.

#### Amendments

The 1967 amendment, in the first paragraph, inserted "and except as provided in section 40-2821 (5), R. C. M. 1947" after "hereinafter provided" in the second sentence; and, in the second paragraph, increased the percentage of net income to be paid under this section from  $5\frac{1}{4}\%$  to  $5\frac{1}{2}\%$ , and inserted the second sentence.

The 1969 amendment, in the first sentence of the second paragraph, raised the percentage of net income from "five and one-half per cent ( $5\frac{1}{2}\%$ )" to "six and one-quarter per cent ( $6\frac{1}{4}\%$ )"; in the second sentence deleted "all" before "taxable years" and substituted "1969" for

"1967"; inserted the third sentence; and raised the minimum tax stated in the fourth sentence from "\$10" to "\$50."

#### Effective Date

Section 2 of Ch. 318, Laws 1967 read: "The rate set forth in this act shall be effective as to all taxable years ending on or after February 28, 1967, whether on the calendar or fiscal year basis."

Section 3 of Ch. 318, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved March 20, 1967.

#### Cross-References

Multistate tax compact, sec. 84-6701.

#### Sale of Assets in Liquidation

Directors and trustees in liquidation of a liquidated corporation were entitled to a refund of that portion of the corporate license tax paid upon the gain realized by the corporation in the sale of its assets in liquidation. *Barth v. Montana State Board of Equalization*, 148 M 259, 419 P 2d 484, 485.

### 84-1501.1. Definitions.

#### References

*Barth v. Montana State Board of Equalization*, 148 M 259, 419 P 2d 484, 485.

### 84-1501.2. Election by small business corporation.

#### References

*Barth v. Montana State Board of Equalization*, 148 M 259, 419 P 2d 484, 485.

### 84-1501.3. Small business option unavailable on dissolution, etc.

#### Application

This section applies only to shifting of the tax burden under sections 84-1501.1

and 84-1501.2. *Barth v. Montana State Board of Equalization*, 148 M 259, 419 P 2d 484, 485.

**84-1501.4. State banks exempt until national banks taxable.** State banks organized under the Montana Bank Act shall not be required to pay

the Montana corporation license tax provided for under chapter 15 of Title 84 of the Revised Codes of Montana, 1947, until and unless the said tax is required to be paid by national banks organized under the laws of the United States.

**History:** En. Sec. 1, Ch. 316, L. 1967.

**Compiler's Notes**

The Montana Bank Act, referred to in this section, is codified as secs. 5-101 to 5-1311.

**Title of Act**

An act to provide that state banks shall not be required to pay Montana corpora-

tion license tax until and unless said tax is required to be paid by national banks.

**Effective Date**

Section 2 of Ch. 316, Laws 1967 read "This act shall be effective as to all taxable periods ending after June 30, 1967, whether on the calendar or fiscal year basis."

**84-1501.5. Minimum fee of corporations qualifying under section 84-1501.2 unaffected.** Notwithstanding the provisions of this act, corporations electing and qualifying under section 84-1501.2 shall pay a minimum fee of ten dollars (\$10).

**History:** En. Sec. 2, Ch. 11, Ex. L. 1969.

**Effective Date**

Section 3 of Ch. 11, Ex. Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 19, 1969.

**84-1503. (2297.1) Segregation of income within and without state.** If the income of any corporation from sources within the state cannot be properly segregated from income without the state, then, in that event, the amount of the net income returned shall be that proportion of the taxpayer's total net income which the taxpayer's gross business done in the state of Montana bears to the total gross business of the taxpayer, and apportionment shall be made under the rules and regulations prescribed by the state board of equalization, giving consideration to sales, property and payroll and such other factors as may be deemed applicable; provided, however, that the state board of equalization shall, upon the presentation of satisfactory evidence, determine that the income from sources within the state of Montana may be properly segregated from income from sources without the state of Montana and shall allow separate accounting. The board shall publish not less than once every three (3) years, all rules and regulations and all changes in rules and regulations as they occur pertaining to this section. All decisions by the board under this section shall be subject to judicial review in an action prosecuted by the corporation in the district court of Lewis and Clark county. The taxpayer may not change from apportionment by formula to separate accounting or vice versa without first obtaining permission from the board.

**History:** En. Sec. 3, Ch. 166, L. 1933; amd. Sec. 1, Ch. 219, L. 1957; amd. Sec. 1, Ch. 143, L. 1969.

**Amendments**

The 1969 amendment substituted "not less than once every three (3) years" for "not less than once a year" after "board

shall publish" and inserted "and all changes \* \* \* as they occur" in the second sentence; substituted "may not change \* \* \* or vice versa" for "cannot change from one method of accounting to another method of accounting" in the last sentence.



**84-1504. (2299) Computation of license tax, etc.****Sale of Assets in Liquidation**

Directors and trustees in liquidation of a liquidated corporation were entitled to a refund of that portion of the corporate licensed tax paid upon the gain realized

by the corporation in the sale of its assets in liquidation. *Barth v. Montana State Board of Equalization*, 148 M 259, 419 P 2d 484, 485.

**84-1505. (2300) Assessment and collection of tax.** (1) Assessment and payment of tax, penalty and interest. All taxpayers shall compute the amount of tax payable under this act and shall remit such amount to the state board of equalization on or before the fifteenth day of the fifth month following the close of the taxable period. If the tax is not paid on or before the due date, there shall be assessed a penalty of ten per cent (10%) of the amount of the tax, unless it is shown that the failure was due to reasonable cause and not due to neglect. If any tax due under this chapter is not paid when due, by reason of extension granted, or otherwise, interest shall be added thereto at the rate of nine per cent (9%) per annum from the due date until paid.

(2) and (3). \* \* \* [Same as parent volume.]

**History:** En. Sec. 5, Ch. 79, L. 1917; re-en. Sec. 2300, R. C. M. 1921; amd. Sec. 2, Ch. 146, L. 1923; amd. Sec. 1, Ch. 209, L. 1945; amd. Sec. 1, Ch. 102, L. 1961; amd. Sec. 4, Ch. 186, L. 1963; amd. Sec. 1, Ch. 324, L. 1969.

rate on unpaid taxes from "six per cent (6%)" to "nine per cent (9%)" per annum.

**Effective Date**

Section 2 of Ch. 324, Laws 1969 read "This act is effective as to taxable years ending on and after December 31, 1968."

**Amendments**

The 1969 amendment raised the interest

**84-1505.1. Release of tax liens.** (1) The state board of equalization shall issue a certificate of release of any lien imposed with respect to any tax due under Title 84, chapter 15, R.C.M. 1947, when it finds that the liability for the amount of tax assessed, together with all penalties and interest in respect thereof has been fully satisfied. The state board of equalization may issue a certificate of release if it determines that the lien is unenforceable.

(2) The state board of equalization may issue a certificate of discharge of any part of the property subject to any lien imposed with respect to any tax due under Title 84, chapter 15, R.C.M. 1947, if:

(a) It finds that the fair market value of that part of the property remaining subject to the lien is at least double the value of the unsatisfied liability secured by such lien and the amount of all other liens upon the property which may have priority to such lien;

(b) There is paid to the state treasurer in part satisfaction of the liability secured by the lien, an amount which shall not be less than the value, as determined by the state board of equalization, of the interest of the state of Montana in the part to be discharged; or

(c) The state board of equalization determines at any time that the interest of the state of Montana in the part to be so discharged has no value.

**History:** En. Sec. 1, Ch. 53, L. 1967.

**Title of Act**

An act to permit release of lien and discharge of property from force of lien imposed with respect to corporation license tax liability.

**84-1505.2. Immediate payment of tax or deficiency due may be required if delay would jeopardize collection.** If the state board of equalization finds that the assessment or collection of the tax or a deficiency in tax due under any corporation license tax statute of Montana for any taxable period will be jeopardized in whole or in part by delay, it may mail notice of its findings to the taxpayer together with a demand for immediate payment of the tax or deficiency declared to be in jeopardy, including penalty and accrued interest. In the case of a tax for a current period, the board may declare the taxable period of the taxpayer immediately terminated, and shall mail or issue notice of its findings to the taxpayer together with a demand for immediate payment of the tax based on the period declared terminated. A jeopardy assessment is immediately due and payable, and proceedings for collection may be commenced at once.

**History:** En. Sec. 1, Ch. 246, L. 1969.

**Title of Act**

An act which empowers the state board of equalization to require immediate pay-

ment of a tax or deficiency due under any corporation license tax statute of Montana if the board finds that the collection of the tax or deficiency will be jeopardized in whole or in part by delay.

**84-1508.2. Periods of limitation—limitations for notification of additional tax extended if taxpayer fails to report change in federal tax—waiver.** (1) Except as otherwise provided in this section and in section 84-1513, R. C. M. 1947, no deficiency shall be assessed or collected with respect to the year for which a return is filed unless the notice of additional tax proposed to be assessed is mailed within five (5) years from the date the return was filed. For the purposes of this section a return filed before the last day prescribed for filing shall be considered as filed on such last day. Where before the expiration of the period prescribed for assessment of the tax, the taxpayer consents in writing to an assessment after the time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The limitations prescribed for giving notice of a proposed assessment of additional tax shall not apply when a taxpayer has failed to file a report of changes in federal taxable income or an amended return as required by section 84-1517, R. C. M. 1947, until five (5) years after the federal changes become final or the amended federal return was filed, whichever the case may be.

(2). \* \* \* [Same as parent volume.]

**History:** En. Sec. 2, Ch. 186, L. 1963; amd. Sec. 1, Ch. 142, L. 1969.

**Amendments**

The 1969 amendment, in the first sen-

tence of subsection (1), substituted "in this section and \* \* \* R. C. M. 1947" for "in section 84-1513"; substituted "such last day" for "that day" at the end of the second sentence and added the last sentence.

**84-1509. Consolidated returns—computation and procedure on.** (1) Corporations which are affiliated may not file a consolidated return unless at least eighty per cent (80%) of all classes of stock of each corporation involved is owned directly or indirectly by one (1) or more members of the affiliated group.

(2) Corporations may not file a consolidated return unless the operation of the affiliated group constitutes a unitary business and permission to file a consolidated return is given by the state board of equalization. For

purposes of this section, a "unitary business operation" means one in which the business operations conducted by the corporations in the affiliated group are interrelated or interdependent to the extent that the net income of one corporation cannot reasonably be determined without reference to the operations conducted by the other corporations.

(3) If the conditions of subsections (1) and (2) of this section are met, the state board of equalization may require corporations to file a consolidated return when the board considers a consolidated return necessary.

(4) Any corporation liable to report under this act and owning, or controlling, either directly or indirectly, at least eighty per cent (80%) of all classes of stock of each corporation involved, may be required to make a consolidated report showing the combined net income[,] such assets of the corporation as are required for the purposes of this act, and such other information as the state board of equalization may require, but excluding intercorporate stockholdings and intercorporate accounts. Any corporation liable to report under this act and owned or controlled, either directly or indirectly, by another corporation may be required to make a report consolidated with the owning company, showing the combined net income, such assets of the corporation as are required for the purposes of this act, and such other information as the state board of equalization may require, but excluding intercorporate stockholdings and intercorporate accounts. In case it shall appear to the state board of equalization that any arrangement exists in such a manner as to improperly reflect the business done, the segregable assets or the entire net income earned from business done in this state, the state board of equalization is authorized and empowered, in such manner as it may determine, to equitably adjust the tax.

**History:** En. Sec. 5, Ch. 166, L. 1933;  
amd. Sec. 1, Ch. 243, L. 1969.

#### **Amendments**

The 1969 amendment substituted subsections (1) to (3) for former subsection (a) which provided that affiliated corporations

make a consolidated return if authorized and/or required by the state board of equalization; redesignated former subsection (b) as subsection (4) and inserted "at least eighty per cent \* \* \* of each corporation involved" after "controlling, either directly or indirectly" in the first sentence.

### **84-1511. (2303.3) Return and payment of tax by corporations, etc.**

#### **Sale of Assets in Liquidation**

Directors and trustees in liquidation of a liquidated corporation were entitled to a refund of that portion of the corporate license tax paid upon the gain realized

by the corporation in the sale of its assets in liquidation. *Barth v. Montana State Board of Equalization*, 148 M 259, 419 P 2d 484, 485.

### **84-1515. (2303.7) Reviver of corporation after suspension or forfeiture.**

Any corporation which has suffered the suspension or forfeiture referred to in the preceding section may be relieved therefrom upon making application therefor in writing supported by a certificate from the state board of equalization showing that the required return has been made and filed and/or that the tax and interest and penalties have been paid, for which the suspension or forfeiture occurred. Application for reviver may be made by any stockholder or creditor of the corporation or by a majority of the surviving trustees or directors, and the same shall be filed with the secretary of state, for which he shall receive a filing and recording fee of



five dollars (\$5). In case the application is made more than one (1) year from the date the suspension or forfeiture occurred the applicant shall pay twice the amount of the tax and penalties due the state for the taxable year with respect to which the suspension or forfeiture occurred, and upon such payment the secretary of state shall issue a certificate of reviver for which he shall collect a fee of five dollars (\$5) and thereupon the applicant shall be revived. The reviver shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture. The certificate of reviver shall be prima facie evidence of the reviver. Any certificate of reviver provided for in this section may be recorded in the office of the county recorder in any county of this state.

**History:** En. Sec. 11, Ch. 166, L. 1933; amd. Sec. 1, Ch. 49, L. 1947; amd. Sec. 15, Ch. 117, L. 1961; amd. Sec. 1, Ch. 52, L. 1967.

the act should be in effect from and after its passage and approval. Approved February 18, 1967.

#### Amendments

The 1967 amendment substituted "more than one (1) year from the date" for "in any taxable year other than the taxable year in which" after "application is made" and substituted "with respect to which" for "in which" after "for the taxable year," both in the third sentence.

#### Effective Date

Section 2 of Ch. 52, Laws 1967 provided

#### Contract Made During Suspension

Statute providing that reviver shall be without prejudice to any action, defense or right which has accrued by reason of original suspension or forfeiture relates to right of corporation to do business rather than to nonenforceability of contract made by corporation while suspended. *Manufacturers Acceptance Corp. v. Krsul*, 151 M 28, 438 P 2d 667.

**84-1517. (2303.9) Failure to make return—estimate and investigation of net income—copy of federal return to be furnished on request—report of change in federal tax—copy of amended federal returns.** (1) If any taxpayer fails to make return as herein required, the state board of equalization is authorized to make an estimate of the taxes due from such taxpayer from any information in its possession.

(2) The state board of equalization, for the purpose of ascertaining the correctness of any return or for the purpose of making an estimate of net income of any corporations where information has been obtained, shall also have power to examine or to cause to have examined by any agent or representative designated by it for that purpose, any books, papers, records or memoranda bearing upon the matters required to be included in the return, and may require the attendance of any officer or employee of the corporation rendering such return or the attendance of any other person having knowledge in the premises, and may take testimony and require proof material for its information.

(3) Every corporation shall, upon request of the state board of equalization, furnish a copy of its federal income tax return and the computation schedule filed for such taxable year or years as the said board may specify in its request. If the amount of a corporation taxable income reported on its federal income tax return or the computation schedule filed for any taxable year is changed or corrected by the United States internal revenue service or other competent authority, the corporation shall report such proposed change or correction to the state board of equalization within ninety (90) days after receiving official notice thereof. Any corpora-

tion filing an amended federal income tax return changing or correcting its taxable income for any taxable year shall also file an amended return with the state board of equalization within ninety (90) days thereafter.

**History:** En. Sec. 13, Ch. 166, L. 1933; amd. Sec. 2, Ch. 142, L. 1969.

**Effective Date**

Section 3 of Ch. 142, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved February 27, 1969.

**Amendments**

The 1969 amendment redesignated subsections (a) and (b) as subsections (1) and (2); and added subsection (3).

CHAPTER 16—LICENSE TAXES—ELECTRICAL ENERGY PRODUCERS

**Section**

84-1601. Electrical energy producers' license tax.

84-1602. Payment of tax—not to be set out on customers' bills.

**84-1601. (2343.1) Electrical energy producers' license tax.** That in addition to the license tax now provided by law, each and every individual, firm, partnership, common-law trust, corporation, association or other organization now engaged in the generation, manufacture or production of electricity, and electrical energy in the state of Montana, either through water power or by any other means, for barter, sale or exchange and hereinafter referred to as the "producer," shall on or before the fifteenth day of each calendar month beginning with the fifteenth day of May, 1969, render a statement to the state board of equalization of the state of Montana, showing the gross amount of money received on account of sales of electricity and electrical energy during the preceding calendar month without any deduction, and shall pay a license tax thereon in the sum of one and one-quarter per cent ( $1\frac{1}{4}\%$ ) of such gross amount as shown on such statement in the manner and within the time hereinafter provided; provided however, that for the two taxable years commencing on or after April 1, 1969, the tax shall be computed at the rate of one and four hundred thirty-eight thousandths per cent (1.438%).

**History:** En. Sec. 1, Ch. 51, Ex. L. 1933; amd. Sec. 1, Ch. 83, L. 1937; amd. Sec. 1, Ch. 214, L. 1957; amd. Sec. 1, Ch. 5, Ex. L. 1969.

1969" for "August, 1957"; and added the proviso.

**Cross-References**

Multistate tax compact, sec. 84-6701.

**Amendments**

The 1969 amendment substituted "May,

**84-1602. (2343.2) Payment of tax—not to be set out on customers' bills.** Said license tax shall be remitted with the statement and paid on or before the fifteenth (15th) day of each month. No bill, statement or account rendered or given any customer by any organization affected by the provisions of this act shall set out or contain, as a separate item, any amount on account or by reason of, the license tax imposed by this act.

**History:** En. Sec. 2, Ch. 51, Ex. L. 1933; amd. Sec. 2, Ch. 5, Ex. L. 1969.

**Amendments**

The 1969 amendment deleted "beginning with the fifteenth (15th) day of April, 1934" at the end of the first sentence.

**Effective Date**

Section 3 of Ch. 5, Ex. Laws 1969 provided the act should be in effect from and

after its passage and approval. Approved March 19, 1969.

CHAPTER 17—LICENSE TAXES—EXPRESS COMPANIES

**84-1702. (2306) Statements to be filed with state board of equalization.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

CHAPTER 18—LICENSE TAXES—GASOLINE DEALERS AND DISTRIBUTORS—SPECIAL FUEL TAX

**Section**

- 84-1832. Tax imposed.
- 84-1832.1. Tax to be collected on diesel fuel, when.
- 84-1833. Special fuel users' and special fuel users' licenses and special fuel vehicle permits.
- 84-1835. Monthly returns and payments.
- 84-1836. Credits.
- 84-1837. Procedures for credits.
- 84-1838. Administration.
- 84-1840. Disposition of funds.
- 84-1842. Special fuel user's temporary trip permits—agents by whom issued.
- 84-1845. Short title.
- 84-1846. Definitions.
- 84-1847. Gasoline license tax—amount.
- 84-1848. Aviation gasoline tax exemption certificates.
- 84-1849. Distributors' statements—payment of the tax.
- 84-1850. Examination of records.
- 84-1851. Records to be kept by distributor.
- 84-1852. Inspection of records.
- 84-1853. Invoice of distributors.
- 84-1854. Information reports.
- 84-1855. Refund of gasoline license tax—procedure.
- 84-1856. Timely mailing treated as timely filing and paying.
- 84-1857. License and bond of gasoline distributors.
- 84-1858. Penalties—delinquent payment—procedure in case of failure to file statement or pay tax—lien for tax.
- 84-1859. Penalties.
- 84-1860. Statute of limitations.
- 84-1861. Rules and regulations to be established by state board.

**84-1801, 84-1801.1, 84-1802, 84-1802.1, 84-1803, 84-1803.1, 84-1804, 84-1805, 84-1805.1, 84-1806 to 84-1811. (2381.11 to 2381.21) Repealed.**

**Repeal**

Sections 84-1801, 84-1801.1, 84-1802, 84-1802.1, 84-1803, 84-1803.1, 84-1804, 84-1805, 84-1805.1, 84-1806 to 84-1811 (Secs. 1, 3 to 12, Ch. 19, L. 1927; Sec. 4, Ch. 92 L. 1929; Sec. 1, Ch. 175, L. 1929; Sec. 4, Ch. 6, L. 1931; Sec. 1, Ch. 170, L. 1933; Sec. 1, Ch. 116, L. 1935; Sec. 1, Ch. 63, L. 1943; Sec. 1, Ch. 202, L. 1949; Sec. 1, Ch. 52, L. 1951; Sec. 1, Ch. 217, L. 1953; Secs. 1, 2, Ch. 17, L. 1955; Sec. 1, Ch. 230, L. 1957; Sec. 1, Ch. 175, L. 1959; Secs. 1, 2, Ch. 64,

L. 1963; Secs. 2 to 6, Ch. 70, L. 1963; Sec. 214, Ch. 147, L. 1963; Sec. 1, Ch. 6, Ex. L. 1967; Sec. 1, Ch. 355, L. 1969), relating to the gasoline license tax, were repealed by Sec. 20, Ch. 369, Laws 1969.

**Compiler's Notes**

Section 1 of Ch. 355, Laws 1969 purported to amend section 84-1801.1 to increase the tax from six and one-half cents to seven cents for the period from July 1, 1969 to July 1, 1971.

**84-1813. (2381.23) Repealed.**

**Repeal**

Section 84-1813 (Sec. 2, Ch. 116, L. 1935; Sec. 1, Ch. 210, L. 1955; Sec. 1, Ch. 73, L. 1963), relating to collection of

tax on motor fuel, was repealed by Sec. 1, Ch. 60, L. 1969 and Sec. 20, Ch. 369, Laws 1969. The language of section 84-1813 was re-enacted as section 84-1832.1.



**84-1814. (2381.24) Repealed.****Repeal**

Section 84-1814 (Sec. 15, Ch. 19, L. 1927), relating to delinquency in payment

of the gasoline license tax as a misdemeanor, was repealed by Sec. 20, Ch. 369, Laws 1969.

**84-1818, 84-1818.1, 84-1819 to 84-1823. (2396.4 to 2396.9) Repealed.****Repeal**

Sections 84-1818, 84-1818.1, 84-1819 to 84-1823 (Secs. 1, 2, Ch. 17, L. 1927; Sec. 1, Ch. 168, L. 1929; Sec. 1, Ch. 175, L. 1931; Secs. 1 to 4, Ch. 157, L. 1933; Sec. 1, Ch. 96, L. 1937; Sec. 1, Ch. 67, L. 1939; Sec. 1, Ch. 130, L. 1947; Sec. 1, Ch. 168, L. 1949; Sec. 1, Ch. 198, L. 1949; Sec. 1, Ch. 221, L. 1953; Secs. 3, 4, Ch. 17,

L. 1955; Sec. 1, Ch. 212, L. 1955; Sec. 1, Ch. 17, L. 1963; Secs. 3, 4, Ch. 64, L. 1963; Sec. 1, Ch. 70, L. 1963; Sec. 6, Ch. 126, L. 1963; Sec. 221, Ch. 147, L. 1963; Sec. 1, Ch. 224, L. 1963; Sec. 2, Ch. 251, L. 1967), relating to gasoline tax refunds and to the licensing of gasoline dealers and distributors, were repealed by Sec. 20, Ch. 369, Laws 1969.

**84-1828, 84-1829. Repealed.****Repeal**

Sections 84-1828 and 84-1829 (Secs. 5, 6, Ch. 162, L. 1945), relating to the definition of terms and effect of the "Special Fuel

Tax Act" on the license tax upon diesel fuel, were repealed by Sec. 20, Ch. 369, Laws 1969.

**84-1830. Title.****Cross-References**

Multistate tax compact, sec. 84-6701.

**84-1832. Tax imposed.** There is hereby levied and imposed a tax on the use of each and every gallon of special fuel in any motor vehicle while operated upon the highways, equivalent to the lawful tax levied on motor fuel under section 84-1832.1 or on liquid petroleum gases under section 84-1802. Said tax, with respect to all special fuel delivered by a special fuel dealer into supply tanks of motor vehicles in this state, shall attach at the time of such delivery and shall be collected by such special fuel dealer from the special fuel user and shall be paid over to the board as hereinafter provided. Said tax, with respect to special fuel acquired by any special fuel user in any manner other than by delivery by a special fuel dealer into a fuel supply tank of a motor vehicle, shall attach at the time of the consumption of such fuel in the propulsion of a motor vehicle upon the highways of the state and shall be paid over to the board by the special fuel user as hereinafter provided. The various counties, incorporated cities and towns and school districts of this state shall be exempt from the levy and imposition of this tax.

**History:** En. Sec. 3, Ch. 162, L. 1955; amd. Sec. 2, Ch. 66, L. 1963; amd. Sec. 3, Ch. 60, L. 1969.

**Amendments**

The 1969 amendment substituted the reference to "section 84-1832.1" for a reference to repealed "section 84-1813."

**Compiler's Notes**

Section 84-1802, referred to at the end of the first sentence, was repealed by Sec. 20, Ch. 369, Laws 1969.

**84-1832.1. Tax to be collected on diesel fuel, when.** The state board of equalization shall, under the provisions of rules and regulations issued by said board, collect or cause to be collected from the owners or operators

of motor vehicles a tax in an amount equal to nine cents (9¢) for each gallon of diesel fuel or other volatile liquid, of less than forty-six degrees (46°) A.P.I. (American Petroleum Institute) gravity test, when actually sold or used to produce motor power to propel motor vehicles upon the public highways or streets within the state of Montana, or used in motor vehicles, motorized equipment and the internal combustion of any and all engines including stationary engines used in connection with any and all work performed under any and all contracts pertaining to the construction, reconstruction or improvement of any highway or street and their appurtenances awarded by any and all public agencies, including federal, state, county, municipalities, or other political subdivision.

**History:** En. Sec. 84-1832.1 by Sec. 2, Ch. 60, L. 1969.

**Title of Act**

An act to repeal section 84-1813, R. C. M. 1947, and to re-enact its language as a new section for the purpose of removing the

statute establishing a tax on diesel fuel from the gasoline license tax laws and its proper placement in the laws pertaining to special fuel taxes; and amending section 84-1832, R. C. M. 1947, to change the reference to section 84-1813 therein to 84-1832.1.

**84-1833. Special fuel dealers' and special fuel users' licenses and special fuel vehicle permits.** (a) to (c). \* \* \* [Same as parent volume.]

(d) **Bond:** No special fuel dealer's license or special fuel user's license shall be issued to any person or continued in force unless such person has furnished bond, as defined in section 84-1831 (i) and in such form as the board may require to secure its compliance with this act, and the payment of any and all taxes, interest and penalties due and to become due hereunder. Upon application the board may waive the bond requirement of any special fuel user who establishes to the reasonable satisfaction of the board that no tax, interest or penalties are accrued under the provisions of this act.

The total amount of the bond or bonds required of any special fuel dealer or special fuel user shall be equivalent to twice his estimated monthly tax payments as hereinafter provided, determined in such manner as said board may deem proper; provided, however, that the total amount of the bond or bonds shall never be less than five thousand dollars (\$5,000.00) for any special fuel user awarded a contract in accordance with section 84-1932.1, nor less than five hundred dollars (\$500.00) for any other special fuel user; and not less than one thousand dollars (\$1,000.00) for a special fuel dealer.

(e) to (k). \* \* \* [Same as parent volume.]

**History:** En. Sec. 4, Ch. 162, L. 1955; amd. Sec. 1, Ch. 216, L. 1957; amd. Sec. 8, Ch. 70, L. 1963; amd. Sec. 1, Ch. 61, L. 1969.

**Amendments**

The 1969 amendment inserted the second sentence in subsection (d) and, in the second paragraph of that subsection, substituted "five thousand dollars . . . any other special fuel user" for "five hundred dollars (\$500.00), for a special fuel user."

**84-1835. Monthly returns and payments.** (a) **Returns:** For the purpose of determining the amount of his liability for the tax herein imposed, each special fuel dealer and each special fuel user shall file with the board, on forms prescribed by said board, a monthly tax return. Such return

shall contain a declaration by the person making the same, to the effect that the statements contained are true and are made under penalties of perjury, which declarations shall have the same force and effect as a verification. The return shall show such information as the board may reasonably require for the proper administration and enforcement of this act; provided, however, that if a special fuel dealer or user is also a wholesale distributor of special fuel at a location where special fuel is delivered into the supply tank of a motor vehicle, and if separate storage is provided thereat from which special fuel is delivered or placed into fuel supply tanks of motor vehicles, the monthly return to the board need not include inventory control data covering bulk storage from which wholesale distribution of special fuel is made. The special fuel dealer or special fuel user shall file the return on or before the twenty-fifth (25th) day of the next succeeding calendar month following the monthly period to which it relates; provided, however, that for good cause the board may grant a taxpayer a reasonable extension of time for filing, but not to exceed thirty (30) days.

Any claim, statement, remittance, or other document which is transmitted to this state through the United States mail, shall be deemed filed and received by this state on the date shown by the post office cancellation mark stamped upon the envelope or other appropriate wrapper containing it. Any claim, statement, remittance, or other document which is mailed but not received by this state or where received with a cancellation mark that is illegible, erroneous, or omitted, shall be deemed filed and received on the date mailed if the sender establishes by competent evidence that the claim, statement, remittance, or other document was deposited in the United States mail on or before the date due for filing. In cases of such nonreceipt of a claim, statement, remittance, or other document, the sender must file with the state a duplicate within thirty (30) days after written notification is given to the sender by the state of its nonreceipt of such claim, statement, remittance, or other document.

If any claim, statement, remittance, or other document is sent by United States registered mail, certified mail or certificate of mailing, a record authenticated by the United States Post Office of such registration, certification or certificate shall be considered competent evidence that the report, claim, tax return, statement, remittance or other document was mailed to the addressee, and the date of registration, certification or certificate shall be deemed the postmarked date.

If the final filing date falls on a Saturday, Sunday or legal holiday, the next secular or business day shall be the final filing date. Such reports shall be considered filed or received on the date or as provided in this chapter.

Upon annual application the board may waive the filing of a monthly tax return of any special fuel user who establishes to the reasonable satisfaction of the board that no tax, interest or penalties are accrued under the provisions of this act.

(b) and (c). \* \* \* [Same as parent volume.]

(d) Refusal or failure to file return or pay tax when due: In case of any special fuel dealer or special fuel user who refuses or fails to file



a return required by this act within the time prescribed by subsection (a) of this section, there is hereby imposed a penalty of twenty-five dollars (\$25) or a sum equal to twenty-five per cent (25%) of the tax due, whichever is greater, together with interest at the rate of one per cent (1%) on the tax due, for each calendar month or fraction thereof during which such refusal or failure continues; provided, however, that if any such special fuel dealer or special fuel user shall establish to the satisfaction of the board that his failure to file a return within the time prescribed was due to reasonable cause, the board shall waive the penalty provided by this subsection.

(e) to (i). \* \* \* [Same as parent volume.]

**History:** En. Sec. 6, Ch. 162, L. 1955; amd. Sec. 9, Ch. 70, L. 1963; amd. Sec. 1, Ch. 52, L. 1969; amd. Sec. 2, Ch. 61, L. 1969.

#### Amendments

Chapter 52, Laws of 1969, substituted "twenty-five dollars (\$25)" for "one hundred dollars (\$100)" after "there is hereby imposed" in subsection (d).

Chapter 61, Laws of 1969, inserted the second, third and fifth paragraphs of subsection (a).

#### Effective Date

Section 2 of Ch. 52, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved February 20, 1969.

#### Compiler's Notes

This section was amended twice in 1969, once by Ch. 52 and once by Ch. 61. Neither amendatory act mentioned nor included the changes made by the other. Since the two amendments do not appear to conflict, the compiler has made a composite section incorporating both amendments.

**84-1836. Credits.** Any licensed special fuel user or licensed special fuel dealer who has paid a special fuel tax either directly or to the vendor from whom it was purchased, shall receive credit in the amount of any tax paid on special fuel exported for use outside of this state, or for any use off the public roads and highways of this state, or for any overpayment of special fuel taxes not due to the state. Special fuel carried from this state in the fuel tank of a motor vehicle is deemed to be exported from this state.

Any licensed special fuel user who purchases a temporary special fuel permit, and thereafter applies for a special fuel vehicle permit for the same vehicle in less than eleven (11) days after the temporary permit is issued, shall receive credit in the amount of the temporary permit fee.

**History:** En. Sec. 7, Ch. 162, L. 1955; amd. Sec. 1, Ch. 104, L. 1967.

#### Amendments

The 1967 amendment substituted "licensed special fuel user or licensed special

fuel dealer" for "person" near the beginning of the first paragraph; added "or for any use \* \* \* to the state" at the end of the first sentence of the first paragraph; and added the second paragraph.

**84-1837. Procedures for credits.** Should a licensed special fuel user or licensed special fuel dealer desire to receive refund of special fuel taxes or of the temporary permit fee, the user or dealer shall make a signed and written request to the board requesting those amounts then due. Any amount determined to be creditable by the board under section 84-1836 shall first be credited on any amounts then due and payable from the special fuel dealer or special fuel user to whom the refund is due, and the board shall then certify the balance to the credit of the dealer or user, and a warrant shall be drawn upon the state treasurer for the amount of such claim and

same shall be paid in the same manner as other claims against the state are paid.

Provided however, in case any special fuel user or special fuel dealer fails or neglects to file a request for refund of special fuel taxes within twelve (12) months from the date his special fuel license became canceled, the board shall be under no obligation to make a refund.

**History:** En. Sec. 8, Ch. 162, L. 1955; amd. Sec. 2, Ch. 104, L. 1967.

**Amendments**

The 1967 amendment inserted the first

sentence of the first paragraph; added "and a warrant shall be \* \* \* claims against the state are paid" at the end of the first paragraph; and added the second paragraph.

**84-1838. Administration.** (a). \* \* \* [Same as parent volume.]

(b) Examination of records: The board or its authorized representative is hereby empowered to examine the books, papers, records and equipment of any special fuel dealer or special fuel user or any person dealing in, transporting, or storing special fuel as defined in this act and to investigate the character of the disposition which any person makes of such special fuel in order to ascertain and determine whether all excise taxes due hereunder are being properly reported and paid. If such books, papers, records and equipment are not maintained in this state at the time of demand, they shall be furnished to the board for review and shall be accompanied by the special fuel dealer or special fuel user or such dealer or user shall bear the reasonable cost of examination by an agent authorized or designated by the board at the place where such books or records are kept provided the taxpayer shall not be liable for such costs for a period exceeding one (1) week or for such longer period as he may consent to in writing, unless the result of said examination is the payment of a tax deficiency.

(c) and (d). \* \* \* [Same as parent volume.]

**History:** En. Sec. 9, Ch. 162, L. 1955; amd. Sec. 1, Ch. 106, L. 1967.

**Amendments**

The 1967 amendment inserted "and shall be accompanied by the special fuel dealer or special fuel user" after "review" in the second sentence of subsection (b).

**84-1840. Disposition of funds.** All taxes, interest and penalties collected under this act shall be turned over promptly to the state treasurer and the state treasurer shall place the same in the earmarked revenue fund to the credit of the state highway department.

(1) The lesser of the following amounts from funds collected under this act shall be allocated each fiscal year to the counties and incorporated cities and towns in Montana for construction, reconstruction, maintenance and repair of rural roads, and city or town streets and alleys, as provided in subsections [(1)] (a) and (b) hereof,

(i) Three million dollars (\$3,000,000) or

(ii) Sixty-six per cent (66%) of the amount of state matching funds saved under the provisions of clause B of section 120 (a) of Title 23, United States Code, but not less than one million five hundred thousand dollars (\$1,500,000).

In any fiscal year when the amount of funds allocated to the counties

and incorporated cities and towns under subsection (1) (ii) does not equal three million dollars (\$3,000,000) the difference between the three million dollars (\$3,000,000) and the funds allocated for that year shall carry forward and be allocated to the counties and incorporated cities and towns in subsequent fiscal years.

(a) Forty per cent (40%) shall be divided among the various counties in the following manner:

(i) Forty per centum (40%) in the ratio that the rural road mileage in each county exclusive of the federal-aid interstate system and the federal-aid primary system bears to the total rural road mileage in the state exclusive of the federal-aid interstate system and the federal-aid primary system.

(ii) Forty per centum (40%) in the ratio that the rural population in each county outside incorporated cities and towns bears to the total rural population in the state outside incorporated cities and towns.

(iii) Twenty per centum (20%) in the ratio that the land area of each county bears to the total land area of the state.

(b) Sixty per cent (60%) shall be divided among the incorporated cities and towns in the following manner:

(i) Fifty per cent (50%) of the sum shall be divided in the ratio that the population within the corporate limits of the city or town bears to the total population within corporate limits of all the cities and towns in Montana.

(ii) Fifty per cent (50%) shall be divided in the ratio that the city or town street and alley mileage, exclusive of the federal-aid interstate system and the federal-aid primary system, within corporate limits bears to the total street and alley mileage, exclusive of the federal-aid interstate system and federal-aid primary system, within the corporate limits of all cities and towns in Montana.

(2) All funds hereby allocated to counties, cities and towns shall be used exclusively for the construction, reconstruction, maintenance and repair of rural roads, city or town streets and alleys, or for the share which such city, town or county might otherwise expend for proportionate matching of federal funds allocated for the construction of roads or streets which are part of the federal-aid primary or secondary highway system, or urban extensions thereto.

(3) Upon receipt of the allocation provided herein, the county commissioners, in the case of counties, or the governing body, in the case of incorporated cities or towns, shall propose the expenditure of said funds to the state highway commission. The commission may consult with the county commissioners or the governing body proposing expenditures before approving the same provided, however, that before any contract for the expenditure of funds provided herein shall be let, an agreement covering the same shall be executed by both the proposing body and the state highway commission.

(4) All construction, reconstruction, maintenance and repair authorized herein shall be pursuant to the design and subject to the supervision



of the state highway commission, and all funds hereby allocated to counties, cities and towns shall be disbursed by the state highway commission to the lowest responsible bidder according to the bidding procedures specified in chapter 41, Title 32 of this code with the exception that five per cent (5%) of the funds allocated each fiscal year to any county, incorporated city and town or seven thousand five hundred dollars (\$7,500), whichever amount is greater, may be expended for maintenance of rural roads and city or town streets without being submitted to bid.

(5) The state highway commission shall make and establish such rules and regulations as may be necessary to carry out the intent of this act and shall keep records of the funds allocated to each city or town, and the subsequent expenditure of said funds.

(6) For the purposes of this act where distribution of funds is made on a basis related to population, the population shall be determined by the last preceding official federal census.

(7) For the purposes of this act where determination of mileage is necessary for distribution of funds it shall be the responsibility of the cities, towns and counties to furnish to the state highway commission a yearly certified statement indicating the total mileage within their respective areas applicable to this act. All mileage submitted shall be subject to review and approval by the state highway commission.

(8) None of the funds authorized by this section shall be used for the purchase of capital equipment. Section 2 (b), effective July 1, 1971, the total amount of funds allocated each fiscal year in section 2 (a) (1) to the counties and incorporated cities and towns shall reduce to one million five hundred thousand dollars (\$1,500,000).

**History:** En. Sec. 11, Ch. 162, L. 1955; amd. Sec. 213, Ch. 147, L. 1963; amd. Sec. 2, Ch. 6, Ex. L. 1967; amd. Sec. 2, Ch. 355, L. 1969.

#### Compiler's Notes

The provisions of subdivision (8) as added by section 2 of Ch. 355, Laws 1969 are printed above as they appear in the copy of the Act as received from the office of the Secretary of State.

#### Amendments

The 1967 amendment added subdivisions (1) through (7).

The 1969 amendment, in subdivision (1), substituted "The lesser of the following amounts from" for "One million five hundred thousand dollars (\$1,500,000) of the," inserted "maintenance" after "reconstruction," and inserted subsections (1) (i) and (ii), and the final paragraph; in item (1) (a), substituted "Forty per cent (40%)" for "Six hundred thousand dollars (\$600,000)"; in item (b) substituted "Sixty per cent (60%)" for "Nine hundred thousand dollars (\$900,000)"; inserted "exclusive of the federal-aid interstate system and the federal-aid primary system" after "alley mileage" in two places in (b) (ii);

inserted "maintenance" after "reconstruction" in subdivision (2); inserted "maintenance" after "reconstruction" and added "with the exception \* \* \* submitted to bid" in subdivision (4); and added subdivision (8).

#### Repealing Clauses

Section 3 of Ch. 6, Ex. Laws 1967 repealed all acts and parts of acts in conflict therewith.

Section 3 of Ch. 355, Laws 1969 repealed all acts and parts of acts in conflict therewith.

#### Separability Clauses

Section 4 of Ch. 6, Ex. Laws 1967 read "The provisions of this act shall be severable and if any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void, the remainder of this act shall continue in full force and effect."

Section 4 of Ch. 355, Laws 1969 read "The provisions of this act shall be severable and if any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void, the remainder of this act shall continue in full force and effect."

**84-1842. Special fuel user's temporary trip permits—agents by whom issued.** Any person operating a special fuel-powered vehicle upon the public roads and highways of this state who fails or neglects to carry in the vehicle a valid special fuel vehicle permit, as provided by section 84-1833, shall be required to purchase a special fuel user's temporary trip permit. The permits will be issued by scale house personnel, gross vehicle weight (g.v.w.) patrol crews, Montana highway patrolmen, and such other enforcing agents as the board of equalization may prescribe by order, rule or regulation.

**History:** En. Sec. 1, Ch. 200, L. 1961; amd. Sec. 1, Ch. 105, L. 1967.

present first sentence of the section for a former first sentence which read "A temporary permit shall be issued to all unlicensed users of all special fuel vehicles operating within the state of Montana."

**Amendments**

The 1967 amendment substituted the

**84-1845. Short title.** This act may be cited as the "Distributor's Gasoline License Tax Act."

**History:** En. Sec. 1, Ch. 369, L. 1969.

**Title of Act**

An act providing for the amount of the distributor's gasoline license tax; payment of the tax by distributors; establishing a refund procedure; licensing of gasoline

distributors; empowering the state board of equalization to establish regulations; providing for enforcement of the act by penalties; and repealing sections 84-1801 through 84-1814, 84-1818 through 84-1823, 84-1828, and 84-1829, R. C. M. 1947, relating to the gasoline dealer's license tax.

**84-1846. Definitions.** As used in this act, the following definitions shall apply:

(1) The term "gasoline" includes all products commonly or commercially known or sold as gasoline, including casinghead gasoline, natural gasoline, aviation gasoline and all flammable liquids, composed of a mixture of selected hydrocarbons expressly manufactured and blended for the purpose of effectively and efficiently operating internal combustion engines. The term "gasoline" does not include special fuels as defined in section 84-1831 (e).

(2) The word "person" means any person, firm, association, joint-stock company, syndicate or corporation.

(3) The words "motor vehicle" mean all vehicles operated or propelled upon the public highways or streets of this state, in whole or in part by the combustion of gasoline.

(4) The word "use" shall include and mean the operation of motor vehicles upon the public roads or highways of the state of Montana, or of any political subdivision thereof.

(5) The word "import" shall include and mean to receive into any person's possession or custody first after its arrival and coming to rest at destination within the state of Montana of any gasoline shipped or transported into this state from point of origin without this state, other than in the fuel supply tank of a motor vehicle.

(6) Gasoline deemed to be "distributed." (a) Gasoline refined, produced, manufactured, or compounded in this state and placed in tanks thereat, or gasoline transferred from a refinery or pipeline terminal in this state and placed in tanks thereat, or gasoline imported into this state and placed in storage at refineries or pipeline terminals, shall be deemed

to be distributed, for the purpose of this act, at the time the gasoline is withdrawn from such tanks, refinery or terminal storage for sale or use in this state or for the transportation to destinations in this state other than by pipeline to another refinery or pipeline terminal in this state. When withdrawn from such tanks, refinery or terminal, such gasoline may be distributed only by a person who is the holder of a valid distributor's license.

(b) Gasoline imported into this state other than that gasoline placed in storage at refineries or pipeline terminals, shall be deemed to be distributed after it has arrived in and is brought to rest in this state.

(7) The word "distributor" means

(a) any person who engages in the business in this state of producing, refining, manufacturing or compounding gasoline for sale, use or distribution,

(b) any person who imports gasoline for sale, use or distribution; and no refund shall be allowed of that portion of the tax per gallon upon aviation gasoline allocated to the state aeronautics commission by section 1-501.

(c) any dealer licensed as of January 1, 1969, except a dealer at an established airport.

(8) The words "aviation gasoline" mean gasoline or any other liquid fuel by whatsoever name such liquid fuel may be known or sold, compounded for use in and sold for use in aircraft, including but not limited to any and all such gasoline or liquid fuel meeting or exceeding the minimum specifications prescribed by the United States for use by its military forces in aircraft.

**History:** En. Sec. 2, Ch. 369, L. 1969.

**84-1847. Gasoline license tax—amount.** Every distributor shall pay to the state board of equalization a license tax for the privilege of engaging in and carrying on business in this state in an amount equal to six and one-half cents (\$.06½) for each gallon of all gasoline distributed by him within the state and upon which the gasoline license tax has not been paid by any other distributor. Gasoline exported or sold for export out of the state of Montana shall not be included in the measure of the distributor's license tax.

**History:** En. Sec. 3, Ch. 369, L. 1969.

**84-1848. Aviation gasoline tax exemption certificates.** Any dealer at an established airport, who purchases aviation gasoline for resale directly to consumers using such gasoline in aircraft or any consumer who purchases such gasoline in lots of not less than fifty (50) gallons for use in aircraft and not for resale and who purchases from a distributor or dealer other than at an established airport, may apply to the state board of equalization for a permit to issue aviation gasoline tax exemption certificates. The application for a permit, the permit itself, and any exemption certificates issued pursuant thereto shall all be in such form and shall contain such information as the board may from time to time require. The board



may require the payment of a fee of not to exceed five dollars (\$5) for each permit issued and may provide that said permits shall be valid for a period not exceeding five (5) years. No permit shall be transferable. The permit shall be subject to revocation at any time by the board for any violation of law relating thereto or any false statement made by the holder in connection therewith.

So long as his permit remains unrevoked, the holder thereof shall have the privilege to purchase aviation gasoline from any distributor or dealer without the payment of any part of the license tax, imposed by this section, except the part allocated to the state aeronautics commission upon surrendering to the seller an aviation gasoline tax exemption certificate certifying, if the holder is a dealer at an established airport, that the gasoline purchased will be resold only to consumers for use directly in aircraft, and if the holder is a consumer purchasing from a distributor or dealer other than at an established airport and the purchase is fifty (50) gallons or more, that the gasoline is purchased for use directly in aircraft and not for resale; and any distributor or dealer who sells aviation gasoline either directly to the holder of such a permit and who receives a valid certificate directly from the permit holder covering that sale, or who sells to another distributor or dealer who surrenders valid certificates held by him covering prior sales, shall be under no liability or obligation to collect or pay the tax, on the number of gallons covered by such certificates, except the portion thereof allocated to the state aeronautics commission; but notwithstanding any other provision to the contrary, no tax exemption certificate shall be valid for any purpose nor entitled any distributor to the deduction authorized in section 5 [84-1849] of this act unless submitted to the board prior to the end of the second calendar month immediately succeeding the month in which the sale was made with respect to which such certificate issued.

**History:** En. Sec. 4, Ch. 369, L. 1969.

**84-1849. Distributors' statements—payment of the tax.** Each distributor shall, not later than the twenty-fifth day of each calendar month render a true statement to the state board of equalization, duly signed, of all gasoline distributed and received by him in this state during the preceding calendar month, and containing such other information as the state board of equalization may reasonably require in order to administer the gasoline license tax law. The statement shall be accompanied by a payment in an amount equal to the tax imposed by section 3 [84-1847] of this act, less any refund credit issued under section 11 [84-1855] of this act, and less two per cent (2%) of the first six cents (\$.06) tax which shall be deducted by the distributor as an allowance for evaporation and other loss of gasoline distributed by such distributor. In addition a distributor may deduct for each gallon of aviation gasoline sold by him and for which he submits a valid gasoline tax exemption certificate, an amount equal to the tax per gallon except the portion thereof allocated to the state aeronautics commission by section 1-501.

Any distributor engaged in or carrying on his business at more than

one (1) place or location in this state may include all such places of business in one (1) statement.

**History:** En. Sec. 5, Ch. 369, L. 1969.

**84-1850. Examination of records.** The board, or its authorized representative is hereby empowered to examine the books, papers, records and equipment of any gasoline distributor or any person dealing in, transporting, or storing gasoline as defined in this act and to investigate the character of the disposition which any person makes of such gasoline in order to ascertain and determine whether all excise taxes due hereunder are being properly reported and paid. If such books, papers, records and equipment are not maintained in this state at the time of demand they shall be furnished to the board for review or such dealer shall bear the reasonable cost of examination by an agent authorized or designated by the board at the place where such books or records are kept, provided the taxpayer shall not be liable for such costs for a period exceeding one (1) week or for such longer period as he may consent to in writing, unless the result of such examination is the payment of a tax deficiency.

**History:** En. Sec. 6, Ch. 369, L. 1969.

**84-1851. Records to be kept by distributor.** Each distributor shall keep for a period not to exceed three (3) years such records, receipts and invoices and any other pertinent papers and information as the state board of equalization may require.

**History:** En. Sec. 7, Ch. 369, L. 1969.

**84-1852. Inspection of records.** The records, receipts and invoices and any other pertinent papers supporting sales of every distributor or any person dealing in, transporting or storing gasoline shall be open and subject to inspection by the state board of equalization or any of its employees or assistants during business hours in order to ascertain the amount of license tax due.

**History:** En. Sec. 8, Ch. 369, L. 1969.

**84-1853. Invoice of distributors.** Each distributor in this state shall at the time of delivery, except where authorized by the board, issue to the purchaser an invoice in which shall be stated the number of gallons of gasoline covered by such invoice and such other information as the state board of equalization may require.

**History:** En. Sec. 9, Ch. 369, L. 1969.

**84-1854. Information reports.** Any person receiving gasoline, including every common carrier, private carrier and contract carrier of property who shall haul, receive, transport, or ship any gasoline, from any other state or foreign country into this state or from this state to any other state or foreign country or from any refinery or pipeline terminal in this state to another point within this state, shall submit to the board of equalization upon its request and within the time specified a statement showing the number of gallons of gasoline contained in each shipment in inter-

state commerce and the movement of such products from any refinery or pipeline terminal located within this state to another point within this state during the preceding calendar month, the names and addresses of the consignor and the consignee and the date of delivery to the consignee.

In case of any person, except licensed distributors, who refuses or fails to file a statement as herein provided for, there is hereby imposed a penalty of twenty-five dollars (\$25) for each failure or refusal, provided, however, that if any person shall establish to the satisfaction of the board that his failure to file a statement as prescribed by the board was due to reasonable cause, the board shall waive the penalty.

**History:** En. Sec. 10, Ch. 369, L. 1969.

**84-1855 Refund of gasoline license tax—procedure.** (1) Any person who shall purchase and use any gasoline, on which the Montana gasoline license tax has been paid, for operating or propelling stationary gasoline engines, tractors used off the public highways and streets, motorboats, airplanes or aircraft, or for cleaning or dyeing, or for any commercial use other than propelling vehicles upon any of the public highways or streets of this state, shall be allowed a refund of the amount of tax paid directly or indirectly on the gasoline so used. Provided, that such refund or drawback should in no instance exceed the tax paid or to be paid, to the state of Montana; and no refund shall be allowed on any sale with respect to which an aviation gasoline tax exemption certificate has been issued.

Any distributor paying the gasoline license tax to this state erroneously shall be allowed a credit or refund of the amount of tax so paid.

The application for refund shall be a signed statement on forms furnished by the board, accompanied by the invoice or invoices issued to the claimant, showing the total amount of the gasoline on which a refund is claimed and the reason, the amount of the tax and any additional information required by the board. Each separate delivery shall constitute a purchase. If any invoice is either lost or destroyed, the purchaser may support his claim for refund by submitting an affidavit relating the circumstances of such loss or destruction and by producing such other evidence as may be required by the board.

(2) All applications for refunds shall be filed with the board of equalization within thirteen (13) months after the date on which the gasoline was purchased as shown by invoices or after the date on which the tax was erroneously paid. Provided, however, that a distributor may file a claim for refund of taxes erroneously paid within three (3) years after the date of such erroneous payment. The board shall have one hundred twenty (120) days after receiving the claim to approve or reject it. If approved, the board shall issue a credit in lieu of refund for the amount of the claim, if the claimant is a distributor. For all other persons, a warrant shall be drawn upon the state treasurer for the amount of the claim.

(3) Should the board of equalization find that the statement contains errors which are not fraudulently inserted, it may correct the statement and approve it as corrected, or the board may require the claimant to



file an amended statement. If the state board of equalization determines that any claim has been fraudulently presented or is supported by invoice or invoices fraudulently made or altered or that any statement in the claim or affidavit is willfully false and made for the purpose of misleading, the board may reject such claim in full. If a claim is rejected, the board may suspend claimant's right to refund for a period not to exceed one (1) year.

(4) Any person, other than a licensed distributor, desiring to claim refund on gasoline purchased shall obtain a permit from the state board of equalization. The application for permit shall contain the applicant's name, address, occupation, nature of business, identification of machinery and equipment in which the taxable motor fuel is to be used, and any other information which may be required by the board.

(5) Each permit issued shall bear a permit number and each claim filed shall bear the permit number of the claimant. The state board of equalization shall keep a record of all permits issued and a cumulative record of refunds claimed and paid thereunder.

A fee of one dollar (\$1) shall be collected from each person to whom a refund permit is issued. No refund shall be paid to any person unless said person has first secured a refund permit and paid said fee. The refund permit must be renewed and the license fee paid every five (5) years from the date of issuance.

(6) Any person, other than a licensed distributor, shall obtain a permit from the state board of equalization prior to selling gasoline on which a refund may be claimed. The application for permit shall contain the applicant's name, address, place or places of business in the state of Montana, and other information which may be required by the board. Permits issued shall bear a permit number and the date of issuance. The board shall keep a record of all permits issued, canceled, or suspended. Permits shall be issued for the calendar year upon payment of a fee of one dollar (\$1) and must be renewed annually before the first day of January.

Any person failing to comply with this subsection shall be subject to a fine of not less than twenty-five dollars (\$25) or more than two hundred dollars (\$200) or imprisonment in the county jail for a period not less than ten (10) days or more than sixty (60) days, or both fine and imprisonment.

**History:** En. Sec. 11, Ch. 369, L. 1969.

#### DECISIONS UNDER FORMER LAW

##### Motorboat Fuel

Under prior law which did not provide for tax refund for gasoline used in motorboats, one who consumed gasoline in motorboat in off-highway use was not entitled to refund on basis of due process and equal

protection clauses of constitution, since dealer, rather than the consumer, is the taxpayer, and since consumer, as a boat user, was not proper party to represent all nonhighway users. *Harvey v. Blewett*, 151 M 427, 443 P 2d 902.

**84-1856. Timely mailing treated as timely filing and paying.** Any claim, statement, remittance, or other document which is transmitted to this state through the United States mail, shall be deemed filed and received by this state on the date shown by the post-office cancellation mark

stamped upon the envelope or other appropriate wrapper containing it. Any claim, statement, remittance, or other document which is mailed but not received by this state or where received with a cancellation mark that is illegible, erroneous, or omitted, shall be deemed filed and received on the date mailed if the sender establishes by competent evidence that the claim, statement, remittance, or other document was deposited in the United States mail on or before the date due for filing. In cases of such nonreceipt of a claim, statement, remittance, or other document, the sender must file with the state a duplicate within thirty (30) days after written notification is given to the sender by the state of its nonreceipt of such claim, statement, remittance, or other document.

If any claim, statement, remittance, or other document is sent by United States registered mail, certified mail or certificate of mailing, a record authenticated by the United States post office of such registration, certification or certificate shall be considered competent evidence that the report, claim, tax return, statement, remittance or other document was mailed to the addressee, and the date of registration, certification or certificate shall be deemed the postmarked date.

If the date for filing any claim, statement, remittance, or other document falls upon a Saturday, Sunday or legal holiday, the filing shall be considered timely if done on the next business day.

**History:** En. Sec. 12, Ch. 369, L. 1969.

**84-1857. License and bond of gasoline distributors.** All gasoline distributors prior to the commencement of doing business shall file an application for a license with the state board of equalization on forms prescribed and furnished by the board setting forth the information as may be requested by the board. Each distributor shall at the same time file a corporate surety bond or such collateral security or indemnity as may be deemed sufficient by the state board of equalization, but in no case more than twice the estimated amount of gasoline taxes the distributor will pay to this state each month. Upon approval of the application, the state board of equalization shall issue to the distributor a nonassignable license which shall continue in force until surrendered or canceled.

**History:** En. Sec. 13, Ch. 369, L. 1969.

**84-1858. Penalties—delinquent payment—procedure in case of failure to file statement or pay tax—lien for tax.** Any license tax not paid within the time provided shall be delinquent and a penalty of ten per cent (10%) shall be added to the tax and the tax shall bear interest at the rate of one per cent (1%) per month from the date of delinquency until paid. Upon a showing of good cause by the distributor, the board may waive penalty.

If any distributor or other person subject to the payment of such license tax shall willfully fail, neglect, or refuse to make any statement required by this act, or shall willfully fail to make payment of such license tax within the time provided, the state board of equalization shall be authorized to revoke any license issued under this act. In addition, the board shall inform itself regarding the matters required to be in such

statement and determine the amount of the license tax due the state from such distributor, and shall add thereto a penalty of twenty-five dollars (\$25) or ten per cent (10%) thereof, whichever is greater, together with interest at the rate of one per cent (1%) per month from the date such statements should have been made and said license tax paid. The state treasurer shall proceed to collect such license tax with penalties and interest. Upon the request of the state treasurer, the attorney general shall commence and prosecute to final determination in any court of competent jurisdiction an action to collect such license tax. All license taxes, penalties and interest due from any distributor under the provisions of this act, shall be a lien upon any and all property of such distributor or other person upon the filing by the state board of equalization of a copy of its statement, or a certified copy of any statement filed with the board, in the office of the county clerk of the county where the distributor's property is situated. The lien shall have precedence over any other claim, lien or demand filed or recorded thereafter. The lien may be enforced in the name of this state in the same manner as judgment liens are enforced. No action shall be maintained to enjoin the collection of all or any part of the license tax. When the amount due is paid in full before the entry of foreclosure decree, the state treasurer shall release the lien by filing in the office of the county clerk where the lien was filed, a written release. At any time prior to the payment of said taxes, penalty and interest, before the entry of foreclosure decree, the state treasurer may release from the operation of the lien a part of the distributor's property to enable the distributor to mortgage, sell or otherwise dispose of it in order to procure funds to pay taxes, penalty and interest, provided there remains, in the judgment of the state treasurer, sufficient property subject to the lien to ensure the payment of all the unpaid taxes, penalty and interest.

**History:** En. Sec. 14, Ch. 369, L. 1969.

**84-1859. Penalties.** Any distributor or other person, who fails, neglects, or refuses to make and file the statements required by this act in the manner or within the time provided, or who shall be delinquent in the payment of any license tax imposed by this act, or who shall make any false statement with reference to his business, or who shall make any false statement on any claim for refund or who violates any provision of the act, shall, in addition to any other penalties imposed, be deemed guilty of a misdemeanor and upon conviction shall be fined in any amount not exceeding one thousand dollars (\$1,000) or imprisonment in the county jail for not to exceed six (6) months, or shall be punished by the imposition of both such fine and imprisonment.

**History:** En. Sec. 15, Ch. 369, L. 1969.

**84-1860. Statute of limitations.** Except in the case of a fraudulent return or of neglect, or refusal to make a return, every deficiency shall be assessed within three (3) years from the due date of the return or the date of filing the return, whichever period expires later.

**History:** En. Sec. 16, Ch. 369, L. 1969.



**84-1861. Rules and regulations to be established by state board.** The state board of equalization shall have the power, and it shall be its duty to adopt, publish and enforce the rules and regulations consistent with and necessary for carrying out the provisions of this act.

**History:** En. Sec. 17, Ch. 369, L. 1969.

**Separability Clause**

Section 18 of Ch. 369, Laws 1969 read "If any section, subsection, sentence or clause in the act shall, for any reason, be held unconstitutional or void, such decision shall not affect the validity or meaning of any other portion of this act."

**Repealing Clauses**

Section 19 of Ch. 369, Laws 1969 re-

pealed all acts and parts of acts in conflict therewith.

Section 20 of Ch. 369, Laws 1969 read "Sections 84-1801, 84-1801.1, 84-1802, 84-1802.1, 84-1803, 84-1803.1, 84-1804, 84-1805, 84-1805.1, 84-1806, 84-1807, 84-1808, 84-1809, 84-1810, 84-1811, 84-1813, 84-1814, 84-1818, 84-1818.1, 84-1819, 84-1820, 84-1821, 84-1822, 84-1823, 84-1828, and 84-1829, R. C. M. 1947, are repealed."

CHAPTER 19—LICENSE AND OTHER TAX PROCEEDS—HOW DISPOSED OF

**84-1901. Disposition of moneys from certain designated license, etc. taxes.**

**Compiler's Notes**

Sections 84-4916 and 84-4918, included in the reference to sections 84-4901 to 84-4935 in this section in the parent vol-

ume, were repealed by Sec. 15, Ch. 260, Laws 1955; section 4-316, included in the reference to sections 4-301 to 4-356, was repealed by Sec. 12, Ch. 166, Laws 1951.

CHAPTER 20—LICENSE TAXES—METALLIFEROUS MINES

Section

84-2004. Amount of tax.

**84-2002. (2344.2) Persons liable to pay license tax.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

**84-2004. (2344.4) Amount of tax.** The annual license tax to be paid by such person engaged in or carrying on the business of working or operating any mine or mining property in this state from which gold, silver, copper, lead or any other metal or metals, precious or semiprecious gems or stones are produced, shall be one dollar, together with an additional sum or amount computed on the gross value of product which may have been derived by such person from such business, work or operation within this state during the calendar year immediately preceding, at the following rates: one-half of one per cent ( $\frac{1}{2}$  of 1%) of the amount by which such gross value of product exceeds one hundred thousand dollars (\$100,000) and does not exceed two hundred and fifty thousand dollars (\$250,000); three-fourths of one per cent ( $\frac{3}{4}$  of 1%) of the amount by which such gross value of product exceeds two hundred and fifty thousand dollars (\$250,000) and does not exceed four hundred thousand dollars (\$400,000); one per cent (1%) of the amount by which the gross value of product exceeds four hundred thousand dollars (\$400,000) and does not exceed five hundred thousand dollars (\$500,000) and one and one-fourth per cent ( $1\frac{1}{4}$ %) of the amount by which the gross value of product exceeds five hundred thousand dollars (\$500,000); provided, however, that for all pro-

duction obtained during the production years 1969 and 1970, the rate of tax shall be fifteen hundredths of one per cent (0.15 of 1%) of the first one hundred thousand dollars (\$100,000) of the gross value of the product; five hundred seventy-five thousandths of one per cent (0.575 of 1%) of the amount by which such gross value of product exceeds one hundred thousand dollars (\$100,000) and does not exceed two hundred and fifty thousand dollars (\$250,000); eighty-six hundredths of one per cent (0.86 of 1%) of the amount by which such gross value of product exceeds two hundred and fifty thousand dollars (\$250,000) and does not exceed four hundred thousand dollars (\$400,000); one and fifteen hundredths per cent (1.15%) of the amount by which the gross value of product exceeds four hundred thousand dollars (\$400,000) and does not exceed five hundred thousand dollars (\$500,000) and one and four hundred thirty-eight thousandths per cent (1.438%) of the amount by which the gross value of product exceeds five hundred thousand dollars (\$500,000).

**History:** En. Sec. 4, Initiative No. 28, 1925; amd. Sec. 1, Ch. 220, L. 1957; amd. Sec. 1, Ch. 176, L. 1959; amd. Sec. 1, Ch. 9, Ex. L. 1969.

**Effective Date**

Section 2 of Ch. 9, Ex. Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 19, 1969.

**Amendments**

The 1969 amendment added the proviso dealing with tax for production years 1969 and 1970.

CHAPTER 21—LICENSE TAXES—NATURAL GAS DISTRIBUTORS

**Section**

84-2102. Natural gas distributors' license tax—amount—standard for measurement of gas distributed—persons not contemplated by act.

**84-2102. (2408.2) Natural gas distributors' license tax—amount—standard for measurement of gas distributed—persons not contemplated by act.** Every person engaged in or carrying on the business of distributing to consumers within this state, natural gas, produced, or not produced within this state, or engaged in or carrying on the business of owning, controlling, managing, leasing or operating within this state, any system or plant for the distribution of natural gas, produced, or not produced within this state, to consumers within this state for the purpose of use outside this state, or engaged in or carrying on the business of owning, controlling, managing, leasing or operating within this state, any system or plant for the distribution of natural gas, produced, or not produced within this state, to consumers within this state must, for the year beginning July 1, 1957, and each year thereafter when engaged in carrying on such business in this state, pay to the state treasurer for the exclusive use and benefit of the state of Montana, a license tax for engaging in and carrying on such business an amount equal to one-half ( $\frac{1}{2}$ ) of one (1) cent for each one thousand (1,000) cubic feet of such natural gas, produced within this state, or not produced within this state, and distributed by such person to consumers within this state, during such year, or conveyed through a pipeline to a point outside this state during such year, except in connection with the operating of natural gas wells from which the same was extracted

or produced, or delivered by such person to any other person for sale; provided, however, for the two taxable years commencing on or after January 1, 1969, the tax shall be computed at the rate of five hundred seventy-five thousandths (.575) of one cent for each one thousand (1,000) cubic feet of such natural gas, produced within this state, or not produced within this state, and distributed by such person to consumers within this state, during such year, or conveyed through a pipeline to a point outside this state during such year, except in connection with the operating of natural gas wells from which the same was extracted or produced, or delivered by such person to any other person for sale; provided that the standard or base pressure to be used in the measurement of such gas so distributed for determining the amount of license tax imposed hereunder, shall be ten (10) ounces above an atmospheric pressure of fourteen (14) and four-tenths (4/10) pounds per square inch, and at a temperature of sixty (60) degrees Fahrenheit, regardless of the atmospheric pressure and temperature at the point of measurement, and all measurements of gas shall be reduced, by computation, to these standards no matter what may have been the pressure and temperature at which gas was actually produced or measured; provided, however, that nothing in this act shall be construed as requiring laborers, employees, hired or employed, by any person to work on or about, or in connection with any natural gas well property or business, to pay such license taxes, nor shall any work required to be done in prospecting, or in developing, or opening up any natural gas property or plant, be deemed to be carrying on of natural gas business, or engaging in the business of working or operating of a natural gas well or plant; provided further, that if during any such work of developing any natural gas property, any marketable natural gas shall be extracted or produced and sold, then the same shall be deemed the carrying on of a natural gas business of distributing to consumers.

**History:** En. Sec. 2, Ch. 180, L. 1933; amd. Sec. 1, Ch. 52, Ex. L. 1933; amd. Sec. 1, Ch. 205, L. 1957; amd. Sec. 1, Ch. 8, Ex. L. 1969.

#### **Amendments**

The 1969 amendment inserted the proviso increasing the tax for the two taxable years commencing January 1, 1969.

#### **Effective Date**

Section 2 of Ch. 8, Ex. Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 19, 1969.

#### **Cross-References**

Multistate tax compact, sec. 84-6701.

## **CHAPTER 22—LICENSE TAXES—OIL PRODUCERS**

### **Section**

84-2202. Oil producers' license tax—amount—exceptions.

84-2209. Procedure to compute and collect tax in absence of statement.

### **84-2202. (2398) Oil producers' license tax — amount — exceptions.**

Every person engaging in or carrying on the business of producing, within this state, petroleum, or other mineral or crude oil, or engaging in or carrying on the business of owning, controlling, managing, leasing or operating within this state any well or wells from which any merchantable or marketable petroleum or other mineral or crude oil is extracted or produced, suf-



ficient in quantity to justify the marketing of the same, must, for the year beginning July 1, 1957, and each year thereafter, when engaged in or carrying on any such business in this state, pay to the state treasurer, for the exclusive use and benefit of the state of Montana, a license tax for engaging in and carrying on such business, computed at the following rates:

(a) Two and one-tenth per cent (2.1%) of the total gross value of that portion of all the petroleum and other mineral or crude oil produced by such person from each lease or unit in the calendar quarter not in excess of an amount obtained by multiplying the number of producing wells on such lease or unit by four hundred fifty (450) barrels.

(b) Two and sixty-five hundredths per cent (2.65%) of the total gross value of that portion of all the production of such person from each lease or unit in each calendar quarter in excess of four hundred fifty (450) barrels multiplied by the number of producing wells on such lease or unit; but in determining the amount of such tax there shall be excluded from consideration all petroleum, or other crude or mineral oil produced and used by such person during such year in connection with his operations in prospecting for, developing and producing such petroleum, crude or mineral oil; provided, however, that nothing in this act shall be construed as requiring laborers or employees, hired or employed by any person, to drill any oil well, or to work in or about any oil well, or prospect or explore for, or do any work for the purpose of developing any petroleum or other mineral or crude oil to pay such license tax, nor shall any work be done, or the drilling of any well or wells, for the purpose of prospecting or exploring for petroleum or other mineral or crude oils, or for the purpose of developing same, be deemed to be engaging in or carrying on of any such business; provided, further, that in the doing of any such work, or in the drilling of any oil well, or in such prospecting, exploring or development work, any merchantable or marketable petroleum or other mineral or crude oil in excess of the quantity required by such person for carrying on such operation shall be produced sufficient in quantity to justify the marketing of the same, then such work, drilling, prospecting, exploring or development work shall be deemed to be the engaging in and carrying on of such business within this state within the meaning of this section.

(c) Every person required to pay such tax hereunder shall pay the same in full for his own account and for the account of each of the other owner or owners of the gross proceeds in value or in kind of all the marketable petroleum or other mineral or crude oil extracted and produced, including owner or owners of working interest, royalty interest, overriding royalty interest, carried working interest, net proceeds interest, production payments and all other interest or interests owned or carved out of the total gross proceeds in value or in kind of such extracted marketable petroleum or other mineral or crude oil; in all leases establishing royalty interests entered into hereafter or in renewals of existing leases, or in division of proceeds orders, or by other contracts, such other owner or owners may agree with every person required to pay such

tax that such other owner or owners will pay their prorata share of said tax, and that said prorata share may be deducted from any settlements under said lease or leases or division of proceeds orders or other contracts.

**History:** En. Sec. 2, Ch. 266, L. 1921; re-en. Sec. 2398, R. C. M. 1921; amd. Sec. 1, Ch. 67, L. 1923; amd. Sec. 1, Ch. 221, L. 1957; amd. Sec. 1, Ch. 172, L. 1959; amd. Sec. 1, Ch. 359, L. 1969.

**Amendments**

The 1969 amendment substituted "two and one-tenths per cent (2.1%)" for "two per cent" in subdivision (a) and "two and sixty-five hundredths per cent (2.65%)"

for "two and one-half per cent" in subdivision (b); and added subdivision (c).

**Effective Date**

Section 2 of Ch. 359, Laws 1969 read "This act is effective for all taxable years commencing after December 31, 1968."

**Cross-References**

Multistate tax compact, sec. 84-6701.

**84-2209. (2405) Procedure to compute and collect tax in absence of statement.** If any such person shall fail, neglect or refuse to file any statement required by section 84-2207, within the time therein required, the state board of equalization shall, immediately after such time has expired, proceed to inform itself, as best it may, regarding the number of barrels of petroleum and other mineral or crude oil extracted and produced by such person in this state during such quarter, and during each month thereof, and the average value thereof during each such month, and shall determine and fix the amount of the license taxes due to the state from such person for such quarter and shall make out a statement, in duplicate, showing the same, and shall add to the amount of such license taxes a penalty of twenty-five per cent thereof, and deliver one of such statements to the state treasurer, who shall proceed to collect the amount of such license taxes, with the penalty added thereto and interest on the whole thereof at the rate of twelve per cent, per annum from the date of the making of such statement by the state board of equalization until paid. Upon request of the state treasurer, it shall be the duty of the attorney general to commence and prosecute to final determination in any court of competent jurisdiction, an action at law to collect the same. The twenty-five per cent penalty herein provided may be waived by the state board of equalization if reasonable cause for the failure and neglect to file the statement required by section 84-2207 is provided to the said board.

**History:** En. Sec. 9, Ch. 266, L. 1921; re-en. Sec. 2405, R. C. M. 1921; amd. Sec. 8, Ch. 67, L. 1923; amd. Sec. 1, Ch. 328, L. 1969.

**Amendments**

The 1969 amendment added the last sentence.

CHAPTER 23—LICENSE TAXES—SLEEPING CAR COMPANIES

**84-2306. (2315.6) License tax—amount—levy—notice—payment.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

CHAPTER 24—LICENSE TAXES—STORE LICENSE

**84-2401. Store license from board of equalization required.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

## CHAPTER 25—LICENSE TAXES—TELEGRAPH COMPANIES

**84-2501. (2355.1) Telegraph license tax, etc.****Cross-References**

Multistate tax compact, sec. 84-6701.

## CHAPTER 26—LICENSE TAXES—TELEPHONE COMPANIES

**Section**

84-2601. Annual tax levied on gross income of telephone business.

84-2602. Statement and payment on gross income—certain business excluded.

**84-2601. Annual tax levied on gross income of telephone business.**

That on and after the first day of April, 1957, there is hereby levied and shall be collected an annual tax of one and one-half per cent ( $1\frac{1}{2}\%$ ) of the gross income, in excess of two hundred fifty dollars (\$250) quarterly, derived from any telephone business within this state including the transmission of telephone messages in this state, over telephone lines in this state owned by any person, association or corporation; providing, however, that for the two taxable years commencing on or after April 1, 1969, the tax shall be computed at the rate of one and seven hundred twenty-five thousandths per cent (1.725%) of the gross income, in excess of two hundred fifty (\$250) quarterly, derived from any telephone business within this state including the transmission of telephone messages in this state, over telephone lines in this state owned by any person, association or corporation; provided, however, that no bill, statement or account rendered or given any customer shall set out or contain, as a separate item, any amount on account or by reason of the license tax imposed by this act. Such annual license tax shall be paid in quarterly installments for the quarters ending respectively March 31, June 30, September 30, and December 31, in each year.

**History:** En. Sec. 1, Ch. 94, L. 1937; amd. Sec. 1, Ch. 41, L. 1947; amd. Sec. 1, Ch. 213, L. 1957; amd. Sec. 1, Ch. 7, Ex. L. 1969.

viso concerning computation of tax for the two taxable years commencing April 1, 1969.

**Amendments**

The 1969 amendment inserted the pro-

**Cross-References**

Multistate tax compact, sec. 84-6701.

**84-2602. Statement and payment on gross income—certain business excluded.** Each and every person, association or corporation liable to tax under his act engaged in carrying on such telephone business in this state shall, within sixty (60) days after the end of each quarter, beginning with the quarter ending June 30, 1969, make out in duplicate and file with the state board of equalization, under oath, a statement in such form as the state board of equalization may require and prescribe, showing the total gross income of such person, association or corporation derived from the telephone business within this state including the transmission of telephone messages originating and terminating within this state, but excluding therefrom the gross income derived from the transmission of telephone messages passing through this state but both originating and terminating outside of this state and from those originating outside of, but term-



inating within this state and from those originating within but terminating outside of this state during the preceding quarter, and containing such other information as the state board of equalization may require; and shall accompany such statement with the payment to the state board of equalization of a license tax in the amount equal to one and one-half per cent ( $1\frac{1}{2}\%$ ); provided, however, that for the two (2) taxable years commencing on or after April 1, 1969, the rate shall be one and seven hundred twenty-five thousandths per cent ( $1.725\%$ ) of such gross income.

**History:** En. Sec. 2, Ch. 94, L. 1937; amd. Sec. 2, Ch. 213, L. 1957; amd. Sec. 2, Ch. 7, Ex. L. 1969.

**Effective Date**

Section 3 of Ch. 7, Ex. Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 19, 1969.

**Amendments**

The 1969 amendment substituted "June 30, 1969" for "September 30, 1957"; and added the proviso.

CHAPTER 30—LICENSES—ITINERANT MERCHANTS

**84-3006. Application for license—fee.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

CHAPTER 31—LICENSES—ITINERANT VENDORS

**84-3101. (2429) License of itinerant vendor of drugs, etc.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

CHAPTER 32—LICENSES—MISCELLANEOUS COUNTY

**84-3201. (2434) Billiard tables—pawnbrokers—theaters, etc.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

**84-3202. (2435) Railways acting as warehouses.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

**84-3203. (2436) License of manufacturer of soft drinks.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

**84-3204. (2438) Keeper of skating rink or merry-go-round.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

**84-3205. (2439) Moving picture shows—amount of license.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

**84-3207. (2441) Architects, builders, contractors, manufacturers.****Cross-References**

Multistate tax compact, sec. 84-6701.

**84-3208. (2442) Manufacturers of malt.****Cross-References**

Multistate tax compact, sec. 84-6701.

## CHAPTER 34—LICENSES—PRODUCE WHOLESALERS

**84-3402. (2443.2) Produce wholesalers' license—who shall pay.****Cross-References**

Multistate tax compact, sec. 84-6701.

## CHAPTER 35—LICENSES—PUBLIC CONTRACTORS

**Section****84-3501. Definitions.****84-3505. Classes of licenses—rights granted under licenses—fees.****84-3507. Bids to show bidder is licensed, is not presently working overtime on any incomplete contract, and class of bid.****84-3510. Complaints against licensee—grounds—investigation—hearing—suspension of license—appeals.****84-3513. Retention of contract payments to pay assessments—transmittal to board of equalization—contractor to pay when funds not retained—refunds.****84-3514. Corporate license tax credit—additional license fees—treatment of personal property tax as credit.****84-3515. State board of equalization to establish rules and regulations.****84-3516. Failure to file contractor's license—penalty.**

**84-3501. (2433.1) Definitions.** The following words, terms and phrases in this act are, for the purposes hereof, defined as follows:

(a). \* \* \* [Same as parent volume.]

(b) A "public contractor" within the meaning of this act shall include any person who submits a proposal to or enters into a contract for performing all public construction work in the state, with the federal government, state of Montana, or with any board, commission or department thereof, or with any board of county commissioners, or with any city or town council, or with any agency of any thereof, or with any other public board, body, commission or agency, authorized to let or award contracts for any public work when the contract cost, value or price thereof exceeds the sum of one thousand dollars (\$1,000).

(c). \* \* \* [Same as parent volume.]

(d) "Gross receipts" means all receipts from sources within the state whether in the form of money, credits or other valuable consideration, received from, engaging in or conducting a business, without deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, taxes, losses or any other expense whatsoever. However, "gross receipts" shall not include cash discounts allowed and taken on sales and sales refunds, either in cash or by credit, uncollectible accounts written off from time to time, and payments received

in final liquidation of accounts included in the gross receipts of any previous return made by the person.

**History:** En. Sec. 1, Ch. 178, L. 1935; amd. Sec. 1, Ch. 195, L. 1967.

**Amendments**

The 1967 amendment in subsection (b) inserted "for performing all public con-

struction work in the state" after "into a contract"; inserted "federal government" before "state of Montana"; deleted "the construction or reconstruction" after "award contracts for"; and added subsection (d).

**84-3505. (2433.5) Classes of licenses—rights granted under licenses—fees.** (1) There shall be three (3) classes of licenses issued under the provisions of this act; and such classes of licenses are hereby designated as Classes A, B, and C. Any applicant for a license under the provisions hereof, shall specify in his application the class of license applied for.

(2) The holder of a Class A license shall be entitled to engage in the public contracting business within the state of Montana without any limitation as to the value of a single public contract project, subject, however, to such prequalification requirements as may be imposed by the public body or bodies referred to in section 84-3501 (b) and at the time of making the application for such license the applicant shall pay to the registrar a fee in the sum of two hundred dollars (\$200).

(3) The holder of a Class B license shall be entitled to engage in the public contracting business within the state of Montana, but shall not be entitled to engage in the construction of any single public contract project of a value in excess of fifty thousand dollars (\$50,000); and shall pay unto the registrar as a license fee the sum of one hundred dollars (\$100) for such Class B license at the time of making application therefor.

(4) The holder of a Class C license shall be entitled to engage in the public contracting business within the state of Montana, but shall not be entitled to engage in the construction of any single public contract project of a value in excess of twenty-five thousand dollars (\$25,000); and shall pay unto the registrar as a license fee the sum of ten dollars (\$10) at the time of making application therefor.

(5) In addition to the fees enumerated above, each public contractor shall pay to the state an additional license fee in a sum equal to one per cent (1%) of the gross receipts from public contracts during the income year for which the license is issued; provided, however, that the additional license fee hereby imposed shall not be paid upon or collectible from the gross receipts from any public contract which has been let to bid, upon which bids have been awarded, or which has been executed by a public body and a public contractor on the effective date of this act.

(6) Nothing herein shall require any contractor to pay any license fee on any public contract project of a value less than one thousand dollars (\$1,000), nor shall any contractor be required to have a license hereunder in order to submit a bid or proposal for contracts advertised to be let by the Montana highway commission where federal aid is obtained from the bureau of public roads or the department of agriculture of the United States; neither shall a successful bidder be required to be licensed as provided herein before the awarding and execution of any contract to be let by the state highway commission where federal



aid from the bureau of public roads or the department of agriculture of the United States is involved.

**History:** En. Sec. 5, Ch. 178, L. 1935; amd. Sec. 1, Ch. 113, L. 1939; amd. Sec. 2, Ch. 195, L. 1967.

#### Amendments

The 1967 amendment numbered the paragraphs in the old section, and inserted

the present subsection (5) before the last paragraph of the old section, which is now numbered subsection (6).

#### Cross-References

Multistate tax compact, sec. 84-6701.

**84-3507. (2433.7) Bids to show bidder is licensed, is not presently working overtime on any incomplete contract, and class of bid.** All bids and proposals for the construction of any public contract project subject to the provisions of this act shall contain a statement showing that the bidder or contractor is duly and regularly licensed hereunder and is not presently working beyond the contract time, including authorized time extensions, on any previously awarded public contract project. The number and class of such license then held by such public contractor shall appear upon such bid or proposal, and no contract shall be awarded to any contractor unless he is the holder of a license in the class within which the value of the project shall fall as hereinbefore provided, and unless the public contractor has completely executed any previous contract upon which he has worked beyond contract time.

**History:** En. Sec. 7, Ch. 178, L. 1935; amd. Sec. 3, Ch. 141, L. 1967.

#### Amendments

The 1967 amendment added "and is not presently working \* \* \* on any previous-

ly awarded public contract project" at the end of the first sentence and added "and unless \* \* \* he has worked beyond contract time" at the end of the second sentence.

**84-3510. (2433.10) Complaints against licensee—grounds—investigation—hearing—suspension of license—appeals.** Any person, firm, copartnership, corporation, association or other organization may file a duly verified complaint with the registrar charging that the licensee is guilty of one or more of the following acts or omissions:

(1) to (3). \* \* \* [Same as parent volume.]

(4) The making of any false statement in any application for a license or renewal thereof;

(5) The failure to comply with the provisions of section 82-1926 requiring preference of products manufactured or produced in this state by Montana industry and labor.

Upon the filing of such complaint the registrar shall investigate the charge and within sixty days after the filing of such complaint shall render and file said registrar's decision with said registrar's reasons therefor. If the registrar's decision be that the licensee has been guilty of any of such acts or omissions, said registrar shall suspend the contractor's license. At any time within twenty days thereafter the complainant or the contractor may petition the registrar for a rehearing. In the order granting or denying such rehearing the registrar shall set forth a statement of the particular grounds and reasons for said registrar's actions on such petition and shall mail a copy of such order to the parties who have appeared in

support of or in opposition to the petition for rehearing. If a rehearing be granted, the registrar shall set the matter for further hearing on due notice to the parties, and within thirty days after submission of the matter, serve said registrar's decision after rehearing in like manner as an original decision.

The filing of such petition for rehearing as to the registrar's actions in suspending or canceling such license shall suspend the operation of such action and permit the licensee to continue to do business as a public contractor pending final determination of the controversy.

Within thirty days after the decision on rehearing, any party aggrieved by such decision of the registrar may appeal therefrom to the district court in and for the county in which the licensee under this act resides or does business as a public contractor, by serving upon the registrar a notice of such appeal. The matter shall thereupon be heard de novo by the district court. An appeal may be taken from the decision of the district court in the same manner as appeals in other civil cases.

In all cases where the licensee has filed his notice of appeal from the decision of the registrar or from the decision of the district court, such licensee shall be entitled to continue to do business as a public contractor pending final decision of the controversy.

**History:** En. Sec. 10, Ch. 178, L. 1935;  
amd. Sec. 1, Ch. 219, L. 1969.

**Amendments**

The 1969 amendment inserted item (5).

**84-3513 Retention of contract payments to pay assessments—transmittal to board of equalization—contractor to pay when funds not retained—refunds.** The state, county, city or any agency or department thereof, as described in section 84-3501 (b), for whom the contractor is performing public work, shall withhold, in addition to other amounts withheld as provided by law, one per cent (1%) of all payments due the contractor and shall transmit such moneys to the state board of equalization. In the event that the one per cent (1%) of gross receipts is not withheld as provided, the contractor shall make payment of these amounts to the state board of equalization within thirty (30) days after the date on which the contractor receives each increment of payment for work performed by the contractor. Any overpayment of the one per cent (1%) of gross receipts withheld, or paid by any contractor hereunder, shall be refunded by the state board of equalization at the end of the income year upon written application therefor.

**History:** En. Sec. 3, Ch. 195, L. 1967.

**Title of Act**

An act providing for additional public contractors' license fees for all public construction work in Montana, defining terms, prescribing method of collection and disposition of fees, allowing a credit on

corporation or income tax and personal property taxes paid in Montana by licensees on personal property used in licensees' contracting business, providing a penalty and an effective date; amending sections 84-3501 and 84-3505, R. C. M. 1947.

**84-3514. Corporate license tax credit—additional license fees—treatment of personal property tax as credit.** The additional license fees withheld or otherwise paid as provided herein may be used as a credit on the

contractor's corporation license tax provided for in Title 84, chapter 15, R.C.M. 1947, or on the contractor's income tax provided for in Title 84, chapter 49, R.C.M. 1947, depending upon the type of tax the contractor is required to pay under the laws of the state.

Personal property taxes paid in Montana on any personal property of the contractor which is used in the business of the contractor and is located within this state may be credited against the license fees required under this act. However, in computing the tax credit allowed by this act against the contractor's corporation license tax or income tax, the personal property tax credit against the licensee fees herein required shall not be considered as license fees paid for the purpose of such income tax or corporation license tax credit.

**History:** En. Sec. 4, Ch. 195, L. 1967.

**84-3515. State board of equalization to establish rules and regulations.** The state board of equalization shall establish rules and regulations necessary for the effective implementation of the provisions of this act, including, but not limited to, requiring public contractors to file a contractor's return showing public works contracts performed during a calendar year.

**History:** En. Sec. 5, Ch. 195, L. 1967.

**84-3516. Failure to file contractor's license—penalty.** A person failing to file a contractor's license return as provided and required by the state board of equalization, upon conviction, shall be fined not less than one thousand dollars (\$1,000) or more than ten thousand dollars (\$10,000).

**History:** En. Sec. 6, Ch. 195, L. 1967. the act should be in effect from and after its passage and approval. Approved February 28, 1967.

**Effective Date**

Section 7 of Ch. 195, Laws 1967 provided

## CHAPTER 38—LEVY OF TAXES

### Section

84-3804. Increase of state tax levy—support units of university.

**84-3804. Increase of state tax levy — support units of university.** Upon the approval of the electors of this state, to be determined by their vote at the general election to be held in November of 1968, the legislative assembly shall levy a property tax, in addition to any levy authorized by section 9, article XII of the Montana constitution, of not more than six (6) mills on the taxable value of all real and personal property each year for ten (10) years beginning with the year 1969. All revenue from this property tax levy shall be appropriated for the support, maintenance, and improvement of the Montana university system.

**History.** En. Sec. 1, Ch. 50, L. 1967.  
Referendum No. 65, approved at election  
Nov. 5, 1968.

### Compiler's Notes

This section is substituted for Sec. 1, Ch. 218, Laws 1957 and given the same section number as it covers the same subject matter.



## CHAPTER 39—UNIFORM FEDERAL TAX LIEN REGISTRATION ACT

(Repealed—Section 8, Chapter 228, Laws of 1967)

**84-3901 to 84-3907. (2155.1 to 2155.7) Repealed.****Repeal**

These sections (Secs. 1 to 7, Ch. 8, L. 1927), the Uniform Federal Tax Lien

Registration Act, were repealed by Sec. 8, Ch. 228, Laws 1967. For present law see secs. 45-1501 to 45-1507.

## CHAPTER 41—COLLECTION OF GENERAL PROPERTY TAXES—TAX SALES—REDEMPTION—TAX DEEDS—SALE OF TAX DEED LANDS

**Section**

84-4130. Lien of state when vests in purchaser—how alone divested.

84-4191. Terms of sale—sale contract—deed of conveyance.

**84-4130. (2197) Lien of state when vests in purchaser—how alone divested.** On filing the certificate with the county clerk, the lien of the state vests in the purchaser, and is only divested by the payment to him or to the county treasurer for his use of the purchase money and two-thirds (2/3) of one per cent additional for each month that elapses from the date of the sale until redeemed.

**History:** En. Sec. 121, p. 112, L. 1891; re-en. Sec. 3888, Pol. C. 1895; re-en. Sec. 2644, Rev. C. 1907; re-en. Sec. 2197, R. C. M. 1921; amd. Sec. 1, Ch. 8, L. 1967.

**Amendments**

The 1967 amendment inserted "two-thirds (2/3) of" preceding "one per cent additional."

**Extent of Lien**

This section does not permit mortgagee who had previously purchased certificates

of tax sale to retain a lien upon the real estate for the amount of certificates after sheriff's sale. *Stallings v. Erwin*, 148 M 227, 419 P 2d 480, 483.

Where, subsequent to purchase of tax certificates, mortgagee foreclosed the mortgage, the foreclosure sale cut off any lien asserted by mortgagee for taxes paid although the mortgage permitted the mortgagee to pay taxes and collect the same upon foreclosure. *Stallings v. Erwin*, 148 M 227, 419 P 2d 480, 483.

**84-4133. (2202) Redemption to be made in lawful money, etc.****Check as "Lawful Money"**

Use of a check by the small business administration in the redemption of tax delinquent property by the United States constituted "lawful money" under this

section and certificate of redemption issued to the government four days before defendant filed application for tax deed was valid. *United States v. Johnston*, 247 F Supp 707.

**84-4191. Terms of sale—sale contract—deed of conveyance.** Such sale shall be made for cash or, in the case of real property, on such terms as the board of county commissioners may approve; provided, however, that if such sale is made on terms at least twenty per cent (20%) of the purchase price shall be paid in cash at the date of sale and the remainder may be paid in installments extending over a period not to exceed five (5) years and all such deferred payments shall bear interest at the rate of eight per cent (8%) per annum.

If a sale is made on terms, the chairman of the board of county commissioners shall execute a contract containing such terms as shall be provided by a uniform contract prescribed by the board of equalization and upon payment of the purchase price in full together with all interest which may

become due on any installment or deferred payments, the chairman of the board of county commissioners shall execute a deed attested to by the county clerk to the purchaser, or his assigns, or such other instruments as shall be sufficient to convey all of the title of the county in and to the property so sold, provided that the county may in the discretion of the board of county commissioners reserve not to exceed six and one-fourth per cent (6- $\frac{1}{4}$ %) royalty interest in the oil, gas, other hydrocarbons and minerals produced and saved from said land.

**History:** En. Sec. 2, Ch. 171, L. 1941; amd. Sec. 1, Ch. 187, L. 1949; amd. Sec. 1, Ch. 163, L. 1969.

**Effective Date**

Section 2 of Ch. 163, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved February 28, 1969.

**Amendments**

The 1969 amendment increased the deferred payment interest rate from "four per cent (4%)" per annum to "eight per cent (8%)."

CHAPTER 44—SETTLEMENT WITH STATE AUDITOR AND TREASURER

**84-4403 to 84-4405. (2265 to 2267) Repealed.**

**Repeal**

These sections (Secs. 4000 to 4002, Pol. C. 1895), relating to examination of tax

collectors' books, were repealed by Sec. 23, Ch. 249, Laws 1967.

CHAPTER 46—BANKS—TAXATION

**Section**

84-4606. Banks with offices in more than one county—assessment and apportionment of tax.

**84-4606. Banks with offices in more than one county—assessment and apportionment of tax.** Any state or national bank, banking corporation, or private bank, the stock, moneyed capital, or moneys and credits of which are subject to taxation under the provisions of chapter 3 and chapter 46, Title 84, Revised Codes of Montana, 1947, and which has banking offices in more than one (1) county, shall furnish to the assessor of each such county the information required of it by chapter 46, Title 84, Revised Codes of Montana, 1947, together with a statement of the book value of real estate owned and located in the respective counties and a statement of the deposit liability shown by the books of account of said bank at each of its said banking offices at the close of business the day next preceding the first Monday in March; and the aggregate tax on the stock, moneyed capital, and moneys and credits of such bank computed as provided by law shall be assessed by and be paid to the respective counties in the proportion which the amount of the deposit liability shown on the books of the office or offices of such bank located in such counties, respectively, shall bear to the total deposit liability of such bank.

**History:** En. Sec. 1, Ch. 72, L. 1967.

**Title of Act**

An act relating to the assessment for the purpose of taxation of bank stock,

moneyed capital, and moneys and credits, in each county wherein a bank office is located and the payment of taxes thereon; providing for the furnishing of certain information to the county assessor of each

such county by the bank officials and repealing all acts and parts of acts in conflict herewith.

#### Repealing Clause

Section 2 of Ch. 72, Laws 1967 repealed all acts and parts of acts in conflict therewith.

#### Effective Date

Section 3 of Ch. 72, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved February 20, 1967.

### CHAPTER 47—CITIES AND TOWNS—TAXATION AND LICENSE

#### Section

- 84-4701. Limitation on amount of tax for municipal purposes—distribution of funds—levy for park, swimming pools, playgrounds, youth centers and other purposes.
- 84-4701.1. All-purpose levy authorized.
- 84-4701.2. Maximum rate of all-purpose levy.
- 84-4701.6. Extraordinary levies—additional to all-purpose levy.

**84-4701. (5194) Limitation on amount of tax for municipal purposes—distribution of funds—levy for park, swimming pools, playgrounds, youth centers and other purposes.** The amount of taxes to be assessed and levied for general municipal or administrative purposes in cities and towns must not exceed two and four-tenths (2.4%) per centum on the per centum of the assessed value of the taxable property of the city or town; and the council or commission in each city or town may distribute the money collected into such funds as are prescribed by ordinance; provided, that for the purpose of procuring, equipping and maintaining public parks, swimming pools, skating rinks, playgrounds, civic centers, youth centers, museums and combinations thereof, the council or commission in any city or town may assess and levy, in addition to the said levy for general municipal or administrative purposes, not exceeding seven (7) mills on the dollar on the per centum of the assessed value of the taxable property of the city or town.

**History:** Ap. p. Sec. 415, 5th Div. Comp. Stat. 1887; amd. Sec. 16, p. 185, L. 1889; amd. Sec. 4814, Pol. C. 1895; re-en. Sec. 3342, Rev. C. 1907; amd. Sec. 1, Ch. 103, L. 1911; amd. Sec. 1, Ch. 27, L. 1917; re-en. Sec. 5194, R. C. M. 1921; amd. Sec. 1, Ch. 156, L. 1923; amd. Sec. 1, Ch. 175, L. 1925; amd. Sec. 1, Ch. 48, L. 1937; amd. Sec. 4, Ch. 71, L. 1945; amd. Sec. 1, Ch. 192, L. 1951; amd. Sec. 1, Ch. 230, L. 1969. Cal. Pol. C. Sec. 4371.

#### Amendments

The 1969 amendment substituted "two and four-tenths (2.4%) per centum" for "two (2%) per centum" after "must not exceed" near the beginning of the section, and "seven (7) mills" for "six (6) mills" after "not exceeding" near the end of the section.

#### Cross-References

Multistate tax compact, sec. 84-6701.

**84-4701.1. All-purpose levy authorized.** It is the purpose of this act to authorize and empower the cities and towns of the state of Montana, at their option, to make an all-purpose annual mill levy in lieu of the multiple levies now authorized by the statutes of the state of Montana. The all-purpose mill levy shall not include the levy imposed to service and pay bonded indebtedness of municipalities or to pay judgments against municipalities, which levies may be made in addition to the all-purpose levy as provided in section 84-4701.6, R. C. M. 1947. This act shall not be construed as repealing those statutes providing for multiple separate levies.



**History:** En. Sec. 1, Ch. 82, L. 1965; **Amendments**  
amd. Sec. 1, Ch. 226, L. 1969.

The 1969 amendment deleted "exclusive" before "annual mill levy"; and inserted the second sentence.

**84-4701.2. Maximum rate of all-purpose levy.** Notwithstanding the provisions of the statutes of Montana to the contrary, the cities and towns of the state of Montana may make an all-purpose annual levy upon the assessed value of all the taxable property in such cities and towns, for all municipal purposes in lieu of the multiple levies now authorized by statute. The total of such multiple levy shall not exceed sixty (60) mills on the dollar, which levy shall not include any levy necessary to service and pay bonded indebtedness, or judgments in addition to the all-purpose levy as provided in sections 84-4701.1 and 84-4701.6.

**History:** En. Sec. 2, Ch. 82, L. 1965;  
amd. Sec. 2, Ch. 226, L. 1969.

**Amendments**

The 1969 amendment substituted "an all-purpose annual levy" for "an all-

purpose and exclusive annual levy which does not exceed the average number of mills on the dollar levied for all purposes in the preceding three (3) years"; and added the second sentence.

**84-4701.6. Extraordinary levies—additional to all-purpose levy.** That otherwise authorized extraordinary levies to service and pay bonded indebtedness of municipalities and to pay judgments against them, may be made by such municipalities in addition to such all-purpose levy provided in sections 84-4701.1, 84-4701.2, 84-4701.3, 84-4701.4 and 84-4701.5 of the Revised Codes of Montana, 1947.

**History:** En. 84-4701.6 by Sec. 1, Ch. 145, L. 1967.

**Title of Act**

An act to provide for authorized extraordinary levies to service and pay bonded indebtedness of such municipalities and to pay judgments obtained against them, may be made by such municipalities in

addition to such all-purpose levy; and repealing all acts and parts of acts in conflict herewith.

**Repealing Clause**

Section 2 of Ch. 145, Laws 1967 repealed all acts and parts of acts in conflict therewith.

**84-4712. (5200) Special taxes and assessments.**

**Compiler's Notes**

Sections 44-301 to 44-303, referred to in

this section in the parent volume, were repealed by Sec. 12, Ch. 260, Laws 1967.

CHAPTER 48—FREIGHT LINE COMPANIES—TAXATION

**Section**

84-4819. Rate of tax—situs.

84-4820. Railroad companies to withhold tax, file statements annually and remit to state—receipts—investigations—ad valorem tax basis.

**84-4819. Rate of tax—situs.** Every such freight line company shall pay annually for each calendar year a sum in the nature of a tax in the amount of five and one-half per cent (5-½%) of the total gross earnings received from all sources by reason of the use or operation of such cars within this state by such freight line company, which shall be in lieu of all other taxes upon such property of any freight line company so paying

the same; provided, for the purpose of taxation, all cars used exclusively within the state or used partially within and partially without the state, are hereby declared to have situs within the state, the value thereof for such taxation to be determined as provided for in this act.

**History:** En. Sec. 2, Ch. 137, L. 1949;  
amd. Sec. 1, Ch. 346, L. 1969.

**Cross-References**

Multistate tax compact, sec. 84-6701.

**Amendments**

The 1969 amendment raised the tax rate from "five per cent (5%)" to "five and one-half per cent (5½%)" per year.

**84-4820. Railroad companies to withhold tax, file statements annually and remit to state—receipts—investigations—ad valorem tax basis.** Every railroad company so using or leasing said cars, upon payment therefor to such company shall withhold from such payment five and one-half per cent (5½%) of as much thereof as shall constitute gross earnings of such freight line company within this state. On or before March 1, 1970, such railroad company shall make and file with the board a consolidated statement in a form to be prescribed by the board, showing the amount of such payments for the next preceding calendar year ending December 31, 1969, and the amounts so withheld and due the state of Montana. A like report shall be made on or before March 1st of each year thereafter. Such railroad company at the time of filing such statement shall remit the amounts so withheld and due the state of Montana. Upon receipt of such payment, the board shall issue its receipt, in triplicate, one copy of which shall be mailed to such railroad company, one to the freight line company for which such tax is paid, and one to be retained in the office of the state board of equalization. The mailing of such receipt to such freight line company shall constitute notice of the filing of said statement and payment of said tax. If any railroad company shall fail to make or file such report, or if the state board of equalization be dissatisfied with any report filed, the board shall have the power to conduct a hearing and investigation for the purpose of ascertaining from whatever sources to which it has access, the gross earnings of such freight line company from the use or operation of such cars within the borders of this state, and in conducting such hearing and investigation, the board shall have power, by subpoena, to require officers, agents, employees or receivers of such railroad company, or of such freight line company, to attend before the state board of equalization, and to bring with him, or them, for inspection by the board, any books, papers, or documents in his or their possession, or under his or their control, in any manner affecting said tax, and to testify under oath concerning any matter relating to the organization or business of such freight line company within this state. Any person who shall fail, neglect or refuse to attend before the board, when subpoenaed so to do, or who shall fail, neglect, or refuse to bring with him and submit for inspection by the board any books, papers, or documents in his possession or under his control affecting the organization or business of such freight line company within this state, or who shall refuse to testify, or refuse to answer any question which may be asked him concerning the organization or business, shall be deemed

guilty of a misdemeanor, and, upon conviction thereof shall be fined not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000), or be imprisoned in the county jail for not less than thirty (30) days nor more than six (6) months. Every freight line company, as hereinbefore defined, shall be liable for the payment of the difference, if any, between five and one-half per cent ( $5\frac{1}{2}\%$ ) of all gross earnings in this state and the amounts withheld and remitted to the state of Montana by railroads, and shall be liable for the payment of any additional taxes which the board may find due under its authority to raise or lower the rate to conform to the taxes which would be payable if the cars were taxed on an ad valorem basis.

**History:** En. Sec. 3, Ch. 137, L. 1949; amended. Sec. 2, Ch. 346, L. 1969.      tuted "1970" for "1950" and "1969" for "1949."

#### Amendments

The 1969 amendment substituted "five and one-half per cent ( $5\frac{1}{2}\%$ )" for "five per cent (5%)" in the first and last sentences; and in the second sentence, substi-

#### Effective Date

Section 3 of Ch. 346, Laws 1967 read "This act is effective for all taxable years commencing after December 31, 1968."

### CHAPTER 49—INCOME TAX

#### Section

- 84-4901. Income tax—definitions.
- 84-4902. Rate of income tax.
- 84-4902.1. Surtax.
- 84-4903.5. Monthly payment by withholding agent—exception.
- 84-4908. Alternative deduction allowed in computing net income.
- 84-4913. Information agents' duties.
- 84-4914. Returns and payment of tax—penalty and interest—refunds—credits.
- 84-4920.1. Suspension of running of statute of limitations—grounds.
- 84-4924. Penalties for violations of act.
- 84-4928.1. Jeopardy assessments.
- 84-4931. Divulging information unlawful—exceptions—penalty.
- 84-4938. Furnishing copy of federal return, copies of federal corrections, and filing amended return required.
- 84-4946. Quarterly payment by employer—exception.

**84-4901. (2295.1) Income tax—definitions.** For the purpose of this act unless otherwise required by the context:

- (1) and (2). \* \* \* [Same as parent volume.]
- (3) The term "taxable year" means the taxpayer's taxable year for federal income tax purposes.
- (4). \* \* \* [Same as parent volume.]
- (5) The word "paid" for the purposes of the deductions and credits under this act means paid or accrued or paid or incurred, and the terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the taxable income is computed under this act. The term "received" for the purpose of computation of taxable income under this act, means received or accrued and the term "received or accrued" shall be construed according to the method of accounting upon the basis of which the taxable income is computed under this act.
- (6) and (7). \* \* \* [Same as parent volume.]
- (8) The words "foreign country" or "foreign government" mean any



jurisdiction other than the one embraced within the United States, its territories and possessions.

(9). \* \* \* [Same as parent volume.]

(10) The term "net income" means the adjusted gross income of a taxpayer less the deductions allowed by this act.

(11) The term "taxable income" means the adjusted gross income of a taxpayer less the deductions and exemptions provided for in this act.

**History:** En. Sec. 1, Ch. 181, L. 1933; amd. Sec. 1, Ch. 166, L. 1947; amd. Sec. 1, Ch. 253, L. 1959; amd. Sec. 1, Ch. 62, L. 1967.

the last day of any month other than December thirty-first"; substituted "taxable income" for "net income" wherever found in subsection (5); substituted "its territories and possessions" for "The words 'United States' include the states, the territory of Hawaii, and the District of Columbia" at the end of subsection (8); made minor style changes in subsection (8); and inserted "adjusted" before "gross" in subsections (10) and (11).

#### Amendments

The 1967 amendment substituted present subsection (3) for "The words 'taxable year' mean the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this act, and include the period for which such return is made if made for a fractional part of such year under the provisions of this act or under regulations prescribed by the board. The words 'fiscal year' mean an accounting period of twelve (12) months, ending on

#### Effective Date

Section 2 of Ch. 62, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved February 20, 1967.

**84-4902. (2295.2) Rate of income tax.** There shall be levied, collected and paid for each taxable year, commencing on or after December 31, 1968 upon the taxable income of every taxpayer subject to this tax, after making allowance for exemptions and deductions, as hereinafter provided, a tax at the following rates, to wit:

(a) On the first one thousand dollars (\$1,000) of taxable income, or any part thereof, at the rate of two per centum (2%);

(b) On the next one thousand dollars (\$1,000) of taxable income, or any part thereof, at the rate of three per centum (3%);

(c) On the next two thousand dollars (\$2,000) of taxable income, or any part thereof, at the rate of four per centum (4%);

(d) On the next two thousand dollars (\$2,000) of taxable income, or any part thereof, at the rate of five per centum (5%);

(e) On the next two thousand dollars (\$2,000) of taxable income, or any part thereof, at the rate of six per centum (6%);

(f) On the next two thousand dollars (\$2,000) of taxable income, or any part thereof, at the rate of seven per centum (7%);

(g) On the next four thousand dollars (\$4,000) of taxable income, or any part thereof, at the rate of eight per centum (8%);

(h) On the next six thousand dollars (\$6,000) of taxable income, or any part thereof, at the rate of nine per cent (9%);

(i) On the next fifteen thousand dollars (\$15,000) of taxable income, or any part thereof, at the rate of ten per cent (10%);

(j) On any taxable income in excess of thirty-five thousand dollars (\$35,000) of taxable income, or any part thereof, at the rate of eleven per cent (11%).

**History:** En. Sec. 2, Ch. 181, L. 1933; 1, Ch. 228, L. 1957; amd. Sec. 1, Ch. 265, amd. Sec. 1, Ch. 40, Ex. L. 1933; amd. Sec. L. 1959; amd. Sec. 1, Ch. 281, L. 1965;

amd. Sec. 1, Ch. 5, Ex. L. 1967; amd. Sec. 1, Ch. 10, Ex. L. 1969.

#### Amendments

The 1967 amendment substantially rewrote this section, increasing the tax. For previous text, see parent volume.

The 1969 amendment, in the introductory paragraph, substituted "1968" for "1966"; inserted subdivisions (g) and (h); redesignated former subdivision (g) as subdivision (i) and raised the rate from "eight per centum (8%)" to "ten per cent (10%)"; redesignated former subdivision (h) as subdivision (j), substituted "thirty-five thousand dollars" for "twenty-five thousand dollars" after "in excess of" and raised the rate from "ten per centum (10%)" to "eleven per cent (11%)."

#### Tax Credit

Section 2 of Ch. 5, Ex. Laws 1967 read "After the amount of tax liability has been computed for the current taxable year, each person filing a Montana indi-

vidual income tax return may subtract five per cent (5%) of the tax liability, and the amount remaining is the amount due the state of Montana. Section 2 was repealed by Section 7, Ch. 10, Ex. Laws 1969.

#### Effective Dates

Section 3 of Ch. 5, Ex. Laws 1967 read "This act shall be effective as to all taxable years commencing on or after December 31, 1966, whether on a calendar or fiscal year basis."

Section 4 of Ch. 5, Ex. Laws 1967 provided the act should be in effect from and after its passage and approval. Approved March 20, 1967.

#### Repealing Clause

Section 5 of Ch. 5, Ex. Laws 1967 repealed all acts and parts of acts in conflict therewith.

#### Cross-References

Multistate tax compact, sec. 84-6701.

**84-4902.1. Surtax.** After the amount of tax liability has been computed for the current taxable year, each person filing a Montana individual income tax return shall add, as a surtax, ten per cent (10%) of the tax liability, and the amount so arrived at is the amount due the state of Montana.

**History:** En. Sec. 2, Ch. 10, Ex. L. 1969.

#### Title of Act

An act to amend section 84-4902, R. C. M. 1947, relating to the rate of income tax; and providing for a surcharge; and changing and adding income tax brackets and rates of income tax for all taxable years commencing on or after December 31, 1968; and further amending

section 84-4903.5, R. C. M. 1947, to provide for monthly payments to the state board of equalization of amounts withheld from payments to nonresidents under section 84-4903.2, R. C. M. 1947, if the amount withheld is \$50 or more in each quarterly period of any year, applying changes when payments are due to payment periods beginning after June 30, 1969; and providing an effective date.

### 84-4903. (2295.3) Tax on nonresident.

#### Cross-References

Multistate tax compact, sec. 84-6701.

**84-4903.5. Monthly payment by withholding agent—exception.** Withholding agents required to deduct and withhold tax payments under the provisions of section 84-4903.2 shall remit such payments monthly to the state board of equalization for each monthly period on or before the fifteenth day of the month following the close of such monthly period, except that payments for the month of December shall be made on or before the following January 31, payments for the month of March shall be made on or before the following April 30, payments for the month of June shall be made on or before the following July 31, and payments for the month of September shall be made on or before the following October 31.

Provided, however, that when the aggregate total amount of the tax withheld under the provisions of section 84-4903.2 shall amount to less

than fifty dollars (\$50) in each quarterly period of any year, such withholding agent shall not be required to file the monthly returns or to make the monthly payments last hereinabove provided for, but in lieu thereof such withholding agent shall, on or before February fifteenth of the year next succeeding that in which such payments were withheld, file an annual return in such form as shall be determined by the board, and shall pay therewith the amount required by this act to be deducted and withheld by such withholding agent from all payments paid during the preceding calendar year.

**History:** En. Sec. 5, Ch. 208, L. 1959; amd. Sec. 2, Ch. 154, L. 1961; amd. Sec. 3, Ch. 10, Ex. L. 1969.

#### Amendments

The 1969 amendment substituted "monthly" for "quarterly" wherever appearing in the section; in the first paragraph, substituted "fifteenth day of the month" for "last day of the month," and added the exception; and, in the second paragraph, substituted "fifty dollars (\$50)" for "ten dollars (\$10)."

#### Effective Dates

Section 4 of Ch. 10, Ex. Laws 1969 read "Section 1 [84-4902] and section 2 [84-4902.1] of this act shall be effective as to all taxable years commencing on or after

December 31, 1968, whether on a calendar or fiscal year basis."

Section 5 of Ch. 10, Ex. Laws 1969 read "Section 3 [84-4903.5] of this act shall be effective as to all payment periods beginning after June 30, 1969."

Section 6 of Ch. 10, Ex. Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 19, 1969.

#### Repealing Clauses

Section 7 of Ch. 10, Ex. Laws 1969 read "Section 2 of chapter five, extraordinary session laws of Montana, 1967 is repealed."

Section 8 of Ch. 10, Ex. Laws 1969 repealed all acts and parts of acts in conflict therewith.

### 84-4907. (2295.7) Nonresident taxpayers.

#### Cross-References

Multistate tax compact, sec. 84-6701.

**84-4908. (2295.8) Alternative deduction allowed in computing net income.** In the case of a resident individual, a standard deduction equal to ten per cent (10%) of adjusted gross income shall be allowed if elected by the taxpayer on his return. The standard deduction shall be in lieu of all deductions allowed under section 84-4906, R. C. M. 1947, except the deduction allowed for federal income taxes under paragraph (b) of that section. The maximum standard deduction shall be five hundred dollars (\$500) except in the case of a single joint return of husband and wife the maximum standard deduction shall be one thousand dollars (\$1,000). The standard deduction shall not be allowed to either the husband or the wife if the tax of one of the spouses is determined without regard to the standard deduction. For purposes of this section, the determination of whether an individual is married shall be made as of the last day of the taxable year; provided, however, if one of the spouses dies during the taxable year, the determination shall be made as of the date of death.

**History:** En. Sec. 8, Ch. 181, L. 1933; amd. Sec. 1, Ch. 207, L. 1949; amd. Sec. 1, Ch. 187, L. 1953; amd. Sec. 4, Ch. 260, L. 1955; amd. Sec. 1, Ch. 202, L. 1969.

#### Amendments

The 1969 amendment, in the first sentence, deleted "prior to the allowance of

any deductions provided for in section 84-4906" after "adjusted gross income"; substituted the present second sentence for former provision which was similar to the second sentence save for the exception; substituted, in the fourth sentence, "either the husband or the wife" for "a husband or wife" and "one of the spouses" for



"the other spouse" and deleted "on the basis of net income computed" after "terminated"; and added the last sentence.

#### Effective Date

Section 2 of Ch. 202, Laws 1969 read "This act is effective as to taxable years ending on and after December 31, 1968."

**84-4913. (2295.13) Information agents' duties.** Every information agent shall make return to the board of complete information concerning the following distributions made for any individual during the taxable year, upon which no withholding tax has been deducted:

(1) Sums in excess of ten dollars (\$10) distributed as dividends, interest as defined in section 6049 of the Internal Revenue Code of 1965 or as that section may be amended, and payments made under a retirement plan covering an owner-employee as defined in section 401 (c) (3) of the Internal Revenue Code of 1965 or as that section may be amended;

(2) Interest, other than that specified in subsection (1) of this section, rents, royalties, salaries, wages, prizes, awards, annuities, pensions and other fixed or determinable gains, profits and income in excess of six hundred dollars (\$600), except interest coupons payable to the bearer.

The return should be made under the regulations and in the form and manner prescribed by the board, provided, however, that for ease of reporting, the form shall be as nearly identical to the comparable federal form as possible.

**History:** En. Sec. 13, Ch. 181, L. 1933; amd. Sec. 7, Ch. 260, L. 1955; amd. Sec. 1, Ch. 205, L. 1967.

in subsection (1), is codified as Tit. 26 of the United States Code.

#### Amendments

The 1967 amendment completely rewrote this section. For previous text, see parent volume.

#### Compiler's Notes

The Internal Revenue Code, referred to

**84-4914. (2295.14) Returns and payment of tax—penalty and interest—refunds—credits.** (1) Every single individual and every married individual not filing a joint return with his or her spouse and having a gross income for the taxable year of six hundred dollars (\$600) or over, and married individuals not filing separate returns and having a combined gross income for the taxable year of twelve hundred dollars (\$1,200) or over, shall be liable for the return to be filed on such forms and according to such rules and regulations as the board of equalization may prescribe.

(2) In accordance with instructions set forth by the board, every taxpayer who is married and living with husband or wife and is required to file a return may, at his or her option, file a joint return with husband or wife even though one of the spouses has neither gross income nor deductions. If a joint return is made, the tax shall be computed on the aggregate taxable income and the liability with respect to the tax shall be joint and several. If a joint return has been filed for a taxable year, the spouses may not file separate returns after the time for filing the return of either has expired, unless the board so consents.

(3) \* \* \* [Same as parent volume.]

(4) All taxpayers, including, but not limited to those subject to the provisions of sections 84-4939 and 84-4943, as amended, shall compute the

amount of income tax payable and shall at the time of filing the return required by this act, pay to the board any balance of income tax remaining unpaid after crediting the amount withheld as provided by section 84-4943, as amended, and/or any payment made by reason of an estimated tax return provided for in section 84-4939, as amended, provided however, the tax so computed is greater by one dollar (\$1) than the amount withheld and/or paid by estimated return as provided in this act.

If the amount of tax withheld and/or payment of estimated tax exceeds by more than one dollar (\$1) the amount of income tax as computed, the taxpayer shall be entitled to a refund of the excess.

(5) \* \* \* [Same as parent volume.]

(6) If the amount of tax as verified is greater than the amount theretofore paid, the excess shall be paid by the taxpayer to the board within thirty (30) days after notice of the amount of the tax as computed with interest added at the rate of nine per centum (9%) per annum or fraction thereof on the additional tax. In such case there shall be no penalty because of such understatement, provided the deficiency is paid within thirty (30) days after the first notice of the amount is mailed to the taxpayer.

If payment is not made within thirty (30) days or if the understatement is due to negligence on the part of the taxpayer, but without fraud, there shall be added to the amount of the deficiency five per centum (5%) thereof, provided, however, that no deficiency penalty shall be less than two dollars (\$2). Interest will be computed at the rate of nine per centum (9%) per annum or fraction thereof on the additional assessment. Except as otherwise expressly provided in this subdivision, the interest shall in all cases be computed from the date the return and tax was originally due (as distinguished from the due date as it may have been extended) to the date of payment.

If the time for filing a return is extended, the taxpayer shall pay in addition, interest thereon at the rate of nine per centum (9%) per annum from the time when the return was originally required to be filed to the time of payment.

**History:** En. Sec. 14, Ch. 181, L. 1933; amd. Sec. 1, Ch. 34, L. 1949; amd. Sec. 8, Ch. 260, L. 1955; amd. Sec. 2, Ch. 227, L. 1957; amd. Sec. 5, Ch. 253, L. 1959; amd. Sec. 1, Ch. 201, L. 1963; amd. Sec. 1, Ch. 347, L. 1969.

#### Amendments

The 1969 amendment, in subsection (1), substituted "not filing a joint return with

his or her spouse and" for "filing a separate return" and "not filing separate returns" for "filing a joint return"; in subsection (2), added the last sentence; in subsection (4), made minor changes in punctuation; and in subsection (6), raised the interest rate on delinquent income taxes from "six per centum (6%)" per annum to "nine per centum (9%)."

### 84-4915. (2295.15) Exemption allowed nonresident, etc.

#### Cross-References

Multistate tax compact, sec. 84-6701.

**84-4920.1. Suspension of running of statute of limitations—grounds.** The running of the statute of limitations provided for under section 84-4920 shall be suspended during any period that the federal statute of limitations for collection of federal income tax has been suspended by (1) written

agreement signed by the taxpayer or, (2) when the taxpayer has instituted an action which has the effect of suspending the running of the federal statute of limitations, and for one (1) additional year. If the taxpayer fails to file a record of changes in federal taxable income or an amended return as required by section 84-4938, the said statute of limitations shall not apply until five years from the date the federal changes become final or the amended federal return was filed. If the taxpayer omits from gross income an amount properly includable therein which is in excess of twenty-five per cent (25%) of the amount of adjusted gross income stated in the return the said statute of limitations shall not apply for two additional years from the time specified in section 84-4920.

**History:** En. Sec. 2, Ch. 103, L. 1955;  
amd. Sec. 1, Ch. 61, L. 1967.

#### **Amendments**

The 1967 amendment substantially rewrote this section. For previous text, see parent volume.

**84-4924. (2295.24) Penalties for violations of act.** (1) If any person, without intent to evade any tax imposed by this act, fails to make a return of income at the time required by or under the provisions of this act, there shall be imposed a minimum penalty of ten dollars (\$10) for such failure, or, if a tax in excess of two hundred dollars (\$200) is due, a penalty in an amount equal to five (5) per centum thereof, unless it is shown that the failure was due to reasonable cause and not due to neglect. If any person, without intent to evade any tax imposed by this act, fails to pay any tax if one is due at the time required by or under the provisions of this act, there shall be added to the tax an additional amount equal to ten (10) per centum thereof, but not less than ten dollars (\$10), unless it is shown that the failure was due to reasonable cause and not due to neglect. Interest at the rate of nine per centum (9%) per annum shall be added to the tax for the entire period it remains unpaid.

(2) If any person fails with intent to evade any tax imposed by this act, to make a return of income or to pay a tax if one is due at the time required by or under the provisions of this act there shall be added to the tax an additional amount equal to twenty-five per centum (25%) thereof, but such additional amount shall in no case be less than twenty-five dollars (\$25), and interest at one (1) per centum for each month or fraction of a month during which the tax remains unpaid.

(3) and (4). \* \* \* [Same as parent volume.]

**History:** En. Sec. 24, Ch. 181, L. 1933; amd. Sec. 1, Ch. 163, L. 1955; amd. Sec. 3, Ch. 201, L. 1963; amd. Sec. 2, Ch. 347, L. 1969.

#### **Amendments**

The 1969 amendment, in subsection (1), deleted "or pay any tax if one is due" after "return of income," rewrote the penalty provision in the first sentence which formerly provided for a 5% penalty, but

not less than \$2; inserted the second sentence; raised the interest rate in the third sentence from 6 to 9% per year; and in subsection (2), substituted "twenty-five dollars (\$25)" for "two dollars (\$2.00)" after "shall in no case be less than."

#### **Effective Date**

Section 3 of Ch. 347, Laws 1967 read "This act is effective as to taxable years ending on and after December 31, 1968."

**84-4928.1. Jeopardy assessments.** If the state board of equalization finds that the assessment or collection of the tax or a deficiency for any



taxable year will be jeopardized in whole or in part by delay, it may mail or issue notice of its findings to the taxpayer, together with a demand for immediate payment of the tax or deficiency declared to be in jeopardy, including penalty and accrued interest. In the case of a tax for a current period, the state board of equalization may declare the taxable period of the taxpayer immediately terminated and shall mail or issue notice of its findings to the taxpayer, together with a demand for immediate payment of the tax based on the period declared terminated.

A jeopardy assessment is immediately due and payable and proceedings for collection may be commenced at once.

**History:** En. 84-4928.1 by Sec. 2, Ch. 212, L. 1967.

the state of Montana; amending section 84-4946, R. C. M. 1947.

#### Title of Act

An act providing an accelerated tax collection in the event it appears that a delay will jeopardize the collection of tax due

#### Effective Date

Section 3 of Ch. 212, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved February 28, 1967.

**84-4931. (2295.30) Divulging information unlawful—exceptions—penalty.** (1) to (3). \* \* \* [Same as parent volume.]

(4) Further, notwithstanding any of the provisions of this section, the board shall furnish to the Montana highway patrol board all information necessary to identify those persons qualifying for the additional exemption for blindness pursuant to section 84-4910 (d), for the purpose of enabling said highway patrol board to administer the provisions of section 31-127, R.C.M. 1947.

**History:** En. Sec. 30, Ch. 181, L. 1933; amd. Sec. 1, Ch. 110, L. 1951; amd. Sec. 1, Ch. 253, L. 1967.

#### Amendments

The 1967 amendment added subsection (4).

**84-4936. Income tax statute—reference—definition.**

#### Compiler's Notes

Sections 84-4916, 84-4918, 84-4933 to 84-4935, contained in the reference to Chapter 49 of this Title in this section in the parent volume, were repealed by Sec. 15, Ch. 260, Laws 1955; section 84-4923 was

repealed by Sec. 2, Ch. 212, Laws 1957; sections 84-4925, 84-4944, 84-4949, and 84-4952, were repealed by Sec. 4, Ch. 227, Laws 1957; and sections 84-4953 and 84-4957 were repealed by Sec. 8, Ch. 126, Laws 1963.

**84-4937. Credit allowed resident taxpayers for income taxes, etc.**

#### Cross-References

Multistate tax compact, sec. 84-6701.

**84-4938. Furnishing copy of federal return, copies of federal corrections, and filing amended return required.** Every taxpayer shall upon request of the board, furnish a copy of the return for the corresponding year which he has filed or may file with the federal government showing his net income and how obtained and the several sources from which derived. If the amount of a taxpayer's taxable income is changed or corrected by the United States Internal Revenue Service or other competent authority, the taxpayer shall report such change or correction to the board within ninety days after receiving notice thereof. If a taxpayer files an amended federal income tax return changing or correcting his

federal taxable income for any taxable year, he shall also file an amended return with the state board of equalization within ninety days thereafter. The board shall supply all necessary forms and shall return all such forms to the taxpayer after they have been examined by the board, upon the request of the taxpayer.

**History:** En. 84-4938 by Sec. 11, Ch. 260, L. 1955; amd. Sec. 2, Ch. 61, L. 1967.

#### Amendments

The 1967 amendment substantially re-wrote this section. For previous text, see parent volume.

#### Effective Date

Section 3 of Ch. 61, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved February 20, 1967.

**84-4946. Quarterly payment by employer—exception.** On or before the last day of the months of April, July, October and January of each calendar year, beginning with the month of October, 1955, every employer subject to the provisions of sections 84-4943 and 84-4945 shall file a return in such form and containing such information as may be required by the board, and shall pay therewith the amount required by section 84-4943 to be deducted and withheld by said employer from wages paid during the preceding quarterly period of three (3) months, beginning with wages paid from and after July 1, 1955.

If the total amount of the tax withheld by an employer under the provisions of this act upon the wages of all employees of any employer is less than ten dollars (\$10) in each quarterly period of any year, such employer shall not be required to file the quarterly returns or to make the quarterly payments as provided in the preceding paragraph, but in lieu thereof such employer shall, on or before February fifteenth of the year succeeding that in which such wages were paid, file an annual return in such form as may be required by the board, and shall pay therewith the amount required to be deducted and withheld by the said employer from all wages paid during the preceding calendar year.

Provided, however, that if the board has reason to believe that collection of the amount of any tax withheld is in jeopardy, it may proceed as provided for under section 84-4928.1 with respect to jeopardy assessments of income tax.

**History:** En. Sec. 5, Ch. 246, L. 1955; amd. Sec. 1, Ch. 212, L. 1967.

#### Amendments

The 1967 amendment, in the first paragraph, substituted "sections 84-4943 and 84-4945" for "this act" after "provisions of"; substituted "as may be required by" for "as shall be determined by" after "such information"; and substituted "section 84-4943" for "this act" after "the amount required by"; and, in the second paragraph, substituted "If the" for "Pro-

vided, however, that when the aggregate" before "total amount of the tax"; inserted "by an employer" after "withheld"; substituted "as provided in the preceding paragraph" for "last hereinabove provided for" after "quarterly payments"; deleted "next" before "succeeding"; substituted "as may be required by" for "as shall be determined by" after "in such form"; deleted "by this act" after "the amount required"; added the last paragraph; and made minor changes in phraseology.

### CHAPTER 51—INSURANCE COMPANIES GENERAL PROPERTY TAX

#### 84-5101. (2111) Assessment and taxation of insurance companies.

##### Cross-References

Multistate tax compact, sec. 84-6701.

## CHAPTER 54—MINES TAXATION—GENERAL PROPERTY AND NET PROCEEDS TAX

## Section

84-5402. Net proceeds tax—statement of yield, penalty, extension of time.

84-5405. Lien of tax and penalty.

**84-5401. (2088) Taxation of mines.****Cross-References**

Multistate tax compact, sec. 84-6701.

**84-5402. (2089) Net proceeds tax—statement of yield, penalty, extension of time.** Every person, partnership, corporation, or association, engaged in mining, extracting or producing from any quartz vein or lode, placer claim, dump or tailings, or other place or sources whatever, precious stones or gems, gold, silver, copper, coal, lead, petroleum, natural gas, or other valuable mineral, must on or before the thirty-first day of March of each year make out a statement of the gross yield of the above-named metals or minerals from each mine owned or worked by such person, corporation or association during the year preceding the first day of January of the year in which such statement is made, and the value thereof. Such statement shall be in the form prescribed by the state board of equalization, and must be verified by the oath of such person or the manager, superintendent, agent, president or vice-president of such corporation, association or partnership, and must be delivered to the state board of equalization on or before the thirty-first day of March. Such statement shall show the following:

1 to 12. \* \* \* [Same as parent volume.]

If any person shall fail, neglect or refuse to file the statement required by this section within the time required, or within any extended period of time allowed, the state board of equalization when transmitting the net proceeds valuations to the counties shall inform the county assessor of such failure, neglect or refusal and the county assessor in addition to the net proceeds tax, if any, shall assess a penalty of  $\frac{2}{3}$  of 1% of such tax for each calendar month or fraction thereof that the required statement is not filed, deducting therefrom any moneys collected by the state board of equalization required by this section. The state board of equalization shall assess a penalty of \$25 for each calendar month or fraction thereof, not exceeding four months, that the required statement is not filed, to be collected by the state board of equalization and deposited to the credit of the general fund of the state of Montana.

The state board of equalization shall, upon a showing of reasonable cause, grant an extension of time for filing the statement required by this section. This penalty shall be in addition to penalties provided in section 84-5410.

**History:** En. Sec. 1, Ch. 237, L. 1921; re-en. Sec. 2089, R. C. M. 1921; amd. Sec. 1, Ch. 191, L. 1925; amd. Sec. 1, Ch. 139, L. 1927; amd. Sec. 1, Ch. 161, L. 1933; amd. Sec. 1, Ch. 188, L. 1935; amd. Sec. 1, Ch. 95, L. 1947; amd. Sec. 1, Ch. 138, L. 1969.

**Amendments**

The 1969 amendment added the last two paragraphs.



**84-5405. (2090.2) Lien of tax and penalty.** The tax and/or penalty so assessed on net proceeds shall be and shall constitute a lien upon all of the right, title and interest of such operator in or to such mine or mining claim and upon all of the right, title and interest in or to the machinery, buildings, tools and equipment used in operating said mine or mining claim, and the tax and/or penalty on such net proceeds may be collected, and the payment thereof enforced, by the seizure and sale of the personal property upon which the said tax and/or penalty is a lien, in the same manner as other personal property is seized and sold for delinquent taxes, or by the sale of the mine and improvements, as provided for the sale of real property for delinquent taxes, or by the institution of a civil action for its collection in any court of competent jurisdiction; provided, however, that a resort to any one of the methods of enforcing collection, as herein provided for, shall not bar the right to resort to either or both of the other methods, but that any two or all of the methods herein provided for may be used until the full amount of such tax and/or penalty is collected.

**History:** En. Sec. 4, Ch. 161, L. 1933;  
amd. Sec. 2, Ch. 138, L. 1969.

penalty" after "The tax" at the beginning of the section; and added "and the tax and/or penalty \* \* \* such tax and/or penalty is collected."

**Amendments**

The 1969 amendment inserted "and/or

**CHAPTER 56—CIGARETTE TAX—LICENSES—STAMPS**

**Section**

- 84-5606. The tax.
- 84-5606.2. Definitions.
- 84-5606.3. Wholesaler's and retailer's licenses—multiple places of business—application forms.
- 84-5606.4. Vending machines not places of business per se—reports.
- 84-5606.5. Wholesaler's and retailer's license fees—renewal—display of license.
- 84-5606.6. Disposition of license fees—appropriations—transfers to general fund—justification of expenses.
- 84-5606.7. Affixing of insignia.
- 84-5606.8. Revocation or suspension of license—hearing and appeal—duration—sale of cigarettes after revocation or suspension a misdemeanor—forfeiture.
- 84-5606.9. Unlawful acts when license not current and valid—misdemeanor—forfeiture.
- 84-5606.10. Tax imposed by section 84-5606.
- 84-5606.11. Only licensed wholesalers and retailers to affix insignia.
- 84-5606.12. Purchase of insignia at discount to defray costs—defrayment inapplicable to certain portion of tax.
- 84-5606.13. Use of tax meter machine authorized—insignia to be approved—marking of imported packages of cigarettes required—supervision of machines—charge—report.
- 84-5606.14. Resale of insignia prohibited—unused meter settings.
- 84-5606.15. Payment for insignia or affixation within thirty days—bond—new licensees to pay cash.
- 84-5606.16. Proceedings upon failure or refusal to pay tax—penalty.
- 84-5606.17. Tax meter users to keep certain records—examination of records.
- 84-5606.18. Sale and use of cigarettes a misdemeanor if insignia requirements not met.
- 84-5606.19. Place where violations committed deemed a nuisance.
- 84-5606.20. Shipments or deliveries into or out of state to be reported by carrier—form and contents of report.
- 84-5606.21. Transportation of cigarettes without insignia a misdemeanor unless in interstate commerce—vehicle, cigarettes and equipment subject to seizure and forfeiture.
- 84-5606.22. Inventory of seized property—application for return of property.

- 84-5606.23. Investigations, inquiries and hearings authorized—testimony under oath—subpoena powers—finding and order to be made and filed.
- 84-5606.24. Hearing or rehearing before board.
- 84-5606.25. Appeal to district court—notice of appeal—perfecting appeal within thirty days—bond—hearing date.
- 84-5606.26. Board's duties and powers—arrest, entry of complaint and lawful search and seizure authorized.
- 84-5606.27. Promulgation of rules and regulations.
- 84-5606.28. County attorneys and peace officers to assist in enforcement of act—appointment of additional assistants and division authorized—presumption of violation.
- 84-5606.29. Board entitled to sue for unpaid tax and costs—treble damages.
- 84-5606.30. Employment of clerical and field assistants—disposition of taxes—war veterans' compensation fund abolished.
- 84-5606.31. Violation of act a misdemeanor unless otherwise provided—penalties.

### 84-5601 to 84-5605. Repealed.

#### Repeal

Sections 84-5601 to 84-5605 (Secs. 1 to 5, Ch. 289, L. 1947; Secs. 1, 2, Ch. 18, L.

1957), relating to licensing of cigarette dealers and distributors, were repealed by Sec. 32, Ch. 140, Laws 1969.

**84-5606. The tax.** Subdivision — (1) and (2). \* \* \* [Same as parent volume.]

Subdivision—(3) From and after the effective date of this amendatory law there is hereby levied, imposed and assessed, and there shall be collected and paid to the state of Montana, upon cigarettes sold or possessed in this state, the following excise tax, in addition to the excise tax on cigarettes, levied, imposed and assessed by subdivision (2) of this section 84-5606, an additional tax which shall be paid prior to the time of sale and delivery of such cigarettes, to wit:

Two cents (2¢) on each package containing not more than twenty (20) cigarettes, and when packages shall contain more than twenty (20) cigarettes, then two cents (2¢) on each twenty (20) or fraction of twenty (20) cigarettes contained in such package; which additional tax shall continue in force until the payment and retirement of all bonds of the state of Montana, and the payment of interest thereon, issued under the authority of said Initiative No. 54 as amended, for the purpose of paying an honorarium to the residents of Montana who were in military service in the military forces of the United States in World War II, the Korean War, or World War I, and until the payment and retirement of all long-range building program bonds issued under the provisions of title 79, chapter 22, of the Revised Codes of Montana, 1947.

Subdivision—(4) From and after the effective date of this amendatory act of the thirty-eighth legislative assembly of the state of Montana, there is hereby levied, imposed and assessed, and there shall be collected and paid to the state of Montana, upon cigarettes sold or possessed in this state, the following excise tax, in addition to the excise tax on cigarettes, levied, imposed and assessed by subdivisions (2) and (3) of this section 84-5606, an additional tax which shall be paid prior to the time of sale and delivery of such cigarettes, to wit:

One cent (1¢) on each package containing not more than twenty (20) cigarettes, and when packages shall contain more than twenty (20) cigarettes, then one cent (1¢) on each twenty (20) or fraction of twenty (20)

cigarettes contained in such package; which additional tax shall continue in force until the payment and retirement of the additional bonds of the state of Montana authorized by amendatory acts of the thirty-fifth and thirty-eighth legislative assemblies, and the payment of the interest thereon and until the payment and retirement of all long-range building program bonds issued under the provisions of Title 79, chapter 22, of the Revised Codes of Montana, 1947.

Within seventy-two (72) hours after receipt by the distributor or dealer of any such cigarettes, except as hereinafter provided, he shall cause to be securely affixed thereto, the required insignia denoting the tax thereon. Said insignia shall be properly canceled prior to sale or removal for consumption under such regulations as the board may prescribe. Each package shall have the required insignia to affix thereto in such a manner that the insignia will be destroyed when the package is opened. Every person who shall make, alter, forge or counterfeit any license stamp or insignia provided for in this law, or who shall assist or be concerned therein, or who shall have in his possession any altered, forged, counterfeit or spurious stamp, license or insignia, with intent to defraud the state, is guilty of forgery, and shall be punished by imprisonment in the state prison for not less than one (1) year or more than fourteen (14) years.

**History:** En. Sec. 6, Ch. 289, L. 1947; amd. Sec. 16, Initiative No. 54 (L. 1951, p. 781); amd. Sec. 1, Ch. 123, L. 1953; amd. Sec. 3, Ch. 18, L. 1957; amd. Sec. 7, Ch. 44, L. 1957; amd. Sec. 1, Ch. 222, L. 1957; amd. Sec. 1, Ch. 97, L. 1963; amd. Sec. 6, Ch. 270, L. 1963; amd. Sec. 5, Ch. 318, L. 1967.

#### Amendments

The 1967 amendment added "and until the payment \* \* \* Revised Codes of Montana, 1947" at the end of the second paragraph of subdivision (3), and after "interest thereon" in the second paragraph of subdivision (4), substituted the same phrase for "and the payment of the expenses of administration of the amendatory act."

#### Referendum Result

Section 1 of Ch. 318, Laws 1967, read: "It is determined that the electors of the state at the general election held in November, 1966, approved the levy and collection of the three-cent (3¢) per package cigarette tax authorized by section 84-5606, subdivisions (3) and (4), R. C. M. 1947, for the purpose of financing the cost of constructing and remodeling state buildings; this referendum measure having been presented at said election in the manner directed by chapter 264 of the Session Laws of the thirty-ninth legislative assembly, and having been approved by a majority of the electors voting on the question; and that it is now necessary to establish the procedure by which said referendum may be made effective."

### INITIATIVE MEASURE NO. 54 AMENDMENTS

Section 9 of chapter 270 of the 1963 Session, which amended Initiative Measure No. 54 (Laws 1951, pp. 781 to 790) was amended by section 1 of chapter 112 of the 1967 Session. Section 1 of chapter 112 of the 1967 Session was amended by section 1 of chapter 236 of the 1969 Session; Section 9 of the act now reads:

**Chapter 270, Laws 1963; amd. Chapter 112, Laws 1967; amd. Chapter 236, Laws 1969.**

Section 9. Claims for benefits under the provisions of subdivision (1) of section 2, and/or under section 3 of said Initiative No. 54, as by this amendatory act amended, may be filed at any time before the expiration of five (5) years and six (6) months from and after the January first next following the date of

the passage and approval of this act, provided, however, that said period of five (5) years and six (6) months shall be extended for a period equal to the period, or the aggregate of the periods, of the time during which the administration of this act shall be suspended, by reason of litigation or from any other cause.

[The remainder of Ch. 112, Laws 1967 read as follows:



"Section 2. All acts and parts of acts in conflict herewith are hereby repealed. "Section 3. This act shall be in full force and effect upon its passage and approval." Approved February 21, 1967.]

**84-5606.2. Definitions.** As used in this act the following definitions shall apply unless the context otherwise requires:

(a) The word "board" shall mean the state board of equalization of the state of Montana.

(b) The word "person" shall mean any individual, firm, fiduciary, partnership, corporation, trust, organization or association however formed.

(c) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of nontobacco paper, or any other substance or material except tobacco.

(d) The words "insignia" or "indicia" shall mean the impression or mark approved by the state board of equalization, under the provisions of this act.

(e) The words "full face value of insignia" shall mean the total amount of the tax levied under this act.

(f) The words "public warehouses" shall mean agents or representatives of manufacturers who receive cigarettes in earload lots for distribution to wholesaler and retailers in original cases.

(g) The word "wholesaler" shall mean and include any person resident in this state who brings or causes to be brought into this state unstamped cigarettes purchased directly from the manufacturers thereof and stores, sells, or otherwise disposes of the same after they shall reach this state; and also any person who, within this state, manufactures or produces, directly or indirectly, cigarettes and sells or distributes the same within this state.

(h) The words "licensed wholesaler" shall mean a wholesaler duly licensed under the provisions of this act.

(i) The words "cigarette vendor" shall mean and include any person, company or corporation, doing business in the state, who purchases cigarettes through a wholesaler for ten (10) or more cigarette vending machines, which he operates for a profit in premises or locations other than his own. Such person, company or corporation shall be treated as a wholesaler. Any person, company, corporation or fraternal organization who operates less than ten (10) cigarette vending machines shall be treated as a retailer.

(j) The word "retailer" shall mean any person other than a wholesaler, who is engaged in the business of selling cigarettes at retail.

(k) The words "licensed retailer" shall mean any person other than a wholesaler, who is duly licensed under the provisions of this act.

(l) The words "sale" and "sell" shall mean and include any transfer of cigarettes by sale, as defined by section 87A-2-106, R. C. M. 1947, or by gift, barter or exchange.

**History:** En. Sec. 1, Ch. 140, L. 1969.

**Title of Act**

An act repealing sections 84-5601, 84-5602, 84-5603, 84-5604, 84-5605, 84-5607, 84-

5608, 84-5609, 84-5610, 84-5611, 84-5612, 84-5613, 84-5614, 84-5615, 84-5616, 84-5617, 84-5618, 84-5619, 84-5620, 84-5621, 84-5622, and 84-5623, R. C. M. 1947, and providing for annual license fees and for annual licensing of wholesalers and retailers of cigarettes, and for the payment of the costs of enforcement of state cigarette laws; and providing procedures for the

collection of the tax imposed by section 84-5606, R. C. M. 1947; and providing for penalties for violations of this act, and providing for the administration of this act; and providing revenue for the general fund of the state of Montana.

#### Cross-References

Multistate tax compact, sec. 84-6701.

**84-5606.3. Wholesaler's and retailer's licenses—multiple places of business—application forms.** Every wholesaler or retailer shall obtain a license from the board before engaging in the business of wholesaler or retailer. A separate application and a separate license shall be required for each place of business owned, controlled or operated by such wholesaler or retailer within the state of Montana. Application forms shall require the type and general description of applicant organizations, names and home addresses of all known owners, state whether or not principals of such organization have been convicted of a felony and identify each such individual, and such other pertinent information as the board may require in regularly promulgated regulations.

**History:** En. Sec. 2, Ch. 140, L. 1969.

**84-5606.4. Vending machines not places of business per se—reports.** Cigarette vending machines shall not be considered as places of business per se but a report of each and all machines shall be made on forms prescribed by the board, which shall state the name and address of the cigarette vendor, the assigned location of each machine with best machine identification available, type of business, and such other information as the board may require for proper administration of this act.

**History:** En. Sec. 3, Ch. 140, L. 1969.

**84-5606.5. Wholesaler's and retailer's license fees—renewal—display of license.** Each application for a wholesaler's license shall be accompanied by a fee of fifty dollars (\$50) effective July 1, 1969. Each application for a retailer's license shall be accompanied by a fee of five dollars (\$5) effective July 1, 1969. These licenses shall be renewed annually upon payment of the annual fee in the amount set forth above, and shall be effective for one year, without proration. Each license shall be prominently displayed on the licensed premises, and a separate license shall be displayed at each place of business owned, controlled or operated by such wholesaler or retailer.

**History:** En. Sec. 4, Ch. 140, L. 1969.

**84-5606.6. Disposition of license fees—appropriations—transfer to general fund—justification of expenses.** All license fees collected under the provisions of this act shall be deposited monthly with the state treasurer in the board's cigarette enforcement account in the earmarked revenue fund. There shall be appropriated to the board, from said cigarette enforcement account, such sum as may be necessary to comply with the provisions of this act for the fiscal biennium ending June 30, 1971. On or

before June 30, 1971, the board shall pay to the state treasurer to the credit of the state general fund, all funds in excess of seven thousand five hundred dollars (\$7,500) in said cigarette enforcement account, not needed for the administration of this act.

For the biennium beginning July 1, 1971, and each biennium thereafter, there shall be appropriated to the board a sum deemed justified and reasonable to operate the board's cigarette enforcement division, providing that after payment of all pending and known expenses, all sums so appropriated in excess of seven thousand five hundred dollars (\$7,500) not needed for the administration of this act, shall be transferred to the state general fund to be available for general fund purposes. Such transfer shall be made within fifteen (15) days of the last day of the biennium.

All expenses charged against said cigarette enforcement account shall be justified by itemized claims coupled with standard accounting reports.

**History:** En. Sec. 5, Ch. 140, L. 1969.

**84-5606.7. Affixing of insignia.** Wholesalers and retailers licensed under this act may buy, sell or have in their possession only cigarettes which have the insignia provided for in this act on each package. The insignia provided for in this act shall be sold to, and affixed by, licensed wholesalers and licensed retailers only.

**History:** En. Sec. 6, Ch. 140, L. 1969.

**84-5606.8. Revocation or suspension of license—hearing and appeal—duration—sale of cigarettes after revocation or suspension a misdemeanor—forfeiture.** The board may revoke or suspend the license of any wholesaler or retailer for failure to comply with any provision of this act or of the Unfair Cigarette Sales Act (sections 51-301 through 51-314, R. C. M. 1947), and with any lawful rule or regulation of the board made pursuant to said laws. Any person aggrieved by such revocation or suspension may apply to the board for a hearing which shall be open to the public, and may further appeal to the court, as hereinafter provided. When a license has been duly revoked, no license shall again issue to such licensee for a period of one (1) year thereafter. When a license has been duly suspended, the suspension may be for any period not to exceed one (1) year. Any person who shall sell cigarettes after his license has been revoked or suspended is guilty of a misdemeanor, and shall be punished as hereinafter provided, and all cigarettes in his possession shall be seized and forfeited to the state.

**History:** En. Sec. 7, Ch. 140, L. 1969.

**84-5606.9. Unlawful acts when license not current and valid—misdemeanor—forfeiture.** No person shall sell, offer to sell, or possess with intent to sell, any cigarettes, at wholesale or retail unless his license is current and valid, under the provisions of this act. Any person violating the provisions of this section is guilty of a misdemeanor, and shall be punished as hereinafter provided, and all cigarettes in his possession shall be seized and forfeited to the state.

**History:** En. Sec. 8, Ch. 140, L. 1969.



**84-5606.10. Tax imposed by section 84-5606.** The tax referred to in this act shall mean the tax imposed by section 84-5606, R. C. M. 1947. The full face value of the insignia or tax shall be added to the cost of the cigarettes and recovered from the ultimate consumer or user.

**History:** En. Sec. 9, Ch. 140, L. 1969.

**84-5606.11. Only licensed wholesalers and retailers to affix insignia.** Insignia shall be affixed to packages of cigarettes only by licensed wholesalers and licensed retailers.

**History:** En. Sec. 10, Ch. 140, L. 1969.

**84-5606.12. Purchase of insignia at discount to defray costs—defrayment inapplicable to certain portion of tax.** Every licensed wholesaler and licensed retailer shall be entitled to purchase said insignia at full face value less eight per cent (8%) of the face value, upon payment therefor, as defrayment of the costs of affixing insignia and precollecting such tax on behalf of the state of Montana. This defrayment is not applicable to that portion of the tax collected for any veterans' honorarium or long-range building program.

**History:** En. Sec. 11, Ch. 140, L. 1969.

**84-5606.13. Use of tax meter machine authorized—insignia to be approved—marking of imported packages of cigarettes required—supervision of machines—charge—report.** The board may authorize any wholesaler or retailer of cigarettes licensed under this act to use a tax meter machine with which to imprint an insignia upon each package of cigarettes imported, sold or delivered in this state. The insignia shall be one approved by the board. Each package of cigarettes imported into this state, delivered or sold therein shall be marked with the proper insignia of such tax-stamping meter and thereafter any original package of cigarettes so marked may be lawfully possessed and sold within the state by any wholesaler or retailer licensed under this act. The board shall supervise and check the operation of such tax meter machines. The operator of such machine before using the same, shall take the meter thereof to the county treasurer, of the county in which the machine is operated, who is authorized to, and shall set said meter for the number of packages specified and required by the operator. Prior to setting said meter the county treasurer shall charge said operator the amount of money proper for said setting, less the expense defrayment of eight per cent (8%) provided for in section 11 [84-5606.12]. The county treasurer shall collect this amount in advance unless the board has allowed the purchaser credit as provided in section 14 [84-5606.15]. The county treasurer shall report to the board on forms prescribed by it, the name of the licensed wholesaler or licensed retailer and the number of packages for which said meter was set and shall forward to the board any amounts collected from said licensee.

**History:** En. Sec. 12, Ch. 140, L. 1969.

**84-5606.14. Resale of insignia prohibited—unused meter settings.** No wholesaler or retailer shall resell to any other wholesaler or retailer any insignia purchased by him from the board. Any wholesaler or retailer who

has on hand any meter settings at the time of discontinuing his business of selling cigarettes, may apply to the board and be paid the face value of said meter settings less the amount of the expense defrayment allowed by section 11 [84-5606.12].

**History:** En. Sec. 13, Ch. 140, L. 1969.

**84-5606.15. Payment for insignia or affixation within thirty days—bond—new licensees to pay cash.** The board shall permit a licensed wholesaler or licensed retailer to pay for the insignia purchased, or affixation of insignia, within thirty (30) days after the date of purchase and shall require such licensee to file with the board a bond issued by a surety company approved by the state department of insurance as to solvency and responsibility and authority to transact business in the state, for such amount as the board may fix, but not in excess of an amount equal to the maximum insignia purchases incurred for any thirty (30) day period in the previous calendar year; provided, however, that any newly licensed wholesaler or licensed retailer shall pay on a cash basis for one (1) complete calendar year, after which the board may permit him thirty (30) days to pay for the purchase or affixation of insignia and shall require a bond as hereinabove provided.

**History:** En. Sec. 14, Ch. 140, L. 1969.

**84-5606.16. Proceedings upon failure or refusal to pay tax—penalty.** If any person fails or refuses to pay the tax required by this act when due, the board shall proceed to determine the tax due from such information as the board can obtain and shall assess the tax so determined against such person and notify him of the amount thereof. After such notice such tax shall become due and payable, together with a penalty of five per cent (5%) of such tax, or five dollars (\$5) per day for each day after the date of such notice, whichever is greater.

**History:** En. Sec. 15, Ch. 140, L. 1969.

**84-5606.17. Tax meter users to keep certain records—examination of records.** All tax meter users shall keep for a period of one (1) year, all invoices of cigarettes purchased and imported by them, all receipts issued by them and insignia purchased, also, an accurate record of all sales of cigarettes by such tax meter users, showing the name and address of each purchaser, the date of sale, the quantity of each kind sold, the name of any carrier, the shipping point and destination. Such tax meter users shall permit the board, its assistants, authorized agents or representatives to examine all taxable items of cigarettes, invoices, receipts, books, paper, memoranda and records, as may be necessary to determine whether the tax meter machine has been used as required, or the insignia required by this act had been purchased and used, or to determine the amount of such tax as may be due or unpaid.

**History:** En. Sec. 16, Ch. 140, L. 1969.

**84-5606.18. Sale and use of cigarettes a misdemeanor if insignia requirements not met.** Every person who sells any packages of cigarettes

which does not bear the insignia required by this act, and every person who shall use or consume within this state, any cigarette, unless the same shall be taken from the original package having affixed thereto the insignia required by this act, is guilty of a misdemeanor and shall be punished as hereinafter provided.

History: En. Sec. 17, Ch. 140, L. 1969.

**84-5606.19. Place where violations committed deemed a nuisance.**

Every person having possession or control of, or who maintains a building or place where cigarettes are sold in violation of this act, or permits the same to be done in any place or building possessed, controlled or maintained by him, is guilty of maintaining and keeping a nuisance and the building or place so used, together with the personal property and fixtures used in connection therewith shall be deemed a nuisance, and such person shall be enjoined and such building or place, personal property and fixtures abated as a nuisance, at the instance of the state.

History: En. Sec. 18, Ch. 140, L. 1969.

**84-5606.20. Shipments or deliveries into or out of state to be reported by carrier—form and contents of report.** Every common carrier hauling, transporting or shipping into or out of the state of Montana, from or to any other state, any cigarettes shall report in writing such shipments or deliveries to the board, on forms furnished by the board, giving the date, the person to whom the same was consigned and delivered and the quantity as shown by the bill of lading, and such other information as the board may require.

History: En. Sec. 19, Ch. 140, L. 1969.

**84-5606.21. Transportation of cigarettes without insignia a misdemeanor unless in interstate commerce—vehicle, cigarettes and equipment subject to seizure and forfeiture.** It shall be unlawful for any person to transport into, receive, carry or move from place to place within this state, except in the course of interstate commerce, any cigarettes which do not bear the insignia required by this act. Any person violating the provisions of this section is guilty of a misdemeanor and shall be punished as hereinafter provided, and any motor vehicle, airplane, conveyance, vehicle or other means of transportation, in which cigarettes are being unlawfully transported, together with the cigarettes and other equipment or personal property used in connection with such transportation, and found in such means of transportation, shall be subject to seizure by the board, its duly authorized agent, or any sheriff or deputy, or other peace officer, and shall be subject to forfeiture in the manner hereinafter provided.

History: En. Sec. 20, Ch. 140, L. 1969.

**84-5606.22. Inventory of seized property—application for return of property.** Upon the seizure of any cigarettes, and within two (2) days thereafter, the person or officer making such seizure shall deliver an inventory of the property seized to the person from whom such seizure was



made, if known, and file a copy thereof with the board. The person from whom the seizure was made, or any other person claiming an interest in the property seized, may apply for its return as provided in sections 95-713 through 95-716, R. C. M. 1947.

**History:** En. Sec. 21, Ch. 140, L. 1969.

**84-5606.23. Investigations, inquiries and hearings authorized—testimony under oath—subpoena powers—finding and order to be made and filed.** The board and its duly authorized agents are empowered to conduct investigations, inquiries, and hearings hereunder, and any member thereof, or any agent, is authorized to administer oaths and take testimony under oath, relative to the matter of inquiry or investigation. The board, or its authorized agent, may subpoena witnesses and require the production of books, papers and documents pertinent to such inquiry. The board, or its agent, after the hearing, shall make findings and an order, in writing, which findings and order shall be filed in the office of the board and open for public inspection.

**History:** En. Sec. 22, Ch. 140, L. 1969.

**84-5606.24. Hearing or rehearing before board.** Any person aggrieved by any action of the board or its duly authorized agents, under the provisions of this act, may apply to the board, in writing, for a hearing or rehearing thereon within thirty (30) days after such action of the board or its authorized agents. The board shall promptly consider such application, set same for hearing and notify the applicant of the time and place fixed for such hearing or rehearing, which may be at its office or in the county of the applicant. After such hearing or rehearing, the board may make any further or other order in the premises, as it may deem proper and lawful and shall furnish a copy thereof to the applicant. The board, on its own initiative, may order a hearing on any matter concerned with the administration of this act, upon at least ten (10) days notice in writing to the person or persons to be investigated.

**History:** En. Sec. 23, Ch. 140, L. 1969.

**84-5606.25. Appeal to district court—notice of appeal—perfecting appeal within thirty days—bond—hearing date.** Any person aggrieved by any action or decision of the board, made under the provisions of this act, may appeal therefrom to the district court of the county where appellant resides, which appeal shall be taken by notice of appeal in writing, setting forth the actions or decisions of the board, of which the appellant is aggrieved. Such appeal shall be perfected within thirty (30) days after notice of any action or decision of the board, and shall be taken by serving a notice of appeal upon the board and filing the same with the clerk of said court, together with a good and sufficient bond to the state of Montana. The condition of such bond shall be to the effect that appellant agrees to prosecute said appeal diligently, and if the court shall finally decide that the state is entitled to judgment, that appellant will pay the amount thereof together with costs of such appeal. The bond shall be in the form required by law and in such an amount as the court may require. The notice of ap-

peal shall be signed by the appellant or his attorney, and the matter appealed shall be heard upon ten (10) days' notice given by either party, unless a different time is specified by the court. Said district court may grant such relief as the law and the facts in the premises require.

**History:** En. Sec. 24, Ch. 140, L. 1969.

**84-5606.26. Board's duties and powers—arrest, entry of complaint and lawful search and seizure authorized.** The board is charged with the duty of administering and enforcing the provisions of this act, and the board, its members and agents, are hereby given the powers of peace officers, and are authorized and empowered to arrest any person violating any provision of this act, and to enter complaint before any court of competent jurisdiction, and to lawfully search and seize and use as evidence, any unlawful or unlawfully possessed license, stamp or insignia found in the possession of any person or place.

**History:** En. Sec. 25, Ch. 140, L. 1969.

**84-5606.27. Promulgation of rules and regulations.** The board shall have the power and authority to prescribe all rules and regulations not inconsistent with the provisions of this act, for the detailed and efficient administration thereof. All such rules, regulations and orders promulgated shall be published promptly and a copy distributed to each wholesale licensee; be published cumulative annually, and maintained in full as a public record.

**History:** En. Sec. 26, Ch. 140, L. 1969.

**84-5606.28. County attorneys and peace officers to assist in enforcement of act—appointment of additional assistants and division authorized—presumption of violation.** In the enforcement of this act, the board may call to its assistance, and it shall be the duty of any county attorney, or any peace officer, in this state, to assist the board in the enforcement of this act; and the board is hereby authorized to appoint such additional assistants, and to establish an additional division of cigarette enforcement, as may be required to carry out the provisions of this act. Whenever any cigarettes are found in the place of business of any unlicensed wholesaler, retailer or other person, without the insignia affixed and canceled, or not marked as having been received by the unlicensed wholesaler, retailer or person within the preceding seventy-two (72) hours the presumption shall be that such cigarettes are kept therein in violation of the provisions of this chapter.

**History:** En. Sec. 27, Ch. 140, L. 1969.

**84-5606.29. Board entitled to sue for unpaid tax and costs—treble damages.** In the case of any violation of this chapter, the board shall be entitled to sue, in the district where the board maintains its principal office for the amount of the unpaid tax and costs, including reasonable expense of the board in effecting collection of the unpaid tax. Where the

court finds the failure to pay the tax has been willful, the court must, in addition, assess damages in treble the amount of the tax found to be due.

**History:** En. Sec. 28, Ch. 140, L. 1969.

**84-5606.30. Employment of clerical and field assistants—disposition of taxes—war veterans' compensation fund abolished.** The board is hereby authorized to employ such clerical and field assistants as may be necessary to properly administer the provisions of this law. All moneys collected under the provisions of subdivision (2) of section 84-5606, less the expense of collecting all the taxes levied, imposed and assessed by said section 84-5606, shall be paid to the state treasurer and deposited in the general fund of the state. All taxes levied, imposed and assessed under the provisions of subdivision (3) of said section 84-5606 shall, when collected, be paid to the state treasurer and credited to a subfund in the sinking fund and shall, while any of the bonds hereafter issued and sold for the purpose of paying an honorarium, or adjusted compensation, to the residents of Montana who were in military service in the military forces of the United States in World War I or World War II, or any of the interest thereon, remain unpaid, be available for the payment thereof.

All taxes levied, imposed and assessed under the provisions of subdivision (4) of said section 84-5606 shall, when collected, be paid to the state treasurer and credited to a subfund in the sinking fund, which shall, while any of the bonds hereafter issued and sold, in addition to the bonds authorized by said Initiative Measure No. 54, as originally enacted, or any of the interest upon such additional bonds, remain unpaid, be used only for the payment thereof, and of the expenses of administration of this act.

The War Veterans' Compensation Fund established by Initiative No. 54, as amended by chapter 44, Laws of 1957, is abolished and all moneys in the fund are transferred to a subfund in the bond proceeds and insurance clearance fund. When all veterans' honoraria authorized by law have been paid, such moneys shall be transferred to the two accounts in the sinking fund established by this section.

After all of the outstanding War Veterans' Compensation Bonds and World War I Compensation Bonds have been paid or redeemed, or after the necessary funds have been set aside for their payment or redemption, the balance of the proceeds theretofore collected under the provisions of subdivisions (3) and (4) of said section 84-5606 shall be transferred to the sinking fund account provided for in section 79-2203, R. C. M. 1947.

**History:** En. Sec. 29, Ch. 140, L. 1969.

**84-5606.31. Violation of act a misdemeanor unless otherwise provided—penalties.** Unless hereinbefore expressly otherwise provided, the violation of any provision of this act shall constitute a misdemeanor, and any person violating any such provision shall be punished by a fine of not less than one hundred dollars (\$100), or more than five hundred dollars (\$500), or by imprisonment in the county jail for not less than thirty (30) days or more than six (6) months, or by both such fine and imprison-



ment; and if such person is the holder of a license issued under this act, such license shall be revoked by the board for a period of one (1) year.

**History:** En. Sec. 30, Ch. 140, L. 1969.

#### Repealing Clause

Section 32 of Ch. 140, Laws 1969 read "Sections 84-5601 through 84-5605, R. C. M. 1947, and sections 84-5607 through 84-5623, R. C. M. 1947, are repealed."

#### Separability Clause

Section 31 of Ch. 140, Laws 1969 read "The provisions of this act shall be severable and if any of its provisions shall be held unconstitutional or void, the remainder of this act shall continue in full force and effect."

### 84-5607 to 84-5623. Repealed.

#### Repeal

Sections 84-5607 to 84-5623 (Secs. 7 to 23, Ch. 289, L. 1947; Sec. 16, Initiative No. 54, L. 1951, p. 781; Sec. 1, Ch. 123, L. 1953; Secs. 4 to 6, Ch. 18, L. 1957; Sec. 7, Ch. 44, L. 1957; Sec. 2, Ch. 222, L. 1957; Sec.

209, Ch. 147, L. 1963; Sec. 7, Ch. 270, L. 1963; Sec. 6, Ch. 318, L. 1967), relating to the administering of the cigarette tax, were repealed by Sec. 32, Ch. 140, Laws 1969.

## CHAPTER 59—MICACEOUS MINERAL MINES—LICENSE TAXES

### 84-5902. Persons subject to tax.

#### Cross-References

Multistate tax compact, sec. 84-6701.

## CHAPTER 60—MIGRATORY PERSONAL PROPERTY—TAXATION

#### Section

84-6008. Assessment of personal property brought into the state—exceptions.

**84-6008. Assessment of personal property brought into the state—exceptions.** Any personal property, including livestock, brought, driven or coming into this state at any time during the year which is used in the state for hire, compensation or profit; or if the owner and/or the user of the property is engaged in gainful occupation or business enterprise in the state; or the property otherwise comes to rest and becomes a part of the general property of the state, shall be subject to taxation and shall be assessed for all taxes, levied or leviable for that year in the county in which the same shall thus be, in the same manner and to the same extent except as hereinafter otherwise provided, as though such property had been in the county on the regular assessment date; provided that such property has not been regularly assessed for the year in some other county of the state; provided further that nothing herein contained shall be construed into authority to assess or levy any tax against any merchant or dealer within this state on goods, wares or merchandise brought into the county to replenish the stock of such merchant or dealer, in addition to the tax levied against the inventory of said merchant or dealer on the regular assessment date; provided further, that this act shall not apply to motor vehicles brought, driven or coming into this state by any nonresident migratory bona fide agricultural workers temporarily employed in agricultural work in Montana where said motor vehicles are used exclusively for transportation of agricultural workers.

**History:** En. Sec. 1, Ch. 41, L. 1953; amd. Sec. 4, Ch. 290, L. 1967.

**Cross-References**

Multistate tax compact, sec. 84-6701.

**Amendments**

The 1967 amendment substituted "which is used in \* \* \* property of the state" for "and which shall remain in the state for a period not less than thirty (30) days" before "shall be subject"; deleted "and remain" after "thus be"; deleted "and" after "county of the state"; substituted "any" for "an additional" after "assess or levy"; and substituted "in addition to \* \* \* assessment date" for "so long as such addition does not materially increase the inventory or stock which has been duly assessed to such merchant or dealer as of the regular assessment date" before the third proviso.

**Purchase from Dealer**

Where new truck was brought into the state subsequent to the first day of January as replacement to a dealer's stock and therefore exempt from taxation under this section, truck was not subject to personal property taxation to the purchaser of the vehicle at the time of purchase, since he was not the owner of the truck on the date fixed by law for the assessment of property. *Schwartz v. Berg*, 147 M 178, 411 P 2d 736.

**DECISIONS UNDER FORMER LAW**

**Motor Vehicle Inventory**

State board of equalization would be enjoined from assessing cars or trucks brought into state as dealer's inventory after assessment date since dealer would

be taxed thereby in violation of proviso in former statute limiting subsequent tax assessments to material increases in inventory only. *Hardin Auto Co. v. Alley*, 149 M 1, 422 P 2d 346.

**84-6009. Repealed.**

**Repeal**

This section (Sec. 2, Ch. 41, L. 1953), which dealt with tax laws in relation to

listing of personal property, was repealed by Sec. 6, Ch. 290, Laws 1967.

**CHAPTER 61—UNITED STATES PROPERTY—TAXATION**

**84-6101. Property of United States held under contract, etc.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

**CHAPTER 62—MINES OR WELLS PRODUCING NATURAL GAS OR PETROLEUM  
—NET PROCEEDS TAX**

**Section**

84-6202. Statement of yield, penalty, extension of time.

84-6213. Lien of tax and penalty—enforcement of payment.

**84-6202. Statement of yield, penalty, extension of time.** Every person engaged in mining upon any mine whatsoever containing natural gas, petroleum, or other crude or mineral oil must on or before the thirty-first day of March in each year make out and deliver to the state board of equalization a statement of the gross yield of such natural gas, petroleum, or other crude or mineral oil from each mine owned or worked by such person during the next preceding calendar year, and the value thereof. Such statement shall be in the form prescribed by the state board of equalization and must be verified by the oath of such person or the manager, superintendent, agent, president or vice-president of such corporation, association or partnership. Such statement shall show the following:

1 to 7. \* \* \* [Same as parent volume.]

If any person shall fail, neglect or refuse to file the statement required by this section within the time required, or within any extended period of time allowed, the state board of equalization when transmitting the net proceeds valuations to the counties shall inform the county assessor of such failure, neglect or refusal and the county assessor in addition to the net proceeds tax, if any, shall assess a penalty of  $\frac{2}{3}$  of 1% of such tax for each calendar month or fraction thereof that the required statement is not filed, deducting therefrom any moneys collected by the state board of equalization required by this section. The state board of equalization shall assess a penalty of \$25 for each calendar month or fraction thereof, not exceeding four months, that the required statement is not filed, to be collected by the state board of equalization and deposited to the credit of the general fund of the state of Montana.

The state board of equalization shall upon a showing of reasonable cause, grant an extension of time for filing the statement required by this section.

This penalty shall be in addition to penalties provided in section 84-6209.

**History:** En. Sec. 2, Ch. 135, L. 1955;      **Amendments**  
amd. Sec. 1, Ch. 159, L. 1969.

The 1969 amendment added the last three paragraphs.

#### **84-6208. County assessors to compute taxes.**

##### **Cross-References**

Multistate tax compact, sec. 84-6701.

**84-6213. Lien of tax and penalty—enforcement of payment.** The taxes and/or penalties on such net proceeds must be levied as the levy of other taxes is provided for, and every such tax and/or penalty is a lien upon the mine from which the natural gas, petroleum, or crude or mineral oil is mined or extracted, and is a prior lien upon all personal property and improvements used in the process of extracting such natural gas, petroleum, or crude or mineral oil; provided, however, that such personal or real property is owned by or under lease by the person who extracted said natural gas, petroleum, or other crude or mineral oil.

The tax and/or penalty on such net proceeds may be collected, and the payment thereof enforced, by the seizure and sale of the personal property upon which the said tax and/or penalty is a lien, in the same manner as other personal property is seized and sold for delinquent taxes, or by the sale of the mine and improvements, as provided for the sale of real property for delinquent taxes, or by the institution of a civil action for its collection in any court of competent jurisdiction; provided, however, that a resort to any one of the methods of enforcing collection, as herein provided for, shall not bar the right to resort to either or both of the other methods, but that any two or all of the methods herein provided for may be used until the full amount of such tax and/or penalty is collected.

**History:** En. Sec. 13, Ch. 135, L. 1955;      **Amendments**  
amd. Sec. 2, Ch. 159, L. 1969.

The 1969 amendment inserted "and/or penalties" and "and/or penalty" after "taxes" and "tax" where the references appear.



CHAPTER 64—FLIGHT PROPERTY OF AIRLINE COMPANIES—ASSESSMENT AND TAXATION

Section

84-6401. Definitions.

84-6404. Determination of value.

**84-6401. Definitions.** The following words and phrases, when used in this act, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section:

(a) to (c). \* \* \* [Same as parent volume.]

(d) "Flight property" means aircraft fully equipped ready for flight used in air commerce.

(e) to (g). \* \* \* [Same as parent volume.]

**History:** En. Sec. 1, Ch. 249, L. 1955; **Amendments**  
amd. Sec. 1, Ch. 367, L. 1969.

The 1969 amendment deleted "within the state of Montana" from the end of subdivision (d).

**84-6402. Assessment of flight property.**

**Cross-References**

Multistate tax compact, sec. 84-6701.

**84-6404. Determination of value.** The board shall determine the full and true valuation of all flight property of all airlines operating in this state or used by every scheduled airline company in air commerce. This valuation may be ascertained by:

(1) Determining the full and true valuation of all flight property, owned and operated by every scheduled airline company, as an integrated operation; and,

(2) Allocating to the state of Montana, from this total valuation, a valuation which represents this state's proper share of the valuation of the flight property, through the application of ratios, which are indicated in section 84-6403, subsections (8), (9), (10) and (11), against the total valuation.

**History:** En. Sec. 4, Ch. 249, L. 1955;  
amd. Sec. 2, Ch. 367, L. 1969.

**Amendments**

The 1969 amendment substituted "of all airlines operating in this state" for "operated" after "all flight property" and deleted "in this state" at the end of the first sentence and rewrote the second sentence, which read, "In determining the valuation apportioned to this state of such flight property, the board may consider the pro-

portion of total tonnage in the state, total time in equated plane hours, number of revenue ton miles and number of arrivals and departures as required to be reported under section 84-6403."

**Effective Date**

Section 3 of Ch. 367, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 15, 1967.

DECISIONS UNDER FORMER LAW

**Basis for Assessment**

Under former statute providing that board should determine valuation of all flight property used by scheduled airline in air commerce in state, assessment of airline using three types of aircraft but only one type in state was to be made only on

that portion of airline's business arising directly from aircraft used in state, and depreciated value of aircraft used in state was the base for taxation. *Western Air Lines, Inc. v. Michunovich*, 149 M 347, 428 P 2d 3.

## CHAPTER 65—LICENSE TAXES—RACING ASSOCIATIONS

(Repealed—Section 15, Chapter 196, Laws of 1965; Section 6, Chapter 216, Laws of 1967)

**84-6502 to 84-6504. Repealed.****Repeal**

These sections (Secs. 2 to 4, Ch. 57, L. 1961), relating to the taxing of racing

associations, were repealed by Sec. 6, Ch. 216, Laws 1967.

## CHAPTER 66—PROPERTY TAX ON HOUSE TRAILERS

## Section

84-6601. Definitions.

84-6604. Penalty for failure to display or produce declaration, sticker or receipt.

84-6605. Act restricted to trailers subject to taxation.

84-6606. Verified declaration of destination on out-of-state mobile homes—delivery and affixing to vehicle—obtaining tax receipt—exemptions.

84-6607. State board of equalization to make regulations.

**84-6601. Definitions. As used in this act:**

(1) “Mobile home” means forms of housing known as “trailers,” “house trailers” or “trailer coaches” exceeding eight (8) feet in width or thirty-two (32) feet in length designed to be moved from one place to another by an independent power connected thereto.

(2) “House trailer” means; (a) A trailer or semitrailer other than a mobile home as defined in this section which is designed, constructed and equipped as a dwelling place, living abode or sleeping place (either permanently or temporarily) whether mobile or stationary; or

(b) a trailer or semitrailer whose chassis and exterior shell is designed and constructed for use as a house trailer, whether mobile or stationary.

(c) “dealer” means a person engaged in the distribution or sale of mobile homes.

**History:** En. Sec. 1, Ch. 275, L. 1965; amd. Sec. 4, Ch. 296, L. 1967.

**Amendments**

The 1967 amendment substantially rewrote this section. For previous text, see parent volume.

**84-6604. Penalty for failure to display or produce declaration, sticker or receipt.** (1) Whoever makes a false or fraudulent declaration of destination, or, when required, fails to execute a declaration of destination or fails to produce a declaration of destination or tax paid receipt, if a tax paid receipt is required, is guilty of a misdemeanor and upon conviction is punishable by imprisonment in a county jail for not more than six (6) months, or by a fine of not more than five hundred dollars (\$500), or both.

(2) Whoever fails to display a property tax paid sticker or to produce a property tax paid receipt from fifteen (15) days after the due date for personal property taxes of one (1) year to the due date for personal property taxes of the next year shall constitute a misdemeanor punishable by a fine of not less than ten dollars (\$10) nor more than fifty dollars (\$50) or confinement in the county jail for not more than thirty (30) days or both such fine and imprisonment.

**History:** En. Sec. 4, Ch. 275, L. 1965;  
amd. Sec. 7, Ch. 296, L. 1967.

**Amendments**

The 1967 amendment inserted subsection

(1); designated the old section as new subsection (2); substituted "Whoever fails" for "The failure" before "to display"; and deleted "the failure" before "to produce."

**84-6605. Act restricted to trailers subject to taxation.** The provisions of this act shall apply only to those mobile homes and house trailers, as defined in this act, subject to assessment and taxation under section 84-406 and section 84-6008.

**History:** En. Sec. 5, Ch. 275, L. 1965;  
amd. Sec. 8, Ch. 296, L. 1967.

**Amendments**

The 1967 amendment inserted "mobile homes and" before "house trailers."

**84-6606. Verified declaration of destination on out-of-state mobile homes—delivery and affixing to vehicle—obtaining tax receipt—exemptions.**

(1) whoever brings a mobile home into the state of Montana shall immediately upon arrival in the state execute a written declaration verified under oath stating the destination of the mobile home and such other information as the state board of equalization shall require and shall deliver the original of the declaration to whoever is on duty at the nearest port of entry station, state vehicle weight station or such other places and persons as the state board of equalization may prescribe. He shall also immediately upon arrival in the state of Montana affix a copy of the declaration to the mobile home at a conspicuous place.

(2) Whoever moves a mobile home from a point within the state of Montana to another point within or without the state of Montana shall first:

(a) Execute the declaration provided for in subsection (1) of this section, deliver the original of it to the treasurer of the county in which the move originates or to such other person as the state board of equalization shall prescribe and affix a copy of it to the mobile home to be moved at a conspicuous place;

(b) Obtain from the county treasurer of the county in which the move originates a receipt showing payment in full of property taxes due with respect to that mobile home to the date it is moved.

(3) The provisions of subsection (2) (b) of this section shall not apply whenever a person moves a mobile home:

(a) From a point without to a point within the state of Montana.

(b) Between places of business of dealers within or without the state of Montana.

(c) From the place of business of a dealer to a point within or without the state of Montana.

**History:** En. Sec. 5, Ch. 296, L. 1967.

**84-6607. State board of equalization to make regulations.** The state board of equalization may make reasonable rules and regulations necessary for or as an aid to effectuation of the purposes of this act.

**History:** En. Sec. 6, Ch. 296, L. 1967.



## CHAPTER 67—MULTISTATE TAX COMPACT

## Section

84-6701. Compact adopted—text.

84-6702. Montana compact commissioner—chairman of state board of equalization.

84-6703. Alternate—member of state board of equalization.

84-6704. Advisory committee—members—reimbursement—meetings.

**84-6701. Compact adopted—text.** The “Multistate Tax Compact” is hereby enacted into law and entered into with all jurisdictions legally joining therein, in the form substantially as follows:

## ARTICLE I. PURPOSES.

The purposes of this compact are to:

1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
2. Promote uniformity or compatibility in significant components of tax systems.
3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
4. Avoid duplicative taxation.

## ARTICLE II. DEFINITIONS.

As used in this compact:

1. “State” means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.
2. “Subdivision” means any governmental unit or special district of a state.
3. “Taxpayer” means any corporation, partnership, firm, association, governmental unit or agency or person acting as a business entity in more than one state.
4. “Income tax” means a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, one or more forms of which expenses are not specifically and directly related to particular transactions.
5. “Capital stock tax” means a tax measured in any way by the capital of a corporation considered in its entirety.
6. “Gross receipts tax” means a tax, other than a sales tax, which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax an income tax.
7. “Sales tax” means a tax imposed with respect to the transfer for a consideration of ownership, possession or custody of tangible personal property or the rendering of services measured by the price of the tangible personal property transferred or services rendered and which is required by state or local law to be separately stated from the sales price by the seller, or which is customarily separately stated from the sales price, but

does not include a tax imposed exclusively on the sale of a specifically identified commodity or article or class of commodities or articles.

8. "Use tax" means a nonrecurring tax, other than a sales tax, which (a) is imposed on or with respect to the exercise or enjoyment of any right or power over tangible personal property incident to the ownership, possession or custody of that property or the leasing of that property from another including any consumption, keeping, retention, or other use of tangible personal property and (b) is complementary to a sales tax.

9. "Tax" means an income tax, capital stock tax, gross receipts tax, sales tax, use tax, and any other tax which has a multistate impact, except that the provisions of Articles III, IV and V of this compact shall apply only to the taxes specifically designated therein and the provisions of Article IX of this compact shall apply only in respect to the determinations pursuant to Article IV.

### ARTICLE III. ELEMENTS OF INCOME TAX LAWS.

#### Taxpayer Option, State and Local Taxes.

1. Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in two or more party states may elect to apportion and allocate his income in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with Article IV. This election for any tax year may be made in all party states or subdivisions thereof or in any one or more of the party states or subdivisions thereof without reference to the election made in the others. For the purposes of this paragraph, taxes imposed by subdivisions shall be considered separately from state taxes and the apportionment and allocation also may be applied to the entire tax base. In no instance wherein Article IV is employed for all subdivisions of a state may the sum of all apportionments and allocations to subdivisions within a state be greater than the apportionment and allocation that would be assignable to that state if the apportionment or allocation were being made with respect to a state income tax.

#### Taxpayer Option, Short Form.

2. Each party state or any subdivision thereof which imposes an income tax shall provide by law that any taxpayer required to file a return, whose only activities within the taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible personal property, and whose dollar volume of gross sales made during the tax year within the state or subdivision, as the case may be, is not in excess of \$100,000 may elect to report and pay any tax due on the basis of a percentage of such volume, and shall adopt rates which shall produce a tax which reasonably approximates the tax otherwise due. The multistate tax commission, not more than once in five years, may adjust the \$100,000 figure in order to reflect such changes as may occur in the real value of the dollar,

and such adjusted figure, upon adoption by the commission, shall replace the \$100,000 figure specifically provided herein. Each party state and subdivision thereof may make the same election available to taxpayers additional to those specified in this paragraph.

#### Coverage.

3. Nothing in this Article relates to the reporting or payment of any tax other than an income tax.

### ARTICLE IV. DIVISION OF INCOME.

1. As used in this Article, unless the context otherwise requires:

(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(d) "Financial organization" means any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, credit union, co-operative bank, small loan company, sales finance company, investment company, or any type of insurance company.

(e) "Nonbusiness income" means all income other than business income.

(f) "Public utility" means any business entity (1) which owns or operates any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, except by pipeline, or the production, transmission, sale, delivery, or furnishing of electricity, water or steam; and (2) whose rates of charges for goods or services have been established or approved by a federal, state or local government or governmental agency.

(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article.

(h) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

(i) "This state" means the state in which the relevant tax return is filed or, in the case of application of this Article to the apportionment and allocation of income for local tax purposes, the subdivision or local taxing district in which the relevant tax return is filed.

2. Any taxpayer having income from business activity which is taxable both within and without this state, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided



in this Article. If a taxpayer has income from business activity as a public utility but derives the greater percentage of his income from activities subject to this Article, the taxpayer may elect to allocate and apportion his entire net income as provided in this Article.

3. For purposes of allocation and apportionment of income under this Article, a taxpayer is taxable in another state if (1) in that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

4. Rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in paragraphs 5 through 8 of this Article.

5. (a) Net rents and royalties from real property located in this state are allocable to this state.

(b) Net rents and royalties from tangible personal property are allocable to this state: (1) if and to the extent that the property is utilized in this state, or (2) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

(c) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

6. (a) Capital gains and losses from sales of real property located in this state are allocable to this state.

(b) Capital gains and losses from sales of tangible personal property are allocable to this state if (1) the property had a situs in this state at the time of the sale, or (2) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(c) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

7. Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state.

8. (a) Patent and copyright royalties are allocable to this state: (1) if and to the extent that the patent or copyright is utilized by the payer in this state, or (2) if and to the extent that the patent or copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

(b) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

9. All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.

10. The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

11. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from sub-rentals.

12. The average value of property shall be determined by averaging the values at the beginning and ending of the tax period but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

13. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

14. Compensation is paid in this state if:

(a) the individual's service is performed entirely within the state;

(b) the individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or

(c) some of the service is performed in the state and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state, or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

15. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denomina-

tor of which is the total sales of the taxpayer everywhere during the tax period.

16. Sales of tangible personal property are in this state if:

(a) the property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale; or

(b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (1) the purchaser is the United States government or (2) the taxpayer is not taxable in the state of the purchaser.

17. Sales, other than sales of tangible personal property, are in this state if:

(a) the income-producing activity is performed in this state; or

(b) the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

18. If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors;

(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

## ARTICLE V. ELEMENTS OF SALES AND USE TAX LAWS.

### Tax Credit.

1. Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the state, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision.

### Exemption Certificates. Vendors May Rely.

2. Whenever a vendor receives and accepts in good faith from a purchaser a resale or other exemption certificate or other written evidence of exemption authorized by the appropriate state or subdivision taxing authority, the vendor shall be relieved of liability for a sales or use tax with respect to the transaction.



## ARTICLE VI. THE COMMISSION.

## Organization and Management.

1. (a) The Multistate Tax Commission is hereby established. It shall be composed of one "member" from each party state who shall be the head of the state agency charged with the administration of the types of taxes to which this compact applies. If there is more than one such agency, the state shall provide by law for the selection of the commission member from the heads of the relevant agencies. State law may provide that a member of the commission be represented by an alternate but only if there is on file with the commission written notification of the designation and identity of the alternate. The attorney general of each party state or his designee, or other counsel if the laws of the party state specifically provide, shall be entitled to attend the meetings of the commission, but shall not vote. Such attorneys general, designees, or other counsel shall receive all notices of meetings required under paragraph 1 (e) of this Article.

(b) Each party state shall provide by law for the selection of representatives from its subdivisions affected by this compact to consult with the commission member from that state.

(c) Each member shall be entitled to one vote. The commission shall not act unless a majority of the members are present, and no action shall be binding unless approved by a majority of the total number of members.

(d) The commission shall adopt an official seal to be used as it may provide.

(e) The commission shall hold an annual meeting and such other regular meetings as its bylaws may provide and such special meetings as its executive committee may determine. The commission bylaws shall specify the dates of the annual and any other regular meetings, and shall provide for the giving of notice of annual, regular and special meetings. Notice of special meetings shall include the reasons therefor and an agenda of the items to be considered.

(f) The commission shall elect annually, from among its members, a chairman, a vice-chairman and a treasurer. The commission shall appoint an executive director who shall serve at its pleasure, and it shall fix his duties and compensation. The executive director shall be secretary of the commission. The commission shall make provision for the bonding of such of its officers and employees as it may deem appropriate.

(g) Irrespective of the civil service, personnel or other merit system laws of any party state, the executive director shall appoint or discharge such personnel as may be necessary for the performance of the functions of the commission and shall fix their duties and compensation. The commission bylaws shall provide for personnel policies and programs.

(h) The commission may borrow, accept or contract for the services of personnel from any state, the United States, or any other governmental entity.

(i) The commission may accept for any of its purposes and func-

tions any and all donations and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any governmental entity, and may utilize and dispose of the same.

(j) The commission may establish one or more offices for the transacting of its business.

(k) The commission shall adopt bylaws for the conduct of its business. The commission shall publish its bylaws in convenient form, and shall file a copy of the bylaws and any amendments thereto with the appropriate agency or officer in each of the party states.

(l) The commission annually shall make to the governor and legislature of each party state a report covering its activities for the preceding year. Any donation or grant accepted by the commission or services borrowed shall be reported in the annual report of the commission, and shall include the nature, amount and conditions, if any, of the donation, gift, grant or services borrowed and the identity of the donor or lender. The commission may make additional reports as it may deem desirable.

#### Committees.

2. (a) To assist in the conduct of its business when the full commission is not meeting, the commission shall have an executive committee of seven members, including the chairman, vice-chairman, treasurer and four other members elected annually by the commission. The executive committee, subject to the provisions of this compact and consistent with the policies of the commission, shall function as provided in the bylaws of the commission.

(b) The commission may establish advisory and technical committees, membership on which may include private persons and public officials, in furthering any of its activities. Such committees may consider any matter of concern to the commission, including problems of special interest to any party state and problems dealing with particular types of taxes.

(c) The commission may establish such additional committees as its bylaws may provide.

#### Powers.

3. In addition to powers conferred elsewhere in this compact, the commission shall have power to:

(a) Study state and local tax systems and particular types of state and local taxes.

(b) Develop and recommend proposals for an increase in uniformity or compatibility of state and local tax laws with a view toward encouraging the simplification and improvement of state and local tax law and administration.

(c) Compile and publish information as in its judgment would assist the party states in implementation of the compact and taxpayers in complying with state and local tax laws.

(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact.

## Finance.

4. (a) The commission shall submit to the governor or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that state for presentation to the legislature thereof.

(b) Each of the commission's budgets of estimated expenditures shall contain specific recommendations of the amounts to be appropriated by each of the party states. The total amount of appropriations requested under any such budget shall be apportioned among the party states as follows: one-tenth in equal shares; and the remainder in proportion to the amount of revenue collected by each party state and its subdivisions from income taxes, capital stock taxes, gross receipts taxes, sales and use taxes. In determining such amounts, the commission shall employ such available public sources of information as, in its judgment, present the most equitable and accurate comparisons among the party states. Each of the commission's budgets of estimated expenditures and requests for appropriations shall indicate the sources used in obtaining information employed in applying the formula contained in this paragraph.

(c) The commission shall not pledge the credit of any party state. The commission may meet any of its obligations in whole or in part with funds available to it under paragraph 1 (i) of this Article: provided that the commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the commission makes use of funds available to it under paragraph 1 (i), the commission shall not incur any obligation prior to the allotment of funds by the party states adequate to meet the same.

(d) The commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the commission shall be subject to the audit and accounting procedures established under its by-laws. All receipts and disbursements of funds handled by the commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the commission.

(e) The accounts of the commission shall be open at any reasonable time for inspection by duly constituted officers of the party states and by any person authorized by the commission.

(f) Nothing contained in this Article shall be construed to prevent commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the commission.

## ARTICLE VII. UNIFORM REGULATIONS AND FORMS.

1. Whenever any two or more party states, or subdivisions of party states, have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, sales or use tax, the commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax, or prescribing uniform



tax forms. The commission may also act with respect to the provisions of Article IV of this compact.

2. Prior to the adoption of any regulation, the commission shall:

(a) As provided in its bylaws, hold at least one public hearing on due notice to all affected party states and subdivisions thereof and to all taxpayers and other persons who have made timely request of the commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party states and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the commission.

3. The commission shall submit any regulations adopted by it to the appropriate officials of all party states and subdivisions to which they might apply. Each such state and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures.

#### ARTICLE VIII. INTERSTATE AUDITS.

1. This Article shall be in force only in those party states that specifically provide therefor by statute.

2. Any party state or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the commission to perform the audit on its behalf. In responding to the request, the commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The commission may enter into agreements with party states or their subdivisions for assistance in performance of the audit. The commission shall make charges, to be paid by the state or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

3. The commission may require the attendance of any person within the state where it is conducting an audit or part thereof at a time and place fixed by it within such state for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and place fixed by the commission within the state of which he is a resident: provided that such state has adopted this article.

4. The commission may apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this Article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the state or subdivision on behalf of which the audit is being made or a court in the state in which the object of the order being sought

is situated. The provisions of this paragraph apply only to courts in a state that has adopted this Article.

5. The commission may decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of satisfactory performance. If the commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party states or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the commission.

6. Information obtained by any audit pursuant to this Article shall be confidential and available only for tax purposes to party states, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the states or subdivisions on whose account the commission performs the audit, and only through the appropriate agencies or officers of such states or subdivisions. Nothing in this Article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

7. Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party states or any of their subdivisions are not superseded or invalidated by this Article.

8. In no event shall the commission make any charge against a taxpayer for an audit.

9. As used in this Article, "tax," in addition to the meaning ascribed to it in Article II, means any tax or license fee imposed in whole or in part for revenue purposes.

## ARTICLE IX. ARBITRATION.

1. Whenever the commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this Article in effect, notwithstanding the provisions of Article VII.

2. The commission shall select and maintain an arbitration panel composed of officers and employees of state and local governments and private person who shall be knowledgeable and experienced in matters of tax law and administration.

3. Whenever a taxpayer who has elected to employ Article IV, or whenever the laws of the party state or subdivision thereof are substantially identical with the relevant provisions of Article IV, the taxpayer, by written notice to the commission and to each party state or subdivision thereof that would be affected, may secure arbitration of an apportionment or allocation, if he is dissatisfied with the final administrative determination of the tax agency of the state or subdivision with respect thereto on the ground that it would subject him to double or multiple taxation by two or more party states or subdivisions thereof. Each party state and subdivision thereof hereby consents to the arbitration as provided herein, and agrees to be bound thereby.

4. The arbitration board shall be composed of one person selected by the taxpayer, one by the agency or agencies involved, and one member of the commission's arbitration panel. If the agencies involved are unable to agree on the person to be selected by them, such person shall be selected by lot from the total membership of the arbitration panel. The two persons selected for the board in the manner provided by the foregoing provisions of this paragraph shall jointly select the third member of the board. If they are unable to agree on the selection, the third member shall be selected by lot from among the total membership of the arbitration panel. No member of a board selected by lot shall be qualified to serve if he is an officer or employee or is otherwise affiliated with any party to the arbitration proceeding. Residents within the jurisdiction of a party to the arbitration proceeding shall not constitute affiliation within the meaning of this paragraph.

5. The board may sit in any state or subdivision party to the proceeding, in the state of the taxpayer's incorporation, residence or domicile, in any state where the taxpayer does business, or in any place that it finds most appropriate for gaining access to evidence relevant to the matter before it.

6. The board shall give due notice of the times and places of its hearings. The parties shall be entitled to be heard, to present evidence, and to examine and cross-examine witnesses. The board shall act by majority vote.

7. The board shall have power to administer oaths, take testimony, subpoena and require the attendance of witnesses and the production of accounts, books, papers, records, and other documents, and issue commissions to take testimony. Subpoenas may be signed by any member of the board. In case of failure to obey a subpoena, and upon application by the board, any judge of a court of competent jurisdiction of the state in which the board is sitting or in which the person to whom the subpoena is directed may be found may make an order requiring compliance with the subpoenas, and the court may punish failure to obey the order as a contempt. The provisions of this paragraph apply only in states that have adopted this Article.

8. Unless the parties otherwise agree, the expenses and other costs of the arbitration shall be assessed and allocated among the parties by the board in such manner as it may determine. The commission shall fix a schedule of compensation for members of arbitration boards and of other allowable expenses and costs. No officer or employee of a state or local government who serves as a member of a board shall be entitled to compensation therefor unless he is required on account of his service to forego the regular compensation attaching to his public employment, but any such board member shall be entitled to expenses.

9. The board shall determine the disputed apportionment or allocation and any matters necessary thereto. The determinations of the board shall be final for purposes of making the apportionment or allocation, but for no other purpose.

10. The board shall file with the commission and with each tax agency



represented in the proceeding; the determination of the board; the board's written statement of its reasons therefor; the record of the board's proceedings; and any other documents required by the arbitration rules of the commission to be filed.

11. The commission shall publish the determinations of boards together with the statements of the reasons therefor.

12. The commission shall adopt and publish rules of procedure and practice and shall file a copy of such rules and of any amendment thereto with the appropriate agency or officer in each of the party states.

13. Nothing contained herein shall prevent at any time a written compromise of any matter or matters in dispute, if otherwise lawful, by the parties to the arbitration proceedings.

#### ARTICLE X. ENTRY INTO FORCE AND WITHDRAWAL.

1. This compact shall enter into force when enacted into law by any seven states. Thereafter, this compact shall become effective as to any other state upon its enactment thereof. The commission shall arrange for notification of all party states whenever there is a new enactment of the compact.

2. Any party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

3. No proceeding commenced before an arbitration board prior to the withdrawal of a state and to which the withdrawing state or any subdivision thereof is a party shall be discontinued or terminated by the withdrawal, nor shall the board thereby lose jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein.

#### ARTICLE XI. EFFECT ON OTHER LAWS AND JURISDICTION.

Nothing in this compact shall be construed to:

(a) Affect the power of any state or subdivision thereof to fix rates of taxation, except that a party state shall be obligated to implement Article III [paragraph] (2) of this compact.

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than a sales tax: provided that the definition of "tax" in Article VIII [paragraph] (9) may apply for the purposes of that Article and the commission's powers of study and recommendation pursuant to Article VI [paragraph] (3) may apply.

(c) Withdraw or limit the jurisdiction of any state or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.

(d) Supersede or limit the jurisdiction of any court of the United States.

## ARTICLE XII. CONSTRUCTION AND SEVERABILITY.

This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any state or of the United States or of the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the state affected as to all severable matters.

**History:** En. Sec. 1, Ch. 17, L. 1969.

**Cross-References**

Cities and towns—taxation and license, secs. 84-4701 to 84-4737.

Income tax, secs. 84-4901 to 84-4958.

Levy of taxes, secs. 84-3801 to 84-3810.

**Title of Act**

An act to adopt and implement the Multistate Tax Compact dealing with taxes paid by business firms.

**Effective Date**

For effective date of this act, see Article X, paragraph 1.

**84-6702. Montana compact commissioner—chairman of state board of equalization.** The chairman of the state board of equalization shall represent this state on the multistate tax commission.

**History:** En. Sec. 2, Ch. 17, L. 1969.

**84-6703. Alternate—member of state board of equalization.** The member representing this state on the multistate tax commission may be represented thereon by an alternate designated by him who must be a member of the state board of equalization.

**History:** En. Sec. 3, Ch. 17, L. 1969.

**84-6704. Advisory committee — members — reimbursement — meetings.** There is hereby established the multistate tax compact advisory committee composed of the member of the multistate tax commission representing this state or any alternate designated by him, the attorney general or his designee, and two members of the senate, one (1) from each of the two (2) major political parties appointed by the senate committee on committees, and two (2) members of the house of representatives, one (1) from each of the two (2) major political parties, appointed by the speaker of the house. The chairman shall be the member of the commission representing this state. Members of the commission who are members of the legislative assembly shall be reimbursed for actual and necessary expenses incurred on commission business from any funds appropriated to implement this compact. The committee shall meet on the call of its chairman or at the request of a majority of its members, but in any event it shall meet not less than three (3) times in each year. The committee may consider any and all matters relating to recommendations of the multistate tax

commission and the activities of the members in representing this state thereon.

**History:** En. Sec. 4, Ch. 17, L. 1969.

#### CHAPTER 68—TOBACCO TAX (CIGARETTES EXCLUDED)

##### Section

84-6801. Definitions.

84-6802. Direct tax on retail customer—advance payment—notice in seller's premises—amount of tax—products excepted.

84-6803. Wholesaler to precollect and pay tax.

84-6804. Wholesaler's sale without prepayment a misdemeanor—injunctive penalty.

84-6805. Unlawful sales and offers to sell—penalty.

84-6806. Wholesaler to retain five per cent defrayment—refunds.

84-6807. Rule-making power.

**84-6801. Definitions.** As used in this act, the following definitions shall apply unless the context otherwise requires:

(1) The word "board" shall mean the state board of equalization of the state of Montana.

(2) The word "person" shall mean any individual, firm, fiduciary, partnership, corporation, trust, organization or association, however formed.

(3) The word "cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material except tobacco.

(4) The words "sale" or "sell" shall mean and include any transfer for a consideration, exchange, barter, gift, offer for sale and distribution, in any manner, or by any means whatever of tobacco products, other than cigarettes.

(5) The word "wholesaler" shall mean any person who purchases tobacco products, other than cigarettes, directly from the manufacturer, or who purchases tobacco products, other than cigarettes, from any other person who purchases from the manufacturer, and who acquires such products for the purpose of bona fide sales to retail dealers, or who services retail outlets by the maintenance of an established place of business for the purchase of tobacco products, other than cigarettes, including, but not limited to, the maintenance of warehousing facilities for the storage and distribution of tobacco products. The word "retailer" shall mean any person other than a wholesaler who is engaged in the business of selling tobacco products to the ultimate consumer.

(6) The words "wholesale price" shall mean the established price for which a manufacturer sells a tobacco product, other than cigarettes, to a wholesaler or unclassified acquirer before any discount or other reduction.

**History:** En. Sec. 1, Ch. 12, Ex. L. 1969.

##### Title of Act

An act providing for the imposition of a tax on the sale of all tobacco products, not including cigarettes.

**84-6802. Direct tax on retail customer—advance payment—notice in seller's premises—amount of tax—products excepted.** (1) All taxes paid



pursuant to the provisions of this section shall be exclusively presumed to be direct taxes on the retail consumer, precollected for the purpose of convenience and facility only. When the tax is paid by any other person such payment shall be considered as an advance payment and shall be added to the price of tobacco products, other than cigarettes, and recovered from the ultimate consumer or user. Any person selling tobacco products, other than cigarettes, at retail shall state or separately display in the premises where such products are sold, a notice of the tax included in the selling price and charged or payable pursuant to this section. The provisions of this section shall in no way affect the method of collection of such tax as hereinafter provided.

(2) There is hereby levied, imposed and assessed, and there shall be collected and paid to the state of Montana, upon tobacco products, other than cigarettes, sold or possessed in this state, a tax of twelve and one-half per cent (12- $\frac{1}{2}$ %) of the wholesale price of such products to the wholesaler, excepting therefrom such said products as may be shipped from Montana and destined for retail sale and consumption outside the state of Montana.

**History:** En. Sec. 2, Ch. 12, Ex. L. 1969.

**84-6803. Wholesaler to precollect and pay tax.** The tax imposed shall be precollected and paid by the wholesaler to the board prior to the sale of tobacco products, other than cigarettes, to the purchaser from the wholesaler.

**History:** En. Sec. 3, Ch. 12, Ex. L. 1969.

**84-6804. Wholesaler's sale without prepayment a misdemeanor—injunctive penalty.** Any wholesaler who shall sell any tobacco products, other than cigarettes, without first making payment of the tax provided for by this act in the manner and at the time specified shall be guilty of a misdemeanor, and further shall be enjoined by an action pursued in the district court of the county of Lewis and Clark, Montana from making further sale of tobacco products, other than cigarettes, for a period not less than one (1) month nor more than one (1) year.

**History:** En. Sec. 4, Ch. 12, Ex. L. 1969.

**84-6805. Unlawful sales and offers to sell—penalty.** It shall be unlawful for any person, individual, firm or corporation to sell or offer to sell any tobacco products subject to this tax without the tax having been prepaid as provided for in this act. Violation of this section shall constitute a misdemeanor punishable by a fine of not more than five hundred dollars (\$500) or imprisonment for not more than six (6) months.

**History:** En. Sec. 5, Ch. 12, Ex. L. 1969.

**84-6806. Wholesaler to retain five per cent defrayment—refunds.** The taxes specified in this act that are paid by the wholesaler, shall be paid to the board in full less a five per cent (5%) defrayment for his collection and administrative expense and shall be deposited by the board in the

long-range building sinking fund number 338766. Refunds of the tax paid shall be made as provided in section 84-726, R. C. M. 1947, in cases where the tobacco products purchased become unsalable.

**History:** En. Sec. 6, Ch. 12, Ex. L. 1969.

**84-6807. Rule-making power.** The board is authorized to adopt rules for the effective collection and refund of the tax imposed by this act.

**History:** En. Sec. 7, Ch. 12, Ex. L. 1969.







# REVISED CODES OF MONTANA

## VOLUME 6

### Part 1

### 1969 Cumulative Pocket Supplement

*Containing*

AMENDMENTS TO ACTS AND NEW LAWS ENACTED BY THE  
LEGISLATIVE ASSEMBLY SINCE PUBLICATION OF  
REPLACEMENT VOLUME 6 (PART 1) OF  
THE 1947 REVISED CODES

AND

ANNOTATIONS SUPPLEMENTING REPLACEMENT VOLUME 6  
(PART 1) THROUGH VOLUME 447, PACIFIC  
REPORTER (2ND SERIES)

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## NEW LAWS IN VOLUME 6 (Part 1)

For index see pocket supplement to Replacement Volume 9

### ENACTED IN 1965

Fiduciary permitted to hold property received though not qualified, 86-327.  
Flood control, county and municipal participation, 89-3301 to 89-3313.  
Public utility secured transactions and financing statements, 87A-9-302.1 to 87A-9-302.3.  
Water conservation board,  
    Director of board, 89-103.1 to 89-103.3.  
    Transfer of records, etc., from Carey land act board and state engineer, 89-103.4 to 89-103.8.

### ENACTED IN 1967

Flood control, county and municipal participation, 89-3309.1, 89-3314.  
Imitation Indian articles, 85-301 to 85-304.  
Water conservation board, additional powers, 89-132.1.  
Water Resources Act, 89-101.1, 89-101.2.  
Weather modification and control, 89-310 to 89-331.

### ENACTED IN 1969

Appropriation of water, 89-801.1, 89-801.2.  
Conservancy districts, 89-3401 to 89-3449.  
Sale of commodities, 90-170 to 90-194.  
Standard weights and measures, state sealer, 90-153 to 90-169.  
Trustee's annual statement to beneficiaries, 86-513.

## AMENDMENTS IN VOLUME 6 (Part 1)

Appropriation and adjudication of water rights, 89-801, 89-813, 89-847 to 89-849, 89-851.  
Dam and dike construction, 89-702.  
Employment security,  
    Commission and its divisions, 87-117, 87-118, 87-120.  
    Definitions, 87-148, 87-149.  
    Employer's coverage, 87-110.  
    Penalties, 87-145.  
    Reciprocity as to collection, 87-136.  
    Unemployment benefits, 87-103, 87-104, 87-106, 87-109.  
Financing statement, 87A-9-402 to 87A-9-406.  
Flood control and water conservation, county and municipal participation, 89-3301 to 89-3304, 89-3306 to 89-3311.  
Ground water appropriation, 89-2911, 89-2913.  
Irrigation districts, 89-1201, 89-1208, 89-1708.  
Public utility secured transactions and financing statements, 87A-9-302.1, 87A-9-302.2.  
Trusts and trustees, 86-511.  
Water conservation board, 89-102, 89-103, 89-103.3, 89-113.  
Water rights, 89-813.  
Weather modification permit fee, 89-324.  
Yellowstone River waters, 89-907 to 89-909, 89-912, 89-914.



# MONTANA REVISED CODES

## TITLE 85—TRADE-MARKS

Chapter 3. Sale of imitation Indian articles, 85-301 to 85-304.

### CHAPTER 3—SALE OF IMITATION INDIAN ARTICLES

- Section 85-301. Definitions.  
85-302. Imitation Indian articles to be clearly designated.  
85-303. Designation of authentic Indian articles.  
85-304. Violation as misdemeanor.

**85-301. Definitions.** As used in this act:

(1) "Indian" means a person who is enrolled or who is a lineal descendant of one enrolled upon an enrollment listing of the bureau of Indian affairs, or upon the enrollment listing of a recognized Indian tribe, domiciled in the United States.

(2) "Imitation Indian arts or crafts articles" means those made by machine, or made wholly out of synthetic or artificial materials, or articles which are not made by Indian labor or workmanship.

**History:** En. Sec. 1, Ch. 42, L. 1967.      tation American Indian arts and crafts articles.

**Title of Act**

An act regulating the retail sale of imi-

**85-302. Imitation Indian articles to be clearly designated.** No person shall distribute, sell, or offer for sale in this state any imitation American Indian arts or crafts articles unless the articles are at all times clearly and legibly designated as imitation.

**History:** En. Sec. 2, Ch. 42, L. 1967.

**85-303. Designation of authentic Indian articles.** Only those articles bearing a registered trade-mark or label of authentic Indian labor or workmanship may be deemed authentic Indian arts or crafts articles.

**History:** En. Sec. 3, Ch. 42, L. 1967.

**85-304. Violation as misdemeanor.** Any person who violates this act is guilty of a misdemeanor.

**History:** En. Sec. 4, Ch. 42, L. 1967.





## TITLE 86—TRUSTS AND USES

- Chapter 3. Trustee's obligations—sale, mortgage or lease of trust property, 86-327.  
5. Trusts for benefit of third persons—obligations, powers and rights of trustees, 86-511, 86-513.

### CHAPTER 1—TRUSTS AND USES IN RELATION TO REAL PROPERTY

#### 86-103. (6785) Transfer to one for money paid by another, etc.

##### Conveyances between Persons in Confidential Relationships

In suit by beneficiaries to recover from deceased's brother stock allegedly belonging to estate, exception to general rule raising presumption of gift in favor of

person to whom property is transferred when person making payment and transferee stand in confidential relation did not apply to transfer from deceased to brother. *Detra v. Bartoletti*, 150 M 210, 433 P 2d 485.

### CHAPTER 2—TRUSTS IN GENERAL—NATURE AND CREATION

#### 86-210. (7887) Involuntary trust resulting from fraud, etc.

##### Parent and Child

Constructive trust would not be imposed on lands deeded son by aged mother in absence of evidence that son gained land by accident, mistake, undue influence, violation of trust or other wrongful act or by constructive fraud. *Bodine v. Bodine*, 149 M 29, 422 P 2d 650.

##### Transfer in Contemplation of Death

Where deceased, engaged in cattle partnership with his sister and her husband,

during his last illness transferred bank account and interest in cattle to his sister and her husband, obligating them to pay all bills and expenses surrounding his illness and transfer some money to deceased's son, the sister and her husband were involuntary trustees of the property transferred from which they had paid expenses of deceased's last illness. *Marshall v. Minlschmidt*, 148 M 263, 419 P 2d 486, 488.

### CHAPTER 3—TRUSTEE'S OBLIGATIONS—SALE, MORTGAGE OR LEASE OF TRUST PROPERTY

Section 86-327. Fiduciary permitted to hold property received though not qualified investment.

86-327. Fiduciary permitted to hold property received though not qualified investment. In the absence of express provisions to the contrary in the trust instrument, any fiduciary may hold during the life of the trust all securities or other property, real or personal, received into or acquired by the trust from any source, excepting such as are purchased by the fiduciary in administering the trust, even though such securities or other property are not qualified investments.

History: En. Sec. 1, Ch. 66, L. 1965. Title of Act

An act relating to the retention by trustees of securities and other property received into the trust.

### CHAPTER 5—TRUSTS FOR BENEFIT OF THIRD PERSONS—OBLIGATIONS, POWERS AND RIGHTS OF TRUSTEES

Section 86-511. Compensation of trustee.

86-513. Trustee appointed by will, deed or agreement—income trust beneficiary—annual statement.

**86-511. (7918) Compensation of trustee.** When a declaration of trust, created by will or otherwise, is silent upon the subject of or the rate or amount of compensation, the trustee is entitled to such compensation as may be reasonable under the circumstances.

**History:** En. Sec. 3031, Civ. C. 1895; re-en. Sec. 5403, Rev. C. 1907; amd. Sec. 7918, R. C. M. 1921; amd. Sec. 1, Ch. 65, L. 1965. Cal. Civ. C. Sec. 2274. Field Civ. C. Sec. 1206.

**Amendment**

The 1965 amendment inserted "created

by will or otherwise"; inserted "or the rate or amount of" before "compensation"; substituted "such compensation as may be reasonable under the circumstances" for "the same compensation as an executor"; and deleted second and third sentences, for text of which see parent volume.

**86-513. Trustee appointed by will, deed or agreement—income trust beneficiary—annual statement.** The trustee or trustees appointed by any will, deed or agreement heretofore or hereafter executed shall mail or deliver at least annually to each income trust beneficiary a written itemized statement of all current receipts and disbursements made by the trustee of the funds of the trust, both principal and income, and upon the request of any such beneficiary shall furnish him an itemized statement of all property then held by such trustee, and may also file any such statement in the district court of the county in which the trustee or one of the trustees resides.

In addition thereto any such trustee or trustees, whenever it or they so desire, may file in the district court of the county in which the trustees or one of the trustees resides an intermediate account under oath showing:

- (1) the period covered by the account;
- (2) the total principal with which the trustee is chargeable according to the last preceding account or the inventory if there is no preceding account;
- (3) an itemized statement of all principal funds received and disbursed during such period;
- (4) an itemized statement of all income received and disbursed during such period, unless waived;
- (5) the balance of such principal and income remaining at the close of such period and how invested;
- (6) the names and addresses of all living beneficiaries, including contingent beneficiaries, of the trust, and a statement as to any such beneficiary known to be under legal disability;
- (7) a description of any possible unborn or unascertained beneficiary and his interest in the trust fund.

In addition thereto, after the time for termination of the trust shall have arrived, the trustee or trustees may file a final account in similar manner.

Upon the petition of any settlor or of any beneficiary of such a trust, after due notice thereof to the trustee, the district court in the county where the trustee or one of the trustees resides may direct the trustee or trustees thereof to file in said court such an account at any



time subsequent to one year from the day on which such a report was last filed, or if none, then after one (1) year from the inception of the trust.

When any such account shall have been filed, the clerk of the court where filed shall fix a return day therefor and issue a notice as provided for herein. If each of the beneficiaries and the guardians and guardians ad litem, if any, is personally served with a copy of the notice, whether within or outside the state of Montana, at least twenty-five (25) days prior to the return day, then no publication of the notice shall be required; otherwise the trustee or trustees shall cause notice as provided for herein to be given by publishing the same at least once a week for three (3) successive weeks preceding the return day, the first publication to be at least twenty-five (25) days preceding the return day, such publication to be in a newspaper of general circulation in the county, or if none, then in adjoining county. And in any event, at least twenty-five (25) days prior to the return day, a copy of the notice shall be either served upon each beneficiary not represented by guardian or guardian ad litem or mailed to each such beneficiary not so served at such beneficiary's address last known to the trustee; and shall be either served upon each guardian and guardian ad litem, or mailed to each such guardian and guardian ad litem not so served at such guardian's or guardian ad litem's address last known to the trustee. Proof of service of the notice may be made by affidavit, as provided for service of summons in civil actions, or by written admission of service signed by the person served. The notice shall state the time and place for the return day, the name or names of the trustee or trustees who have filed the account, that the account has been filed, that the court is asked to settle such account, and that any objections or exceptions thereto must be filed with the clerk of said court on or before such return day.

Upon or before the return day, any beneficiary of the trust may file his written objections or exceptions to the account filed or to any action of the trustee or trustees set forth therein. The court may appoint either the legal guardian of a beneficiary, or a guardian ad litem to represent the interest of any such beneficiary who is an infant or of unsound mind or otherwise legally incompetent, or who is yet unborn or unascertained, and such beneficiary shall be bound by any action taken by such representative. Every unborn or unascertainable beneficiary shall be concluded by any action taken by the court for or against any living beneficiary of the same class or whose interests are similar to the interests of such unborn or unascertainable beneficiary.

At the same time, or at some later day fixed by the court if so requested by one or more of the parties, the court, without the intervention of a jury and after hearing all the evidence submitted, shall determine the correctness of the account and the validity and propriety of all actions of the trustee or trustees set forth therein including the purchase, retention and disposition of any of the property and funds of the trust, and shall render its decree either approving or disapproving

the same or any part thereof, and, in addition, may surcharge the trustee or trustees for all losses, if any, caused by negligent or willful breaches of trust.

The decree so rendered shall be deemed final, conclusive and binding upon all the parties interested including all incompetent, unborn and unascertained beneficiaries of the trust, subject only to the right of appeal hereinafter stated.

The decree so rendered shall be a final order from which any party in interest may appeal as in civil actions to the district court of the state of Montana.

This chapter shall not apply to resulting trusts, constructive trusts, business trusts where certificates of beneficial interest are issued to the beneficiaries, investment trusts, voting trusts, insurance trusts prior to the death of the insured, trusts in the nature of mortgages or pledges, trusts created by judgment or decree of a federal court or of the district court when not sitting in probate, liquidation trusts or trusts for the sole purpose of paying dividends, interest or interest coupons, salaries, wages or pensions; nor shall this chapter apply to executors, administrators or guardians.

The settlor of any trust governed by this chapter may waive any or all of the provisions of this act requiring periodical statements to beneficiaries or may add additional duties in the instrument creating the trust; and any beneficiary entitled to an accounting under this act may waive such an accounting by a separate instrument delivered to the trustee or trustees.

**History:** En. Sec. 1, Ch. 24, L. 1969.

## TITLE 87—UNEMPLOYMENT COMPENSATION

Chapter 1. The unemployment compensation law, 87-103, 87-104, 87-106, 87-109, 87-110, 87-117, 87-118, 87-120, 87-136, 87-145, 87-148, 87-149.

### CHAPTER 1—THE UNEMPLOYMENT COMPENSATION LAW

- Section 87-103. Benefits.  
87-104. Duration of benefits.  
87-106. Disqualification for benefits.  
87-109. Contributions.  
87-110. Period, election and termination of employer's coverage.  
87-117. Employment security commission—organization.  
87-118. Divisions.  
87-120. Administration—duties and powers of commission.  
87-136. Collection—reciprocity with other states in effecting collection of unpaid unemployment compensation taxes.  
87-145. Penalties—falsity or willful nondisclosure—violations by employer or agent—violation of act or regulations—wrongfully collecting benefits.  
87-148. Definitions.  
87-149. Definitions—continued.

#### 87-101. Act, how cited.

##### Compiler's Notes

Section 1, Ch. 132, Laws of 1969, amended section 87-117 to change the

name of the unemployment compensation commission to the employment security commission.

**87-103. Benefits.** (a) Payment of benefits. Benefits are payable from the fund to any individual who is or becomes unemployed and eligible for benefits as is herein prescribed; provided, however, that wages earned for services performed as an employee representative as defined in the Railroad Unemployment Insurance Act (52 Stat. 1094), or for services performed for an employer, as defined in said act, shall not be included for the purposes of determining eligibility or weekly benefit amount under this act. All benefits shall be paid through public employment offices in the state of Montana, or other agencies designated by the commission, in accordance with such rules and regulations as the commission may prescribe.

(b) Weekly benefit amount. Except as provided in subsection (c), an insured worker's weekly benefit amount shall be the amount in column B of the benefit schedule of this subsection on the line on which in column A there appears his total wages paid for insured work in that quarter of his base period in which his wages were highest: (designated in the benefit schedule as "High-Quarter Wages").

#### Benefit Schedule

Weekly benefit amount figures from weighted schedule of high-quarter wages and qualifying wages computed as one and one-half times high-quarter wages and maximum potential benefits in benefit year.



High-Quarter Wages (Column A)	Weekly Benefit Amount (Column B)	Minimum Qualifying Wages (Column C)	Maximum total Benefits at 13 weeks (Column D)	Maximum total Benefits at 20 weeks (Column E)	Maximum total Benefits at 26 weeks (Column F)
\$280.00-309.99	\$13.00	\$420.00	\$169.00	\$260.00	\$338.00
310.00-339.99	14.00	465.00	182.00	280.00	364.00
340.00-369.99	15.00	510.00	195.00	300.00	390.00
370.00-399.99	16.00	555.00	208.00	320.00	416.00
400.00-429.99	17.00	600.00	221.00	340.00	442.00
430.00-459.99	18.00	645.00	234.00	360.00	468.00
460.00-489.99	19.00	690.00	247.00	380.00	494.00
490.00-519.99	20.00	735.00	260.00	400.00	520.00
520.00-549.99	21.00	780.00	273.00	420.00	546.00
550.00-579.99	22.00	825.00	286.00	440.00	572.00
580.00-609.99	23.00	870.00	299.00	460.00	598.00
610.00-639.99	24.00	915.00	312.00	480.00	624.00
640.00-669.99	25.00	960.00	325.00	500.00	650.00
670.00-699.99	26.00	1,005.00	338.00	520.00	676.00
700.00-729.99	27.00	1,050.00	351.00	540.00	702.00
730.00-759.99	28.00	1,095.00	364.00	560.00	728.00
760.00-789.99	29.00	1,140.00	377.00	580.00	754.00
790.00-819.99	30.00	1,185.00	390.00	600.00	780.00
820.00-849.99	31.00	1,230.00	403.00	620.00	806.00
850.00-879.99	32.00	1,275.00	416.00	640.00	832.00
880.00-909.99	33.00	1,320.00	429.00	660.00	858.00
910.00-939.99	34.00	1,365.00	442.00	680.00	884.00
940.00-969.99	35.00	1,410.00	455.00	700.00	910.00
970.00-999.99	36.00	1,455.00	468.00	720.00	936.00
1,000.00-1,029.99	37.00	1,500.00	481.00	740.00	962.00
1,030.00-1,059.99	38.00	1,545.00	494.00	760.00	988.00
1,060.00-1,089.99	39.00	1,590.00	507.00	780.00	1,014.00
1,090.00-1,119.99	40.00	1,635.00	520.00	800.00	1,040.00
1,120.00-1,149.99	41.00	1,680.00	533.00	820.00	1,066.00
1,150.00-or more	42.00	1,725.00	546.00	840.00	1,092.00

Such benefit shall not be more than forty-two dollars (\$42) per week nor less than thirteen dollars (\$13) per week.

(c) Qualifying wages. To qualify as an insured worker an individual must have been paid wages for insured work in his base period totaling not less than the amount in column C of the benefit schedule in subsection (b) on the line on which in column B there appears his weekly benefit amount; provided that an individual who has high-quarter wages of eleven hundred and fifty dollars (\$1,150) or more must have been paid wages of one and one-half ( $1\frac{1}{2}$ ) times his high-quarter wages during his base period including the high-quarter.

(d) and (e). \* \* \* [Same as parent volume.]

History: En. Sec. 3 (a), (b), (c), Ch. 137, L. 1937; amd. Sec. 1, Ch. 137, L. 1939; amd. Sec. 1, Ch. 164, L. 1941; amd. Sec. 1, Ch. 245, L. 1947; amd. Sec. 1, Ch. 178, L. 1949; amd. Sec. 1, Ch. 191, L. 1953; amd. Sec. 1, Ch. 238, L. 1955; amd. Sec. 1, Ch. 140, L. 1957; amd. Sec. 1, Ch. 156, L. 1961; amd. Sec. 1, Ch. 269, L. 1963; amd. Sec. 1, Ch. 4, Ex. L. 1969.

#### Amendments

The 1969 amendment made substantial deletions at the beginning and end of the first sentence in subsection (a), substituted "are" for "shall become" before "payable from the fund," and deleted "thereafter" after "individual who"; made substantial changes in the benefit schedule; in the sentence following the schedule, substituted "\$42" for "\$34" and "\$13" for "\$15"; in subsection (c), substituted

"\$1,150" for "\$1,282.50" and "one and one-half . . . including the high quarter" for "one hundred dollars (\$100) or more for insured work in one (1) calendar quarter within his base period other than the quarter in which his wages were the highest."

**87-104. Duration of benefits.** The maximum total amount of benefits payable to any eligible individual during any benefit year shall be: (a) (1) Thirteen (13) times his weekly benefit amount if he is qualified as an insured worker as defined in section 87-103 (c), and does not qualify under subsection (2) or (3) below.

(2) Twenty (20) times his weekly benefit amount if in addition to meeting the requirements of section 87-103 (c), he has been paid wages of \$100.00 or more for insured work in each of two (2) quarters in his base period other than the quarter in which his wages were highest.

(3) Twenty-six (26) times his weekly benefit amount if in addition to meeting the requirement of section 87-103 (c), he has been paid wages of \$100.00 or more for insured work in each of three (3) quarters in his base period other than the quarter in which his wages were highest.

(b) An individual disqualified by and pursuant to section 87-106, subsections (a), (b) and (c), shall have his maximum weekly duration reduced by the number of weeks equal to the number of weeks of disqualification.

**History:** En. Sec. 3 (d), Ch. 137, L. 1937; amd. Sec. 1, Ch. 137, L. 1939; amd. Sec. 1, Ch. 164, L. 1941; amd. Sec. 1, Ch. 245, L. 1947; amd. Sec. 1, Ch. 178, L. 1949; amd. Sec. 2, Ch. 191, L. 1953; amd. Sec. 3, Ch. 140, L. 1957; amd. Sec. 2, Ch. 156, L. 1961; amd. Sec. 2, Ch. 4, Ex. L. 1969.

#### Amendments

The 1969 amendment designated the former section as subdivision "(a)," substituted "subsection (2) or (3)" for "subsection (b) or (c)" at the end of subsection (1); redesignated former subsections (a), (b) and (c) as subsections (1), (2) and (3); and added subdivision (b).

### 87-105. Benefit eligibility conditions.

#### Burden of Proof

Unemployment compensation claimant has the burden of showing that he is not disqualified from the receipt of benefits. *Ollila v. Reeder*, 148 M 134, 417 P 2d 473, 475.

#### Type of Work

Under statute providing that claimant must be available for work and seeking work, claimant was not eligible where all his applications were either for work in which he had no experience or work which he had no prospect of securing; claimant

voluntarily removed himself from only then-existing labor market in area for which he was qualified by refusal to accept farm or ranch work because he despised it. *Noone v. Reeder*, 151 M 248, 441 P 2d 309.

#### Withdrawal from Labor Market

Claimant, who voluntarily withdrew himself from the active labor market, rendered himself ineligible to receive unemployment compensation benefits. *Ollila v. Reeder*, 148 M 134, 417 P 2d 473, 475.

**87-106. Disqualification for benefits.** An individual shall be disqualified for benefits—

(a) If he has left work without good cause attributable to the employment for a period of not less than two (2) nor more than five (5) weeks (in addition to and immediately following the waiting period), as determined by the commission according to the circumstances in each case. No benefit payments or amounts paid any individual after having

left work without good cause attributable to the employment shall ever be charged under section 87-109 against any employer (whose employment the individual left) on account of that particular employment.

(b) to (d). \* \* \* [Same as parent volume.]

(e) For any week with respect to which he is receiving or has received payment in the form of—

(1) and (2). \* \* \* [Same as parent volume.]

(3) Benefits under the Railroad Unemployment Insurance Act or any state unemployment compensation act or similar laws of any state or of the United States. This disqualification does not apply to any week with respect to which an individual is receiving or has received benefits under an unemployment compensation law of another state or of the United States, if such benefits are paid pursuant to section 87-129.

Compensation as set forth in subsection (2) above, which is received as a lump-sum payment for a permanent disability shall not be computed to be spread over a period of weeks in advance so as to bar the recipient from receiving benefits under this act for any week except the one in which the lump-sum payment is made, providing recipient has earned sufficient new wage credits following the date of injury.

Receipt of any wages, compensation or benefits as set forth in subsection (1), (2), or (3) above, after payment of unemployment benefits, and with respect to the same week for which unemployment benefits were received, will thereupon require such individual to repay such unemployment benefits and the commission may collect such unemployment benefits in the same manner as provided for collection of benefits under section 87-145 (d).

(f) and (g). \* \* \* [Same as parent volume.]

(h) Where retired and entitled to receive retirement compensation in excess of one hundred dollars (\$100.00) per calendar month paid in whole or in part from funds furnished by an employing unit, such disqualification to be applied as follows: All wages earned by such individual in the employment from which he has been retired shall not be considered or included in determining his wage credits or weekly benefit amount under section 87-103 and 87-105. No benefit payments or amounts paid any retired individual shall ever be charged under section 87-109 against any employing unit from whose employment the individual is retired and entitled to receive retirement compensation, on account of that particular employment, unless and until the commission shall determine (upon hearing, if requested by employer, and after at least ten (10) days' written notice of such hearing to said employer) that the individual was not retired by the employer acting in good faith. This disqualification does not extend to the receipt of benefits under the Federal Social Security Act, as amended.

(i) and (j). \* \* \* [Same as parent volume.]

History: En. Sec. 5, Ch. 137, L. 1937; amd. Sec. 4, Ch. 156, L. 1961; amd. Sec. 2, amd. Sec. 3, Ch. 164, L. 1941; amd. Sec. Ch. 269, L. 1963; amd. Sec. 1, Ch. 84, 4, Ch. 191, L. 1953; amd. Sec. 1, Ch. 164, L. 1965; amd. Sec. 1, Ch. 188, L. 1967; L. 1955; amd. Sec. 1, Ch. 171, L. 1957; amd. Sec. 3, Ch. 4, Ex. L. 1969.



**Amendments**

The 1965 amendment inserted "in excess of one hundred dollars (\$100.00) per calendar month" in the first sentence of subd. (h); substituted "retired individual" for "individual after such retirement" near the beginning of the present third sentence of subd. (h); inserted "and entitled to receive retirement compensation," following "individual is retired" in the present third sentence of subd. (h); and made a minor change in punctuation.

The 1967 amendment added the second paragraph in subd. (e) (3).

The 1969 amendment, in subdivision (a), substituted "nor" for "or" in the first

sentence; in the second paragraph of item (e) (3), substituted "the date of injury" for "settlement"; and in subdivision (h), substituted "87-103 and 87-105" for "87-103 or 87-105."

**Prior Workmen's Compensation Settlement**

Claimant was barred from receiving unemployment compensation benefits by reason of prior lump-sum workmen's compensation settlement during the period which lump-sum settlement was intended to cover. *Keller v. Reeder*, 149 M 322, 425 P 2d 830.

**87-108. Procedure and appeals.****Findings of Commission**

Finding of unemployment compensation commission that claimant was not available for and seeking work as required by section 87-105 was proper where the evidence showed that claimant quit his job to protect his social security retirement benefits; he knew that his employer would not rehire him if he failed to report off from work; he went to Minnesota to take a rest; and he failed to seek full-time em-

ployment. *Ollila v. Reeder*, 148 M 134, 417 P 2d 473, 475.

**Scope of Judicial Review**

Under that portion of statute relating to court review, findings of fact by commission, if supported by substantial evidence, are conclusive and confine scope of judicial review to questions of law. *Noone v. Reeder*, 151 M 248, 441 P 2d 309.

**87-109. Contributions.** (a) Payment. (1) Contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages as defined in section 87-149 (c), paid for employment (as defined in this act) occurring during such calendar year. Such contributions shall become due and be paid by each employer to the commission for the fund in accordance with such regulations as the commission may prescribe and shall not be deducted, in whole or in part, from the wages of individuals in his employ.

(2). \* \* \* [Same as parent volume.]

(b) Rate of contribution. (1) Each employer shall pay contributions at the rate of three and one-tenth (3.1) per centum of wages, as defined in section 87-149 (c) paid by him with respect to such employment, except as provided in subsection (c) of this section.

(c) Experience rating. The commission shall for each calendar year, classify employers in accordance with their actual contribution and unemployment experience and shall determine for each employer the rate of contribution which shall apply to him throughout the calendar year in order to reflect said experience and classification.

The commission shall apply such form of classification or experience rating system which is best calculated to rate individually and most equitably the employment for each employer and to encourage the stabilization of employment.

In making such classification, the commission shall take account, each to an equal extent, of the following factors relating to the unemployment hazard shown by each employer on the basis of (1) average

annual net percentage declines in taxable payrolls for the last three (3) years prior to computation date; (2) number of years the employer has paid contributions; and (3) chargebacks to the individual employer account upon the last employer basis. The computation date is hereby fixed as of the close of business on June 30th of the preceding calendar year.

The rates for the second calendar quarter of calendar year 1969 and thereafter, except as hereinafter provided, shall be so fixed that they would, if applied to all employers and their total taxable annual payrolls for the preceding calendar year, have yielded total paid contributions equaling approximately one and six-tenths (1.6) per centum of the total of all such payrolls.

The commission shall determine the contribution rate applicable to each employer for any calendar year subject to the following limitations:

(1) Each employer's rate shall be three and one-tenth (3.1) per centum unless and until there have been five (5) years prior to the computation date throughout which the employer has paid contributions at the maximum tax rate set by law for each of such years.

(2) The classified contribution rates for the calendar year 1969, and thereafter, except as hereinafter provided, shall be: five-tenths (.5) of one per centum, seven-tenths (.7) of one per centum, nine-tenths (.9) of one per centum, one and one-tenth (1.1) per centum, one and three-tenths (1.3) per centum, one and five-tenths (1.5) per centum, one and seven-tenths (1.7) per centum, one and nine-tenths (1.9) per centum, two and one-tenth (2.1) per centum, two and three-tenths (2.3) per centum, two and five-tenths (2.5) per centum, two and seven-tenths (2.7) per centum, two and nine-tenths (2.9) per centum, and three and one-tenth (3.1) per centum.

(3). \* \* \* [Same as parent volume.]

(4) No employer's rate shall be fixed below three and one-tenth (3.1) per centum whose benefit payments charged as most recent employer have, in the last three (3) years preceding the computation date, exceeded the amount of his contributions for those years, provided that any employer may, for the purpose of avoiding the provisions of this subsection, have the option of making a voluntary contribution to the unemployment compensation fund to cancel the amount by which the benefit payments charged to him under section 87-109 (c) during the last three (3) completed fiscal years exceed his contributions for the same three (3) years. Such voluntary contribution shall be applied first to cancel the amount by which benefits exceed contributions in the earliest of the three (3) years preceding the computation date, any remaining to cancel the excess in the second earliest year preceding the computation date, and any further remaining to cancel the excess in the most recent year preceding the computation date. Whenever the benefit payments charged to an eligible employer in the last three (3) fiscal years exceed his contributions for the same period, the commission shall notify him of the amount of such excess and the rate which would be applicable to

him for the ensuing calendar year, if he exercises the option. Such employer must exercise the option of making the voluntary contribution allowed by this section within thirty (30) days after receipt of such notice; otherwise his rate for the ensuing calendar year shall be fixed at three and one-tenth (3.1) per centum.

(5) Rates as fixed by the commission shall stand and be in effect unless and until the cash reserves in the unemployment compensation trust fund at any time in the future fall below, and remain below, eighteen million dollars (\$18,000,000.00) continuously for a period of one (1) year, then employer rates effective at the beginning of the next succeeding calendar quarter shall be so fixed that they would, if applied to all employers and their total taxable annual payrolls for the preceding calendar year, have yielded total paid contributions equaling approximately two (2) per centum of the total of all such payrolls, and shall continue at the two (2) per centum average rate until cash reserves in the unemployment compensation trust fund exceed twenty-six million dollars (\$26,000,000.00) at which time all employer rates shall again be so fixed to bring an average return of one and six-tenths (1.6) per centum as in this section hereinabove provided; if reserves remain below eighteen million dollars (\$18,000,000.00) continuously for a period of two (2) years, then the contribution rate of all employers subject to this act shall return to a uniform rate of three and one-tenth (3.1) per centum effective at the beginning of the next succeeding calendar quarter, and shall continue at the three and one-tenth (3.1) per centum rate until cash reserves in the unemployment compensation trust fund exceed twenty-six million dollars (\$26,000,000.00) at which time all employer rates shall again be so fixed to bring an average return of one and six-tenths (1.6) per centum as in this section hereinabove provided.

(6) to (8). \* \* \* [Same as parent volume.]

(9) No employer's account shall be charged with benefits paid to any claimant in determining the contribution rate of such employer unless the employer has had notice of the claim for benefits and has been given opportunity for hearing as an interested party in the manner provided in sections 87-107 and 87-108. Written notice of any hearing shall be mailed to employer not less than ten (10) days prior to the date set.

(d) Wages in excess of three thousand dollars (\$3,000.00). The provisions of this act requiring the payment of contributions by employers subject to this act shall apply only to wages paid up to and including three thousand dollars (\$3,000.00) by an employer to an employee with respect to employment during any calendar year.

**History:** En. Sec. 7, Ch. 137, L. 1937; amd. Sec. 3, Ch. 137, L. 1939; amd. Sec. 4, Ch. 164, L. 1941; amd. Sec. 2, Ch. 245, L. 1947; amd. Sec. 5, Ch. 191, L. 1953; amd. Sec. 2, Ch. 164, L. 1955; amd. Sec. 3, Ch. 171, L. 1957; amd. Sec. 5, Ch. 156, L. 1961; amd. Sec. 3, Ch. 269, L. 1963; amd. Sec. 4, Ch. 4, Ex. L. 1969.

#### **Amendments**

The 1969 amendment made numerous changes in phraseology; rewrote subdivision (b) (1) which formerly provided for employer contributions of 1.8% for 1937 employment and 2.7% for subsequent employment; in subsection (c), deleted an apparently superfluous third paragraph which is shown in brackets in the parent



volume; raised the rates stated in the fourth paragraph from 1.5% to 1.6%; in subdivision (c) (1), substituted 3.1% rate for 2.7% rate, "date" for "rate" and "maximum tax rate set by law for each of such years" for "rate of two and seven-tenths (2.7) per centum"; in subdivision (c) (2), substituted 1969 rates for separate rates for 1947 and thereafter and 1953 and thereafter; in subdivision (c) (4), substituted 3.1% rate for 2.7% rate; in subdivision (c) (5), substituted reference to 1.6% and 3.1% rate for references to 1.5% and 2.7% rate; and inserted subdivision (c) (9).

#### Separability Clause

Section 5 of Ch. 4, Ex. Laws 1969 read "If any clause, sentence, section, paragraph or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid or inoperative, such judgment shall not affect, impair, or invalidate the remainder of this act but shall be confined in its operation to the clause, sentence, section, paragraph

or part directly adjudged to be invalid or inoperative."

#### Repealing Clause

Section 6 of Ch. 4, Ex. Laws 1969 repealed all acts and parts of acts in conflict therewith.

#### Effective Date

Section 7 of Ch. 4, Ex. Laws 1969 read "Sections 1, 2 and 3 of this act shall be in full force and effect on and after April 6, 1969, and sections 1, 2 and 3 shall apply to all benefit years beginning on and after April 6, 1969, and the insured status of all claimants who have a benefit year current on or after April 6, 1969, shall be redetermined and benefits shall be paid in accordance with this provision, provided that no insured worker shall have his benefits reduced or denied by redetermination resulting from the application of this provision; section 4 of this act shall be in full force and effect on and after April 1, 1969."

### 87-110. Period, election and termination of employer's coverage.

(a). \* \* \* [Same as parent volume.]

(b) Except as otherwise provided in subsection (c) of this section an employing unit shall cease to be an employer subject to this act only as of the first day of January, of any calendar year, only if it files with the commission prior to the last day of February, of such year, a written application for termination of coverage, and the commission finds that the total wages payable for employment by said employer in the preceding calendar year did not exceed five hundred dollars (\$500). For the purposes of this subsection, the two (2) or more employing units mentioned in paragraph (2) or (3) of section 87-148 (i) shall be treated as a single employing unit.

(c). \* \* \* [Same as parent volume.]

History: En. Sec. 8, Ch. 137, L. 1937; amd. Sec. 4, Ch. 137, L. 1939; amd. Sec. 5, Ch. 164, L. 1941; amd. Sec. 1, Ch. 37, L. 1969.

#### Amendments

The 1969 amendment deleted "there were not twenty (20) different days, each

day being in a different week within the preceding calendar year within which such employing unit employed one (1) or more individuals in an employment subject to this act, or" before "the total wages payable" in the first sentence of subsection (b).

### 87-115. Transfers from unemployment compensation trust fund, etc.

#### Compiler's Notes

Section 1, Ch. 132, Laws of 1969, amended section 87-117 to change the

name of the unemployment compensation commission to the employment security commission.

### 87-116. Agreements with railroad retirement board.

#### Compiler's Notes

Section 1, Ch. 132, Laws of 1969, amended section 87-117 to change the

name of the unemployment compensation commission to the employment security commission.

**87-117. Employment security commission — organization.** There is hereby created a commission to be known as the employment security commission of Montana. The commission shall consist of three (3) members who shall be appointed by the governor by and with the advice and consent of the senate. Two (2) of the members of the commission shall be from different political parties and shall serve for terms of four (4) years, provided, however, that one (1) of those first appointed after this act takes effect shall serve for a term of two (2) years. They shall serve on a per diem basis and shall be paid at the rate of ten dollars (\$10) per day of service plus actual and necessary expenses, provided, however, that the total per diem compensation in any one (1) year for each of said two (2) members shall not exceed the sum of five hundred dollars (\$500). The third member of the commission, who shall be designated as a chairman at the time of his appointment, shall be paid a full-time salary in an amount to be fixed by the governor and shall be the executive director. During his term of membership on the commission, no member shall serve as an officer or committee member of any political party organization. The governor may, at any time, after notice and hearing, remove any commissioner for neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

**History:** En. Subd. (a), Sec. 10, Ch. 137, L. 1937; amd. Sec. 1, Ch. 102, L. 1953; amd. Sec. 1, Ch. 132, L. 1969.

**Amendments**

The 1969 amendment substituted "employment security commission" for "unemployment compensation commission" in the first sentence.

**87-118. Divisions.** The commission shall establish two co-ordinate divisions: The Montana state employment service division created pursuant to section 87-132, and the unemployment insurance division. Each division shall be responsible to the executive director for the discharge of its distinctive function. Each division shall be a separate administrative unit with respect to personnel, budget, and duties except in so far as the commission may find that such separation is impracticable.

**History:** En. Subd. (b), Sec. 10, Ch. 137, L. 1937; amd. Sec. 2, Ch. 132, L. 1969.

**Amendments**

The 1969 amendment substituted "unemployment insurance division" for "unemployment compensation division" in the first sentence.

**87-120. Administration—duties and powers of commission.** It shall be the duty of the commission to administer this act; and it shall have power and authority to adopt, amend, or rescind such rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable to that end. Such rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of this act, which the commission shall prescribe. The commission shall determine its own organization and methods of procedure in accordance with the provisions of this act, and shall have an official seal which shall be judicially noticed. The commission shall report as provided

in section 2 [82-4002] of this act. Such report shall include a balance sheet of the moneys in the fund in which there shall be provided, if possible, a reserve against the liability in future years to pay benefits in excess of the then current contributions, which reserve shall be set up by the commission in accordance with accepted actuarial principles on the basis of statistics of employment, business activity, and other relevant factors for the longest possible period. Whenever the commission believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, it shall promptly so inform the governor and the legislature, and make recommendations with respect thereto.

**History:** En. Subd. (a), Sec. 11, Ch. 137, L. 1937; amd. Sec. 6, Ch. 156, L. 1961; amd. Sec. 40, Ch. 93, L. 1969.

#### **Amendments**

The 1969 amendment substituted the reporting requirements of section 82-4002 in the fourth sentence for former provision requiring annual reports.

### **87-130. Acquisition of property, etc.**

#### **Compiler's Notes**

Section 1, Ch. 132, Laws of 1969, amended section 87-117 to change the

name of the unemployment compensation commission to the employment security commission.

### **87-132. State employment service.**

#### **Compiler's Notes**

Section 1, Ch. 132, Laws of 1969, amended section 87-117 to change the

name of the unemployment compensation commission to the employment security commission.

### **87-133. Unemployment compensation administration account.**

#### **Compiler's Notes**

Section 1, Ch. 132, Laws of 1969, amended section 87-117 to change the

name of the unemployment compensation commission to the employment security commission.

### **87-134. Reimbursement of fund.**

#### **Compiler's Notes**

Section 1, Ch. 132, Laws of 1969, amended section 87-117 to change the

name of the unemployment compensation commission to the employment security commission.

### **87-135. Penalty and interest on past-due contributions.**

#### **Compiler's Notes**

Section 1, Ch. 132, Laws of 1969, amended section 87-117 to change the

name of the unemployment compensation commission to the employment security commission.

**87-136. Collection—reciprocity with other states in effecting collection of unpaid unemployment compensation taxes.** (a) If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due shall be collected by civil action in the name of the commission, and the employer adjudged in default shall pay the costs of such action. Civil actions brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date and shall be entitled to preference upon the calendar of the court over all other civil actions except petitions for judicial review under this act and cases arising under the workmen's



compensation law of this state. Action for the collection of contributions due shall be brought within five (5) years after the due date of such contributions, otherwise to be barred as provided in section 93-2604.

(b) The courts of this state shall recognize and enforce liabilities for unemployment contributions imposed by other states which extend a like comity to this state. The commission is hereby empowered to sue in the courts of any other jurisdiction which extends such comity, to collect unemployment contributions and interest due this state. The officials of other states which by statute or otherwise extend a like comity to this state may sue in the courts of this state, to collect for such contributions and interest and penalties if any, due such state; in any such case the chairman of the commission of this state may through his attorney or attorneys institute and conduct such suit for such other state. Venue of such proceedings shall be the same as for actions to collect delinquent contributions, penalties and interest due under this act. A certificate by the secretary of any such state under the great seal of such state attesting the authority of such official or officials to collect unemployment compensation contributions, penalties and interest shall be conclusive evidence of such authority.

**History:** En. Subd. (b), Sec. 14, Ch. 137, L. 1937; amd. Sec. 5, Ch. 137, L. 1939; amd. Sec. 8, Ch. 164, L. 1941; amd. Sec. 1, Ch. 36, L. 1969.

#### Amendments

The 1969 amendment designated the former section as subsection (a) and added subsection (b).

### 87-142. Limitation of fees.

#### Attorney's Fees

Attorney who failed to notify unemployment compensation commission that he represented three clients on a contingent fee basis, which the court determined could be considered a debt for "necessaries" under section 87-143, and not hav-

ing requested notification from the commission so that he could collect his fee from the three men, was unable to proceed against either the commission or the state. *McAlear v. Unemployment Compensation Commission*, 145 M 458, 405 P 2d 219.

### 87-143. No assignment of benefits—exemptions.

#### Attorney's Fees

Where services rendered by attorney restored three men to the rolls of the unemployment compensation commission, set aside a one-year purge of their names from those rolls, and cleared their names

of fraud, court concluded that under such facts attorney's fees should be considered a debt incurred for "necessaries." *McAlear v. Unemployment Compensation Commission*, 145 M 458, 405 P 2d 219.

**87-145. Penalties—falsity or willful nondisclosure—violations by employer or agent—violation of act or regulations—wrongfully collecting benefits.** (a) Whoever makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this act, or under an employment security law of any other state, or territory or the federal government either for himself or for any other person, shall:

(1). \* \* \* [Same as parent volume.]

(2) Be disqualified for benefits thereafter until:

(A) He has repaid to the commission a sum equal to the amount so received by him; provided, however, will not be required to repay

any amount so obtained more than five (5) years prior to the date of the commission's determination that the claimant made such false statements, willful nondisclosure or misrepresentation, as provided in this paragraph, and

(B) A period of not less than ten (10) nor more than fifty-two (52) weeks have elapsed since the date of such determination by the commission, the length of time of the disqualification as herein described to be determined by the commission in accordance with the severity of each case.

(b) to (d). \* \* \* [Same as parent volume.]

**History:** En. Sec. 16, Ch. 137, L. 1937; amd. Sec. 1, Ch. 150, L. 1951; amd. Sec. 7, Ch. 164, L. 1955; amd. Sec. 10, Ch. 156, L. 1961; amd. Sec. 1, Ch. 38, L. 1969.

#### Amendments

The 1969 amendment in item (a) (2)

(A), deleted "he" before "will not be required," and in item (a) (2) (B), substituted "A period of not less than ten (10) nor more than fifty-two (52) weeks" for "Twelve (12) months" at the beginning, and added "the length of the time \* \* \* the severity of each case."

**87-148. Definitions.** As used in this act, unless the context clearly requires otherwise:

(a) to (i). \* \* \* [Same as parent volume.]

(j) (1) to (5). \* \* \* [Same as parent volume.]

(6) The term "employment" shall not include:

(A) to (I). \* \* \* [Same as parent volume.]

(J) Services performed by real estate, securities and insurance salesmen paid solely by commissions and without guarantee of minimum earnings.

(k) to (m). \* \* \* [Same as parent volume.]

**History:** En. Subd. (a) to (m), Sec. 19, Ch. 137, L. 1937; amd. Sec. 6, Ch. 137, L. 1939; amd. Sec. 10, Ch. 164, L. 1941; amd. Sec. 5, Ch. 233, L. 1943; amd. Sec. 1, Ch. 160, L. 1953; amd. Sec. 9, Ch. 164, L. 1955; amd. Sec. 11, Ch. 171, L. 1957; amd. Sec. 1, Ch. 177, L. 1959; amd. Sec. 1, Ch. 178, L. 1959; amd. Sec. 2, Ch. 84, L. 1965; Sec. 2, Ch. 37, L. 1969.

#### Compiler's Notes

Section 1, Ch. 132, Laws of 1969, amended section 87-117 to change the name of the unemployment compensation commission to the employment security commission.

Section 15-1401, referred to in subdivision (j) (6) (E) of this section in the parent volume, was repealed by Sec. 98, Ch. 198, Laws 1967.

#### Amendments

The 1965 amendment inserted "securities" in subd. (j) (6) (J).

The 1969 amendment repeated the amendments made in 1965 to insert "securities" in subd. (j) (6) (J).

#### Effective Date

Section 3 of Ch. 84, Laws 1965 read "This act shall be in full force and effect from and after April 1, 1965."

**87-149. Definitions—continued.** (a) Total unemployment:

(1) and (2). \* \* \* [Same as parent volume.]

(3) As used in this subsection the term "wages" shall include only that part of remuneration for work which is in excess of twice the weekly benefit amount, and the term "service" shall include only that work in excess of twelve (12) hours in any one week.

(b) to (f). \* \* \* [Same as parent volume.]

**History:** En. Subd. (n) to (r), Sec. 19, Ch. 137, L. 1937; amd. Sec. 6, Ch. 137, L. 1939; amd. Sec. 10, Ch. 164, L. 1941; amd. Sec. 5, Ch. 233, L. 1943; amd. Sec. 6, Ch. 190, L. 1945; amd. Sec. 3, Ch. 238, L. 1955; amd. Sec. 12, Ch. 171, L. 1957; amd. Sec. 11, Ch. 156, L. 1961; amd. Sec. 4, Ch. 269, L. 1963; amd. Sec. 1, Ch. 200, L. 1969.

#### **Compiler's Notes**

Section 1, Ch. 132, Laws of 1969, amended section 87-117 to change the name of the unemployment compensation commission to the employment security commission.

#### **Amendments**

The 1969 amendment, in subdivision (a) (3), substituted "twice the weekly benefit amount" for "fifteen dollars (\$15.00) in any one week" in the definition of "wages"; and substituted present definition of "service" for one providing that "'services' shall not include work for which remuneration equal to or less than fifteen dollars (\$15.00) per week is payable, or for one (1) day's work not exceeding eight (8) hours, whichever is greater."





## **TITLE 87A—UNIFORM COMMERCIAL CODE**

Chapter 9. Secured transactions—sales of accounts, contract rights and chattel paper, 87A-9-302.1 to 87A-9-302.3, 87A-9-402 to 87A-9-406.

### **CHAPTER 1—GENERAL PROVISIONS**

#### **Part 1—Short Title, Construction, Application and Subject Matter of the Act**

##### **87A-1-101. Short title.**

NOTE.—Uniform State Law. In addition to the states listed in the note in the parent volume the following also have adopted the Uniform Commercial Code: Alabama, Colorado, Delaware, Florida,

Hawaii, Iowa, Kansas, Minnesota, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Utah, Vermont, Washington, and also Virgin Islands.

### **CHAPTER 2—SALES**

#### **Part 3—General Obligation and Construction of Contract**

##### **87A-2-314. Implied warranty—merchantability—usage of trade.**

#### **DECISIONS UNDER FORMER LAW**

##### **Manufacturer's Warranty**

Seller who did not manufacture laundromat equipment made no implied warranty of fitness for intended use within former statute providing that one who manufactures an article under order for par-

ticular purpose warrants by sale that it is reasonably fit for that purpose, especially in view of seller's disclaimer printed on reverse side of sales agreement. *Ryan v. Ald, Inc.*, 149 M 367, 427 P 2d 53.

### **CHAPTER 3—COMMERCIAL PAPER**

#### **Part 1—Short Title, Form and Interpretation**

##### **87A-3-112. Terms and omissions not affecting negotiability.**

##### **Cross-Reference**

Waiver of statutory exemptions in unsecured note unenforceable, sec. 93-5813.1.

#### **Part 4—Liability of Parties**

##### **87A-3-407. Alteration.**

#### **DECISIONS UNDER FORMER LAW**

##### **Material Alteration**

In conviction of grand larceny, in which defendant had stolen and subsequently cashed check, the tearing of the check and

its repair did not constitute spoilation under former section 55-907, so as to make the check a nonnegotiable instrument. *State v. Romero*, 146 M 77, 404 P 2d 500.

## CHAPTER 8—INVESTMENT SECURITIES

## Part 3—Purchase

## 87A-8-307. Effect of delivery without endorsement, etc.

## DECISIONS UNDER FORMER LAW

**Gift of Stock Certificate**

Although endorsement may not be absolutely necessary to valid gift of stock certificates, fact that alleged donor had not endorsed certificates as required under

former law was evidence that no delivery occurred and hence that there was no valid gift. *Bodine v. Bodine*, 149 M 29, 422 P 2d 650.

## CHAPTER 9—SECURED TRANSACTIONS—SALES OF ACCOUNTS, CONTRACT RIGHTS AND CHATTEL PAPER

## Part 3. Rights of Third Parties—Perfected and Unperfected Security Interests—Rules of Priority

- Section 87A-9-302.1. Financing statements of transmitting utilities—definitions.  
 87A-9-302.2. Place of filing of utility financing statement—contents—perfection of security interest.  
 87A-9-302.3. Continued effectiveness of certain laws.

## Part 4. Filing

- Section 87A-9-402. Formal requisites of financing statement—amendments.  
 87A-9-403. What constitutes filing—duration of filing—effect of lapsed filing—duties of filing officer.  
 87A-9-404. Termination statement.  
 87A-9-405. Assignment of security interest—duties of filing officer—fees.  
 87A-9-406. Release of collateral—duties of filing officer—fees.

## Part 2—Validity of Security Agreement and Rights of Parties Thereto

## 87A-9-203. Enforceability of security interest, etc.

**Compiler's Notes**

Sections 53-123 to 53-128, contained in the reference to Chapter 1 of Title 53, in subsection (2) of this section in the par-

ent volume, was repealed by Sec. 1, Ch. 101, Laws 1959. Section 53-138 was repealed by Sec. 5, Ch. 256, Laws 1965.

## Part 3—Rights of Third Parties—Perfected and Unperfected Security Interests—Rules of Priority

87A-9-302.1. Financing statements of transmitting utilities—definitions. As used in this act,

(a) "Transmitting utility" means: (1) Any corporation or other business entity primarily engaged, pursuant to rights or franchises issued by and subject to the jurisdiction of a state or federal regulatory body, in the railroad or street railway business, the telephone or telegraph business, the transmission of oil, gas or petroleum products by pipeline, or the transmission or the production and transmission of electricity, steam, gas or water, and (2) any other corporation primarily engaged in the production, transmission or distribution of electricity, or the furnishing of telephone service, whether or not such corporation is subject to the jurisdiction of a state or federal regulatory body.



(b) "Uniform Commercial Code" means Chapters 1 through 10 of Title 87A of the Revised Codes of Montana, 1947.

**History:** En. Sec. 1, Ch. 76, L. 1965; amd. Sec. 1, Ch. 279, L. 1967.

#### Compiler's Note

Although the title of Ch. 76, Laws 1965, referred to codification of this act at 87A-9-408, the act itself contained no directions as to compilation.

#### Title of Act

An act relating to the Uniform Commercial Code of Montana by adding a new section to be known and codified as section 87A-9-408, relating to the filing

by certain public utilities of certain instruments required to be filed under the provisions of the Uniform Commercial Code; providing for a repealing clause; providing for a severability clause; and providing for an effective date.

#### Amendments

The 1967 amendment subdivided subsection (a), designating the first sentence as subsection (a)(1) and adding subsection (a)(2), and made minor changes in punctuation.

**87A-9-302.2. Place of filing of utility financing statement—contents—perfection of security interest.** Financing statements of a transmitting utility, notwithstanding sections 87A-9-302(3), 87A-9-302(4), 87A-9-401(1), 87A-9-402, 87A-9-403, 87A-9-404, 87A-9-405 and 87A-9-406 of the Uniform Commercial Code.

(a) If filing is required under the Uniform Commercial Code, the proper place to file in order to perfect a security interest in personal property or fixtures of a transmitting utility or other corporation covered hereby is in the office of the secretary of state;

(b) When the financing statement covers goods of a transmitting utility which are or are to become fixtures, no description of the real estate concerned is required;

(c) A security interest in rolling stock of a transmitting utility may be perfected either as provided in section 20 (c) of the Interstate Commerce Act or by filing a financing statement pursuant to the Uniform Commercial Code as provided in subsection (a).

**History:** En. Sec. 2, Ch. 76, L. 1965; amd. Sec. 2, Ch. 279, L. 1967.

#### Repealing Clause

Section 3 of Ch. 279, Laws 1967 repealed all acts and parts of acts in conflict therewith.

#### Effective Date

Section 4 of Ch. 279, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved March 2, 1967.

#### Compiler's Note

Filing provisions of Interstate Commerce Act, see 49 U. S. C., sec. 20c.

#### Amendments

The 1967 amendment, in the first paragraph, inserted "87A-9-403, 87A-9-404, 87A-9-405 and 87A-9-406" after "87A-9-402"; in subdivision (a), inserted "or other corporation covered hereby" after "transmitting utility."

**87A-9-302.3. Continued effectiveness of certain laws.** Unless displaced by the specific provisions of this act, the Uniform Commercial Code and other applicable laws remain in full force and effect and supplement the provisions of this act.

**History:** En. Sec. 3, Ch. 76, L. 1965.

#### Separability Clause

Section 5 of Ch. 76, Laws 1965 read "It is the intent of the legislative assembly that if a part of this act is invalid,

all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

Repealing Clause

Section 4 of Ch. 76, Laws 1965 repealed all acts and parts of acts in conflict therewith.

Effective Date

Section 6 of Ch. 76, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved February 26, 1965.

87A-9-312. Priorities among conflicting security interests, etc.

DECISIONS UNDER FORMER LAW

Ranking of Priorities

Under statute making liquor license transferable personal property capable of being mortgaged to secure existing debt and other statute providing that mortgage first given, acknowledged and recorded was entitled to priority, owner of note

secured by properly recorded mortgage on liquor license was entitled to foreclose mortgage notwithstanding claim of lessor based on covenant in lease whereby lessee agreed not to move liquor license from property. *Gaskill v. Severovic*, 149 M 340, 426 P 2d 582.

Part 4—Filing

87A-9-402. Formal requisites of financing statement—amendments.

(1) A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. Except for financing statements filed pursuant to section 87A-9-302.2, R.C.M. 1947 when the financing statement covers crops growing or to be grown or goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned and the name of the record owner or record lessee thereof. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties.

(2). \* \* \* [Same as parent volume.]

(3) A form substantially as follows is sufficient to comply with subsection (1):

Name of debtor (or assignor) -----

Address -----

Name of secured party (or assignee) -----

Address -----

Name of record owner or record lessee -----

Address -----

1. to 4. \* \* \* [Same as parent volume.]

(4) and (5). \* \* \* [Same as parent volume.]

History: En. Sec. 9-402, Ch. 264, L. 1963; amd. Sec. 1, Ch. 272, L. 1967.

Amendments

The 1967 amendment, in subsection (1), inserted "Except for financing statements filed pursuant to section 87A-9-302.2, R. C. M. 1947" at the beginning of the

third sentence and added "and the name of the record owner or record lessee thereof" after "real estate concerned"; and, in subsection (3), inserted after the name and address of the secured party "Name of record owner or record lessee" and "Address."

**87A-9-403. What constitutes filing—duration of filing—effect of lapses filing—duties of filing officer.** (1) to (4). \* \* \* [Same as parent volume.]

(5) Except financing statements filed pursuant to section 87A-9-302.2, R.C.M., 1947, if the instrument covers crops growing or to be grown or goods which are, or are to become fixtures, or timber, said instrument shall be indexed in accordance with the requirements applicable to the recording of mortgages of real estate under the laws of this state. For the purpose of such indexing, each of the debtor (or assignor) and the record owner or record lessee of any real estate described in the financing statement shall be considered a mortgagor with respect to the financing statement and the secured party (or assignee) shall be considered a mortgagee with respect to the financing statement.

(6) If the collateral is equipment or rolling stock of railroads or street railways, the fee for filing, indexing, and furnishing filing data for an original or a continuation statement shall be fifteen dollars (\$15.00). In all other cases the uniform fee for filing, indexing and furnishing filing data for an original or a continuation statement shall be one dollar (\$1.00), except that where recording is done by photographic or other similar process the uniform fee shall be two dollars (\$2.00) for each page or fraction thereof of such original or continuation statement.

**History:** En. Sec. 9-403, Ch. 264, L. 1963; amd. Sec. 2, Ch. 272, L. 1967.

section (5); redesignated old subsection (5) as new subsection (6); and substituted "data" for "date" after "furnishing filing" in the second sentence.

#### **Amendments**

The 1967 amendment added a new sub-

**87A-9-404. Termination statement.** (1) Whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must on written demand by the debtor send the debtor a statement that he no longer claims a security interest under the financing statement, which shall be identified by file number, and by document number, as the case may be. A termination statement signed by a person other than the secured party of record must include or be accompanied by the assignment or a statement by the secured party of record that he has assigned the security interest to the signer of the termination statement. The uniform fee for filing and indexing such an assignment or statement thereof shall be one dollar (\$1.00), except that where recording is done by photographic or other similar process the uniform fee shall be two dollars (\$2.00) for each page or fraction thereof of such assignment or statement. If the affected secured party fails to send such a termination statement within ten days after proper demand therefor he shall be liable to the debtor for one hundred dollars, and in addition for any loss caused to the debtor by such failure.

(2) On presentation to the filing officer of such a termination statement he must note it in the index. The filing officer shall remove from the files, mark "terminated" and send or deliver to the secured party the financing statement and any continuation statement, statement of assignment or statement of release pertaining thereto. If the original financing



statement or any continuation statement has been indexed in the records relating to real estate mortgages, the termination statement must be indexed in accordance with the requirements applicable to releases of real estate mortgages.

(3). \* \* \* [Same as parent volume.]

History: En. Sec. 9-404, Ch. 264, L. 1963; amd. Sec. 3, Ch. 272, L. 1967.

**Amendments**

The 1967 amendment, added "and by

document number, as the case may be" after "by file number" in the first sentence of subsection (1); and, inserted the third sentence in subsection (2).

**87A-9-405. Assignment of security interest—duties of filing officer—fees.** (1) A financing statement may disclose an assignment of a security interest in the collateral described in the statement by indication in the statement of the name and address of the assignee or by an assignment itself or a copy thereof on the face or back of the statement. Either the original secured party or the assignee may sign this statement as the secured party. On presentation to the filing officer of such a financing statement the filing officer shall mark the same as provided in section 87A-9-403 (4). If the collateral is equipment or rolling stock of railroads or street railways, the fee for filing, indexing and furnishing filing data for a financing statement so indicating an assignment shall be fifteen dollars (\$15.00). In all other cases the uniform fee for filing, indexing and furnishing filing data for a financing statement so indicating an assignment shall be one dollar (\$1.00), except that where recording is done by photographic or other similar process the uniform fee shall be two dollars (\$2.00) for each page or fraction thereof of such statement.

(2) A secured party may assign of record all or a part of his rights under a financing statement by the filing of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record and the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the index of the financing statement. If the original financing statement or any continuation statement has been indexed in the records relating to real estate mortgages, the statement of assignment must contain a reference to the document number of such original or continuation statement and must be indexed in accordance with the requirements applicable to assignments of mortgages. If the collateral is equipment or rolling stock, of railroads or street railways, the fee for filing, indexing and furnishing filing data about such a separate statement of assignment shall be fifteen dollars (\$15.00). In all other cases the uniform fee for filing, indexing and furnishing filing data about such a separate statement of assignment shall be one dollar (\$1.00), except that where recording is done by photographic or other similar process the uniform fee

shall be two dollars (\$2.00) for each page or fraction thereof of such statement.

(3). \* \* \* [Same as parent volume.]

**History:** En. Sec. 9-405, Ch. 264, L. 1963; amd. Sec. 4, Ch. 272, L. 1967. for "date" in the fifth sentence of subsection (1); and inserted the fifth sentence in subsection (2).

#### **Amendments**

The 1967 amendment substituted "data"

**87A-9-406. Release of collateral—duties of filing officer—fees.** A secured party of record may by his signed statement release all or a part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party, and the file number of the financing statement. Upon presentation of such a statement to the filing officer he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. If the original financing statement or any continuation statement has been indexed in the records relating to real estate mortgages, the statement of release must contain a reference to the document number of such original or continuation statement, and must be indexed in accordance with the requirements applicable to release of mortgages. If the collateral is equipment or rolling stock of railroads or street railways, the fee for filing and noting such a statement of release shall be fifteen dollars (\$15.00). In all other cases the uniform fee for filing and noting such a statement of release shall be one dollar (\$1.00), except that where recording is done by photographic or other similar process the uniform fee shall be two dollars (\$2.00) for each page or fraction thereof of such statement.

**History:** En. Sec. 9-406, Ch. 264, L. 1963; amd. Sec. 5, Ch. 272, L. 1967.

#### **Repealing Clause**

Section 6 of Ch. 272, Laws 1967 repealed all acts and parts of acts in conflict therewith.

#### **Amendments**

The 1967 amendment inserted the fourth sentence.

## **Part 5—Default**

### **87A-9-505. Compulsory disposition of collateral, etc.**

#### **DECISIONS UNDER FORMER LAW**

##### **Conditional Sales Contract**

Upon default of conditional sales contract, seller could treat contract as existing but broken by buyer and maintain

action for damages for breach under former statute. *White v. Nollmeyer*, 151 M 387, 443 P 2d 873.





## TITLE 89—WATERS AND IRRIGATION

- Chapter 1. Montana Water Resources Act of 1967, 89-101.1, 89-101.2 to 89-103.8, 89-118, 89-132.1.
3. Weather modification activities, 89-310 to 89-331.
  7. Dams and reservoirs—construction and examination of, 89-702.
  8. Water rights—appropriation and adjudication, 89-801 to 89-801.2, 89-813, 89-847 to 89-849, 89-851.
  9. Yellowstone River Compact—ratification of, 89-907 to 89-909, 89-912, 89-914.
  12. Irrigation districts—organization, 89-1201, 89-1208.
  17. Irrigation districts—bonds, 89-1708.
  29. Appropriation and regulation of ground water, 89-2911, 89-2913.
  33. County and municipal participation in flood control and water conservation, 89-3301 to 89-3309, 89-3309.1, 89-3310 to 89-3314.
  34. Conservancy districts, 89-3401 to 89-3449.

### CHAPTER 1—MONTANA WATER RESOURCES ACT OF 1967

- Section 89-101.1. Short title.
- 89-101.2. State necessity and policy.
- 89-102. Definitions.
- 89-103. Montana water resources board—officers—meetings—quorum—employees—counsel—compensation.
- 89-103.1. Director of Montana water resources board—appointment—qualifications.
- 89-103.2. Powers and duties of director.
- 89-103.3. Salaries of director and employees of board.
- 89-103.4. Powers of Carey Land Act board and state engineer transferred to Montana water resources board.
- 89-103.5. Records and property transferred to Montana water resources board.
- 89-103.6. Funds and appropriations transferred to Montana water resources board.
- 89-103.7. Yellowstone compact obligations unimpaired.
- 89-103.8. State obligations unimpaired.
- 89-118. Powers and duties of board—actions at law.
- 89-132.1. Additional powers and duties of the board.

### 89-101. (349.1) Repealed.

#### Repeal

This section (Sec. 1, Ch. 35, Ex. L. 1933), relating to the state purpose of

water conservation, was repealed by Sec. 7, Ch. 158, Laws 1967.

**89-101.1. Short title.** This act shall be known and may be cited as the "Montana Water Resources Act of 1967."

**History:** En. Sec. 1, Ch. 158, L. 1967.

#### Title of Act

An act providing for the Montana Water Resources Act of 1967; providing an expanded statement of state necessity and policy relating to water resources; amending section 89-103, R. C. M. 1947, providing that name of the state water conservation board shall be changed to Montana water resources board; providing additional powers for the Montana water

resources board; providing for a comprehensive inventory of water resources; providing for a state water plan; amending section 89-102, R. C. M. 1947, providing additional definitions; amending section 89-813, R. C. M. 1947, providing that county clerks and recorders shall furnish the Montana water resources board with copies of water appropriations and transfers of water appropriations; and repealing section 89-101, R. C. M. 1947.

89-101.2. State necessity and policy. It is hereby declared that:

(1) The general welfare of the people of Montana, in view of the state's population growth and expanding economy, requires that water resources of the state be put to optimum beneficial use and not wasted.

(2) The public policy of the state is to promote the conservation, development and beneficial use of the state's water resources to secure maximum economic and social prosperity for its citizens.

(3) The state, in the exercise of its sovereign power, acting through the water resources board, hereinafter created, shall co-ordinate development and use of the water resources of the state so as to effect full utilization, conservation and protection of its water resources.

(4) The development and utilization of water resources, and the efficient, economic distribution thereof, are vital to the people in order to protect existing uses and to assure adequate future supplies for domestic, industrial, agricultural and other beneficial uses.

(5) The water resources of the state must be protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life.

(6) The public interest requires the construction, operation and maintenance of a system of works for the conservation, development, storage, distribution and utilization of water, which said construction, operation and maintenance is a single object and is in all respects for the welfare and benefit of the people of the state.

(7) It is necessary to co-ordinate local, state and federal water resource development and utilization plans and projects through a single agency of state government, hereinafter created and to be known as the "Montana water resources board."

(8) The greatest economic benefit to the people of Montana can be secured only by the sound co-ordination of development and utilization of water resources with the development and utilization of all other resources of the state.

(9) To achieve these objectives, and to protect the waters of Montana from diversion to other areas of the nation, it is essential that a comprehensive, co-ordinated multiple-use water resource plan be progressively formulated, to be known as the "state water plan."

History: En. Sec. 2, Ch. 158, L. 1967.

89-102. (349.2) Definitions. As used in this act, the following words and terms shall have the following meanings:

(a) the word "board" shall mean the Montana water resources board hereinafter created.

(b) The word "works" shall be deemed to include all property, rights, easements and franchises relating thereto and deemed necessary or convenient for their operation, and all water rights acquired or exercised by the board in connection with such works, and shall embrace all means of conserving and distributing water, including, without limiting the generality of the foregoing, reservoirs, dams, diversion canals,

distributing canals, waste canals, drainage canals, dikes, lateral ditches and pumping units, mains, pipelines and waterworks systems and shall include all such works for the conservation, development, storage, distribution and utilization of water including, without limiting the generality of the foregoing, works for the purpose of irrigation, flood prevention, drainage, fish and wildlife, recreation, development of power, watering of stock, supplying of water for public, domestic, industrial or other uses and for fire protection.

(c) The term "cost of works" shall embrace the cost of construction, the cost of all lands, property, rights, easements and franchises acquired, which are deemed necessary for such construction, the cost of all water rights acquired or exercised by the board in connection with such works, the cost of all machinery and equipment, financing charges, interest prior to and during construction and for a period not exceeding three (3) years after the completion of construction, cost of engineering and legal expenses, plans, specifications, surveys, estimates of cost, and other expenses necessary or incident to determining the feasibility or practicability of any project, administrative expense and such other expenses as may be necessary or incident to the financing herein authorized and the construction of the works and the placing of the same in operation; provided, however, the board in determining the cost of works may make nonreimbursable allowances for costs of public benefits, including but not limited to, irrigation, recreation, flood prevention, fish and wildlife, and stream stabilization.

(d) The word "owner" shall include all individuals, irrigation districts, drainage districts, flood control districts, incorporated companies, societies or associations having any title or interest in any properties, rights, easements or franchises to be acquired.

(e) and (f). \* \* \* [Same as parent volume.]

**History:** En. Sec. 2, Ch. 35, Ex. L. 1933; amd. Sec. 1, Ch. 95, L. 1935; amd. Sec. 1, Ch. 163, L. 1965; amd. Sec. 3, Ch. 158, L. 1967.

#### Amendments

The 1965 amendment inserted "waste canals, drainage canals, dikes" in paragraph (b); inserted "flood prevention, drainage, fish and wildlife, recreation" near the end of paragraph (b); substi-

tuted "industrial or other uses and for fire protection" at the end of paragraph (b) for "industrial and other uses for fire protection"; added the proviso at the end of paragraph (c); and inserted "drainage districts, flood control districts" in paragraph (d).

The 1967 amendment, in subdivision (a), substituted: "Montana water resources" for "state water conservation."

**89-103. (349.3) Montana water resources board—officers—meetings—quorum—employees—counsel—compensation.** (1) There is hereby created a board to be known as the "Montana water resources board," and by that name the board may sue and be sued, plead and be impleaded, and contract and be contracted with. Wherever in this code the words, "state water conservation board" shall be used they shall mean the "Montana water resources board." The board shall consist of seven (7) members, including the governor and director who shall be members ex officio. The five (5) remaining members shall be qualified electors of the state and shall be appointed by the governor with the consent of the senate, and



shall serve for a term of six (6) years, except that immediately after the effective date of this act the governor shall appoint two (2) members of the board whose term of office shall expire on the second Monday in January, 1967, another two (2) members of the board whose term of office shall expire on the second Monday in January, 1969, and one (1) member of the board whose term of office shall expire on the second Monday in January, 1971, and their successors shall be appointed for a term of six (6) years, except that any person appointed to fill a vacancy shall be eligible for reappointment. Any of the appointed members of the board may be removed by the governor at any time, and any vacancy caused by the death, removal, or resignation or disqualification of any appointed member shall be filled by appointment as hereinabove provided. Succeeding appointments, except when made to fill a vacancy, shall be made on or before the second (2) Monday in January during the biennial session of the legislative assembly preceding the commencement of the term for which the appointment is made. Before entering upon the discharge of his duties, each appointed member shall take, subscribe and file with the secretary of state the oath prescribed by the constitution.

(2) The governor shall be the chairman of the board and the vice-chairman shall be the secretary and treasurer of the board. The board shall maintain its principal office in the city of Helena and may maintain such branch offices as it may determine. It shall elect a vice-chairman at its first meeting who shall preside at all meetings of the board when the chairman thereof is absent. It may provide for the holding of regular meetings and may hold a special meeting for the transaction of any business which may properly come before the board at any time and at any place in the state upon the call of the chairman or the vice-chairman or any two (2) members, notice of which may be given by telegram or by depositing in the mails at least forty-eight (48) hours before the meeting; but no notice shall be necessary if at least four (4) members of the board shall be present. A majority in number of the members shall constitute a quorum and the affirmative or negative vote of four (4) members shall be necessary to bind the board.

(3) The board shall have and adopt a seal bearing its name, which seal shall be affixed to such records and other instruments as it may direct, and all courts shall take judicial notice of said seal. It is authorized to adopt from time to time, as necessary or expedient, suitable rules and regulations for the administration of this act. The attorney general shall act as legal adviser for the board and shall perform such legal services as the board may request; he shall receive his actual and necessary expenses when engaged in travel in the performance of such services. With his consent the board may employ additional legal counsel, and the board may also appoint such technical and other assistants and employees as may be necessary to enable it to perform its duties and carry out the purposes of this act, and may fix their compensation.

(4) Each appointed member of the board shall receive, as compensation for his services, the sum of twenty dollars (\$20) per day for each day actually engaged in the performance of the duties of his office, in-

cluding time of travel between his home and the place at which he performs such duties, together with actual traveling and maintenance expenses while away from his home in the performance of the duties of his office. All such compensation and expenses shall be paid solely from the funds provided under the authority of this act.

**History:** En. Sec. 3, Ch. 35, Ex. L. 1933; amd. Sec. 50, Ch. 177, L. 1965; amd. Sec. 1, Ch. 278, L. 1965; amd. Sec. 4, Ch. 158, L. 1967.

#### Compiler's Note

This section was amended twice in 1965, once by Ch. 177 and once by Ch. 278. Neither amendment mentioned or incorporated the changes made by the other. Since the two amendments do not appear to conflict, the compiler has made a composite section incorporating the changes made by both amendatory acts.

#### Amendments

Chapter 177, Laws 1965, deleted "and secure such fidelity bonds as it may deem advisable" from the end of subsection (3).

Chapter 278, Laws 1965, increased the size of the board from five to seven and the number of appointive members from three to five; substituted the director for the state engineer as an ex officio member in the former second sentence of subsection (1); inserted "with the consent of the senate" after "appointed by the governor" in the former third sentence of subsection (1); substituted the portion of the former third sentence of subsection (1) relating to appointment and terms of the first appointive members for provisions relating to appointive members whose terms expired in 1935, 1937, and 1939; changed the number of votes re-

quired to bind the board, as specified in the final sentence of subsection (2) from three to four; increased the per diem rate of appointive members, as specified near the beginning of subsection (4), from \$10 to \$25; deleted from the end of subsection (4) a sentence reading, "The state engineer shall exercise such powers and perform such duties, in addition to his regular duties as state engineer and as the board shall prescribe, and may receive and be paid such additional salary for such additional duties as may be fixed by the board"; and made minor changes in phraseology and punctuation.

The 1967 amendment, in the first sentence of subsection (1), substituted "Montana water resources board" for "state water conservation board"; inserted the present second sentence in subsection (1); and, in subsection (4), decreased per diem of board members from \$25 to \$20.

#### Repealing Clause

Section 51 of Ch. 177, Laws 1965 read "Sections 3-407, 6-101, 6-102, 6-103, 6-104, 46-702, 66-810, 77-1004, 79-809, 82-404, 82-507, 82-1013, 82-1907, 82-2213, 92-106 and 92-107, R. C. M. 1947, are repealed."

#### Cross-References

Bonds of state officers and employees, sec. 6-105 et seq.

**89-103.1. Director of Montana water resources board—appointment—qualifications.** There is hereby created the office of director of the state water conservation board who shall hereinafter be referred to as the "director." The director shall be appointed by the governor and shall serve at the pleasure of the governor, or until his successor shall be appointed and shall have qualified. No person shall be appointed director who has not such theoretical and such practical experience and skill as to qualify him to carry out the duties enjoined on him.

**History:** En. Sec. 1, Ch. 279, L. 1965.

#### Compiler's Notes

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

#### Title of Act

An act creating the office of director of

the state water conservation board; providing for the appointment of the director of the state water conservation board by the governor; providing for the term of office, duties of the director of the state water conservation board and limitations on such duties; and providing that nothing herein contained shall impair the lawful obligations of the state water conservation board.

**89-103.2. Powers and duties of director.** The director shall be the chief administrative office [officer] of the state water conservation board

and shall perform and execute in the name of the board all ministerial acts required of the state water conservation board by law and shall perform and execute such other duties as may be required by said board, provided that the director shall not acquire by appropriation or otherwise any water right or interest therein and shall not acquire any real property or interest therein or mortgage or otherwise create a lien on the same or dispose of in any manner any water rights or property without specific authorization from and approval of said board. The director shall not construct or cause to be constructed or contract for the construction of any works or projects without specific authorization from and approval of said board.

**History:** En. Sec. 2, Ch. 279, L. 1965.

**Compiler's Notes**

The state water conservation board has

been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

**89-103.3. Salaries of director and employees of board.** The salary of the director shall be in such amount as may be specified by the legislative assembly in the appropriation to the state water conservation board. If the legislative assembly does not specify the maximum salary for the director, it shall be fixed by the state water conservation board after approval by the board of examiners. Before approving any salary increase, the board of examiners shall review the salaries of comparable positions in Montana state government, other states and private industry.

**History:** En. Sec. 3, Ch. 279, L. 1965; amd. Sec. 14, Ch. 237, L. 1967.

**Compiler's Notes**

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

**Amendments**

The 1967 amendment completely re-wrote this section. Prior to amendment

it read, "The salary of the director shall not exceed ten thousand dollars (\$10,000). No salary of an employee of the board shall exceed the salary of the director."

**Saving Clause**

Section 4 of Ch. 279, Laws 1965 read "Nothing in this act contained shall in any way impair any obligation of the state water conservation board lawfully entered into prior to the effective date of this act."

**89-103.4. Powers of Carey Land Act board and state engineer transferred to Montana water resources board.** Any duties, authority or obligation conferred or imposed by law on the Carey Land Act board or the state engineer which are not in this act otherwise provided for are hereby transferred to and conferred and imposed on the state water conservation board.

**History:** En. Sec. 17, Ch. 280, L. 1965.

**Compiler's Notes**

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

**Title of Act**

An act repealing sections 81-2006, 81-2008, 81-2010, 81-2012, R. C. M. 1947, thereby abolishing the office of state engineer; amending sections 81-2009, 81-2018, 82-3001, 89-702, 89-847, 89-848, 89-849,

89-851, 89-907, 89-908, 89-909, 89-912, 89-914, 89-1201, and 89-2911, R. C. M. 147, to provide for the transfer of certain duties of the state engineer to the state water conservation board; abolishing the Carey Land Act board; repealing sections 81-2001, 81-2002, 81-2003, 81-2004, 81-2005, 81-2007, 81-2013, 81-2015, 81-2017, 81-2101 through 81-2121, 81-2123 and 81-2125 through 81-2130, R. C. M. 1947; providing for the transfer of the book and records and funds of the Carey Land Act board and the office of the state engineer to the state water conservation board; and pro-



viding that nothing in this act contained shall impair the obligations of the state of Montana under the Yellowstone River Compact or the obligations of the state

of Montana, or the state water conservation board contracted prior to the effective date of this act.

**89-103.5. Records and property transferred to Montana water resources board.** Immediately following the effective date of this act all books, records, papers, material and supplies of all kinds and nature belonging to the Carey Land Act board, or in the office of the state engineer shall be transferred to the state water conservation board.

**History:** En. Sec. 18, Ch. 280, L. 1965.

**Compiler's Notes**

The state water conservation board has

been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

**89-103.6. Funds and appropriations transferred to Montana water resources board.** On the effective date of this act all funds in the state treasury which were appropriated to or available to the Carey Land Act board or the state engineer shall become available to the state water conservation board to be used for the purpose of carrying out the purposes of this act and the State Water Conservation Act.

**History:** En. Sec. 19, Ch. 280, L. 1965.

**Compiler's Notes**

The state water conservation board has

been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

**89-103.7. Yellowstone compact obligations unimpaired.** Nothing in this act contained shall in any manner impair the obligations of the state of Montana under the Yellowstone River Compact.

**History:** En. Sec. 20, Ch. 280, L. 1965.

**89-103.8. State obligations unimpaired.** Nothing in this act contained shall impair any obligations of the state of Montana or the state water conservation board or the Carey Land Act board lawfully entering to [entered into], assumed or contracted for prior to the effective date of this act.

**History:** En. Sec. 21, Ch. 280, L. 1965.

**Compiler's Notes**

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

**Repealing Clause**

Section 22 of Ch. 280, Laws 1965 read "Sections 81-2001, 81-2002, 81-2003, 81-2004, 81-2005, 81-2007, 81-2013, 81-2015, 81-2017, 81-2101 through 81-2121, 81-2123 and 81-2125 through 81-2130, R. C. M. 1947, are repealed."

**89-118. (349.15) Powers and duties of board—actions at law. (1).**  
\* \* \* [Same as parent volume.]

(2) The board shall have power to institute in any of the courts of this state, or in any other state, or in any of the federal courts of this state or any other state, any actions, suits, and special proceedings necessary to enable it to acquire, own, and hold title to lands for dam sites, reservoir sites, water rights, rights of way for diversion and distributing canals, and lateral ditches, and other means of distribution of water, and may also in all said courts institute, maintain, and prosecute to final determination any and all actions, suits and special proceedings necessary

to have the water rights adjudicated upon any stream or source of water supply from which is derived the water for such reservoir, diversion and distributing canals, lateral ditches and other means of distribution of the water; and said board may join any and all owners of waters heretofore appropriated by any person, association or corporation from any of the streams of the state of Montana, so that adjudication may be had of all surplus water upon all the streams and sources of water supply of any project so constructed by said board. All costs and expenses of such actions, suits or special proceedings shall be paid by said board out of funds provided under the authority of this act.

**History:** En. Sec. 14, Ch. 35, Ex. L. 1933; amd. Sec. 43, Ch. 177, L. 1965.

furnish a bond in the form and to the amount that shall be required by said board."

#### **Amendment**

The 1965 amendment deleted from subsection (2) a second paragraph reading, "The vice-chairman of the board, who shall act as secretary and treasurer, shall

#### **Cross-References**

Bonds of state officers and employees, sec. 6-105 et seq.

### **89-132. (349.29) Powers of board to carry out policy of state, etc.**

#### **Cross-Reference**

Flood control projects of cities, towns and counties, secs. 89-3301 to 89-3313.

**89-132.1. Additional powers and duties of the board.** In addition to any other power or duty authorized or imposed by provisions of this code, the board shall be empowered, and a duty is hereby enjoined thereon, to:

(1) Gather from any source reliable information relating to Montana's water resources, and prepare therefrom a continuing comprehensive inventory of the water resources of the state. In preparing said inventory, the board may conduct studies, adopt studies made by other competent water resource groups including federal, regional, state or private agencies, perform research or employ other competent agencies to perform research on a contract basis, and hold public hearings in affected areas at which all interested parties shall be given an opportunity to appear.

(2) Formulate and adopt, and from time to time amend, extend or add to, a comprehensive, co-ordinated multiple-use water resources plan, known as the "state water plan." Said state water plan may be formulated and adopted in sections, said sections corresponding with hydrologic divisions of the state. The state water plan shall set out a progressive program for the conservation, development and utilization of the state's water resources, propose the most effective means by which these water resources may be applied for the benefit of the people, with due consideration of alternative uses and combinations of uses. Before adoption of the state water plan, or any section thereof, the board shall hold public hearings in the state, or in an area of the state encompassed by a section thereof if adoption of a section is proposed. Notice of said hearing or hearings shall be published for two (2) consecutive weeks in a newspaper of general county circulation in each county encompassed by the

proposed plan or section thereof at least thirty (30) days prior to said hearing.

(3) Submit to each general session of the legislature the state water plan or any section thereof or amendments, additions or revisions thereto which the board shall have formulated and adopted.

(4) Prepare a continuing inventory of the ground-water resources of the state. Said ground-water inventory shall be included in the comprehensive water resources inventory described in subsection (1) above, but shall be a separate component thereof.

(5) Publish the comprehensive inventory, the state water plan, the ground-water inventory, or any part of each, and may assess and collect a reasonable charge for said publications.

(6) Promulgate rules and regulations necessary to effect the purposes of this act.

**History:** En. Sec. 5, Ch. 158, L. 1967.

### CHAPTER 3—WEATHER MODIFICATION ACTIVITIES

- Section 89-310. Weather modification defined.  
 89-311. Montana water resources board responsible for administration—expenses of members.  
 89-312. Advisory committees—acquisition of property—acceptance and expenditure of funds.  
 89-313. License and permit required for weather modification and control.  
 89-314. Board to review applications—exemptions from fee requirements.  
 89-315. Issuance of license—qualifications of licensees.  
 89-316. Term of license—renewal.  
 89-317. License fee.  
 89-318. Issuance of permits—requirements for permit.  
 89-319. Separate permit for each operation.  
 89-320. Notice of intention to apply for permit—activities limited by terms of permit.  
 89-321. Contents of notice of intention.  
 89-322. Publication of notice of intention.  
 89-323. Proof of financial responsibility by applicant.  
 89-324. Permit fee—time of payment.  
 89-325. Account in agency fund—fees used to pay expenses.  
 89-326. Records of operations maintained by licensees.  
 89-327. Reports of operations.  
 89-328. Records and reports open to public.  
 89-329. Termination of licenses and permits by board.  
 89-330. State and agents not liable for acts of private persons.  
 89-331. Violation as misdemeanor—continuing violations.

### 89-301 to 89-309. (349.54 to 349.62) Repealed.

#### Repeal

These sections (Secs. 1 to 9, Ch. 176, L. 1935), relating to development of state

resources by the state planning board, were repealed by Sec. 10, Ch. 19, Laws 1967.

**89-310. Weather modification defined.** As used in this act unless the context clearly indicates otherwise "weather modification and control" means changing or controlling, or attempting to change or control, by artificial methods, the natural development of any or all atmospheric cloud forms or precipitation forms which occur in the troposphere.

**History:** En. Sec. 1, Ch. 20, L. 1967.

#### Title of Act

An act to control weather modification

activities and designating the state water conservation board as the agency to administer this act.



**89-311. Montana water resources board responsible for administration—expenses of members.** The state water conservation board, hereafter referred to as the "board," is the state agency responsible for administration of this act. Members of the board shall receive no compensation for the performance of their duties under the provisions of this act but shall be reimbursed for expenses necessarily incurred.

**History:** En. Sec. 2, Ch. 20, L. 1967. been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

**Compiler's Notes**

The state water conservation board has

**89-312. Advisory committees—acquisition of property—acceptance and expenditure of funds.** In addition to any other acts authorized by law the board may:

(1) establish advisory committees to advise with and make recommendations to the board concerning legislation, policies, administration, research, and other matters;

(2) acquire materials, equipment and facilities as are necessary to perform its duties under this act;

(3) receive any funds which may be offered or become available from federal grants or appropriations, private gifts, donations, bequests, or any other source and unless their use is restricted, may expend the funds for the administration of this act.

**History:** En. Sec. 3, Ch. 20, L. 1967.

**89-313. License and permit required for weather modification and control.** No person shall engage in activities for weather modification and control except under, and in accordance with, a license and a permit issued by the board authorizing such activities.

**History:** En. Sec. 4, Ch. 20, L. 1967.

**89-314. Board to review applications—exemptions from fee requirements.** The board shall review all applications for weather modification activity, and may provide by rule for exempting from the license and permit fees:

(1) research, development, and experiments by state and federal agencies, institutions of higher learning and bona fide nonprofit research organizations and their agents;

(2) laboratory research and experiments;

(3) activities of an emergency character for protection against fire, frost, sleet, or fog; and

(4) activities normally engaged in for purposes other than those of inducing, increasing, decreasing, or preventing precipitation or hail.

**History:** En. Sec. 5, Ch. 20, L. 1967.

**89-315. Issuance of license—qualifications of licensees.** The license to engage in activities for weather modification and control shall be issued, in accordance with procedures and subject to conditions the board may by rule establish to effectuate the provisions of this act, to applicants

who demonstrate competence in the field of meteorology to the satisfaction of the board. If the applicant is an organization, these requirements must be met by the individual who will be in charge of the operation for the applicant.

History: En. Sec. 6, Ch. 20, L. 1967.

**89-316. Term of license—renewal.** The license shall be issued for a period to expire at the end of the calendar year in which it is issued and, if the licensee possesses the qualifications necessary for the issuance of a new license, shall upon application be renewed at the expiration of the period.

History: En. Sec. 7, Ch. 20, L. 1967.

**89-317. License fee.** A license shall be issued or renewed only upon the payment to the board of one hundred dollars (\$100) for the license or renewal.

History: En. Sec. 8, Ch. 20, L. 1967.

**89-318. Issuance of permits—requirements for permit.** The permits shall be issued in accordance with procedures and subject to conditions the board may by rule establish to effectuate the provisions of this act, only:

- (1) if the applicant is licensed pursuant to this act;
- (2) if sufficient notice of intention is published and proof of publication is filed as required in section 13 [89-322] of this act;
- (3) if an applicant furnishes proof of financial responsibility in an amount to be determined by the board as required in section 14 [89-323] of this act;
- (4) if the fee for the permit is paid as required in section 15 [89-324] of this act;
- (5) if the weather modification and control activities to be conducted are determined by the board to be for the general welfare and the public good;
- (6) if the board has held an open public hearing in the area to be affected as to such issuance.

History: En. Sec. 9, Ch. 20, L. 1967.

**89-319. Separate permit for each operation.** "Operation" means the performance of weather modification and control activities entered into for the purpose of producing or attempting to produce, a certain modifying effect within one (1) geographical area over one continuing time interval not exceeding one (1) year.

History: En. Sec. 10, Ch. 20, L. 1967.

**89-320. Notice of intention to apply for permit—activities limited by terms of permit.** Prior to undertaking any weather modification and control activities, the applicant for a permit shall file with the board, and also have published, a notice of intention. If a permit is issued, the holder

of the permit shall confine his activities to the time and area limits set forth in the notice of intention, unless modified by the board. His activities shall conform to any conditions imposed by the board. The permit may not be sold or transferred.

**History:** En. Sec. 11, Ch. 20, L. 1967.

**89-321. Contents of notice of intention.** The notice of intention shall set forth at least the following:

- (1) the name and address of the applicant;
- (2) the nature, purpose, and objective of the intended operation and the person or organization on whose behalf it is to be conducted;
- (3) the area in which, and the approximate time during which, the operation will be conducted;
- (4) the area which is intended to be affected by the operation;
- (5) the materials and methods to be used in conducting the operation.

**History:** En. Sec. 12, Ch. 20, L. 1967.

**89-322. Publication of notice of intention.** (1) The applicant shall have notice of intention, or that portion thereof including the items specified in section 12 [89-321] of this act, published at least once a week for two (2) consecutive weeks in a newspaper having a general circulation and published within any county in which the operation is to be conducted and in which the affected area is located, or, if the operation is to be conducted in more than one (1) county or if the affected area is located in more than one (1) county or is located in a county other than the one in which the operation is to be conducted, then in newspapers having a general circulation and published within each of the counties.

(2) Proof of publication, made in the manner provided by law, shall be filed by the applicant with the board sooner than the sixteenth day after the date of the last publication of the notice.

**History:** En. Sec. 13, Ch. 20, L. 1967.

**89-323. Proof of financial responsibility by applicant.** Proof of financial responsibility may be furnished by an applicant by his showing, to the satisfaction of the board, ability to respond in damages for liability which might reasonably be attached to, or result from, his weather modification and control activities.

**History:** En. Sec. 14, Ch. 20, L. 1967.

**89-324. Permit fee—time of payment.** The fee to be paid by each applicant for a permit shall be equivalent to one per cent (1%) of the estimated cost of such operation, the estimated cost to be computed by the board from the evidence available to it. The fee is due and payable to the board as of the date of issuance of the permit; however, if the applicant is able to give satisfactory security for the payment of the balance he may be permitted to commence the operation, and a permit may be issued therefor, upon the payment of not less than fifty per cent (50%) of the fee. The balance due shall be paid within three (3) months from the date of termination of the operation as prescribed in the permit.



History: En. Sec. 15, Ch. 20, L. 1967;      Amendments  
amd. Sec. 1, Ch. 151, L. 1969.

The 1969 amendment substituted "one per cent (1%)" for "one and one-half per cent (1½%)" in the first sentence.

**89-325. Account in agency fund—fees used to pay expenses.** There is established an account in the agency fund to be known as the "weather modification board account." All license and permit fees paid to the board shall be deposited in this account and used to pay the expenses of administering this act.

History: En. Sec. 16, Ch. 20, L. 1967.

**89-326. Records of operations maintained by licensees.** Every licensee shall keep and maintain a record of all operations conducted by him under his license and each permit, showing:

- (1) the method employed;
- (2) type of equipment used;
- (3) kinds and amounts of material used;
- (4) times and places of operation of the equipment;
- (5) names and addresses of all individuals participating or assisting in the operation;
- (6) any other general information as the board may require.

History: En. Sec. 17, Ch. 20, L. 1967.

**89-327. Reports of operations.** The board shall require written reports, in a manner as it provides, of each operation for which a permit is issued. The board shall also require reports from any organization that is exempt from license and permit requirements as provided in section 5 [89-314] of this act.

History: En. Sec. 18, Ch. 20, L. 1967.

**89-328. Records and reports open to public.** The records and reports in the custody of the board shall be open for public examination.

History: En. Sec. 19, Ch. 20, L. 1967.

**89-329. Termination of licenses and permits by board.** After notice to the licensee and a reasonable opportunity for a hearing, the board may modify, suspend, revoke, or refuse to renew, any license or permit issued if it appears that the licensee no longer possesses the qualifications necessary or if it appears that the licensee has violated any of the provisions of this act; or in the case of a modification, that it is necessary for the protection of the health or the property of any person.

History: En. Sec. 20, Ch. 20, L. 1967.

**89-330. State and agents not liable for acts of private persons.** Nothing in this act shall be construed to impose or accept any liability or responsibility on the part of the state, the board, or any state officials or employees for any weather modification and control activities of any private person or group.

History: En. Sec. 21, Ch. 20, L. 1967.

**89-331. Violation as misdemeanor—continuing violations.** A person violating any provision of this act is guilty of a misdemeanor, and a con-

tinuing violation is punishable as a separate offense for each day during which it occurs.

**History:** En. Sec. 22, Ch. 20, L. 1967.

#### **Separability Clause**

Section 23 of Ch. 20, Laws 1967 read "It is the intent of the legislative assembly that if a part of this act is invalid, all valid

parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

### **CHAPTER 7—DAMS AND RESERVOIRS—CONSTRUCTION AND EXAMINATION OF**

Section 89-702. Dams and dikes to be constructed in a secure manner—proceedings upon complaint of insecurity.

**89-702. (2659) Dams and dikes to be constructed in a secure manner—proceedings upon complaint of insecurity.** No person, association, or corporation shall construct, or cause to be constructed, a dam or dike for the purpose of accumulating, storing, appropriating, or diverting any of the waters of this state, except in a thorough, secure, and substantial manner.

Upon complaint on oath being made to the state water conservation board by three or more persons residing or having property in such location, that their homes or property would be in danger of destruction or damage in event of flood occurring on account of the breaking of any dam or dike of any reservoir within the state, and that they have reason to believe said reservoir is in an unsafe condition, or that it is being filled with water to such an extent as to render it unsafe, it shall be the duty of the state water conservation board to forthwith examine, or cause to be examined, the said reservoir. If, upon such examination, the state water conservation board shall find that said reservoir is unsafe, or is being filled with water to such an extent as to render it unsafe, it shall notify the county attorney of the county in which the reservoir is located, setting forth its findings, and the county attorney shall immediately take the necessary steps to abate the danger and make the structure safe.

In the event of either party being dissatisfied with the findings of the state water conservation board, it may take an appeal to the district court of the district wherein the reservoir is located, and said court shall hear and determine the matter at the earliest practical time, subject to the right of either party to take an appeal as in other civil cases; provided, that the judgment of the state water conservation board shall control until the final determination of the case.

**History:** Sec. 2139, Rev. C. 1907; amd. Sec. 1, Ch. 168, L. 1917; re-en. Sec. 2659, R. C. M. 1921; amd. Sec. 5, Ch. 280, L. 1965.

sources board. See paragraph (1), sec. 89-103 herein.

#### **Amendment**

The 1965 amendment substituted "state water conservation board" for "state engineer" in five places; and made minor changes in phraseology.

#### **Compiler's Notes**

The state water conservation board has been redesignated the Montana water re-

## CHAPTER 8—WATER RIGHTS—APPROPRIATION AND ADJUDICATION

- Section 89-801. What waters may be appropriated.  
 89-801.1. Established rights of use unaffected.  
 89-801.2. Notice of appropriation.  
 89-813. Record of declaration.  
 89-847. Declaration of policy as to adjudication of waters of the state.  
 89-848. Montana water resources board may bring action to adjudicate waters.  
 89-849. Appointment of referee to take testimony.  
 89-851. Duties of Montana water resources board—scope of examination of streams—surveys, reports, maps and plats may be introduced as evidence.

**89-801. What waters may be appropriated.** (1) The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same.

(2) But the unappropriated waters of the streams and portions of streams hereafter named shall be subject to appropriation by the fish and game commission of the state of Montana in such amounts only as may be necessary to maintain stream flows necessary for the preservation of fish and wildlife habitat. Such uses shall have a priority of right over other uses until the district court in which lies the major portions of such stream or streams shall determine that such waters are needed for a use determined by said court to be more beneficial to the public. The unappropriated water of other streams and rivers not named herein may be set aside in the future for appropriation by the fish and game commission upon consideration and recommendation of the water resources board, fish and game commission, state soil conservation committee, the state board of health and approval of the legislature.

(a) Big Spring creek in Fergus county from its mouth in T17N, R16E, Sec. 26 to the state fish hatchery in T14W, R19E, Sec. 5.

(b) Blackfoot river in Missoula and Powell counties from its mouth in T13N, R18W, Sec. 21 to the mouth of its North Fork in T14N, R12W, Sec. 9.

(c) Flathead river in Flathead county from its mouth in T27N, R20W, Sec. 34 to the Canadian border in T37N, R22W, Sec. 4 & 5, including the section commonly known as the North Fork of the Flathead river.

(d) Gallatin river in Gallatin county from its mouth in T2N, R2E, Sec. 9 to the junction of its East Fork in T2N, R3E, Sec. 27.

(e) Gallatin river in Gallatin county (commonly called the West Gallatin) from the Beck & Border ditch intake in T2S, R4E, Sec. 14, to where it leaves the Yellowstone Park boundary in T9S, R5E, Sec. 18.

(f) Madison river in Madison and Gallatin counties from its mouth in T2N, R2E, Sec. 17 to Hebgen dam in T11S, R3E, Sec. 23.

(g) Missouri river in Lewis and Clark, Broadwater and Cascade counties from its junction with the Smith river in T19N, R2E, Sec. 9 to Toston dam in T4N, R3E, Sec. 7.



(h) Rock creek in Granite and Missoula counties from its mouth in T11N, R17W, Sec. 12 to the junction of its East and West Forks in T6N, R15W, Sec. 31.

(i) Smith river in Cascade and Meagher counties from the mouth of Hound creek in T17N, R3E, Sec. 20 to the Fort Logan bridge in T11N, R5E, Sec. 31.

(j) Yellowstone river in Stillwater, Sweetgrass and Park counties from the North-South Carbon-Stillwater county lines in T3S, R21E, Sec. 10 to where it leaves the Yellowstone Park boundary in T9S, R8E, Sec. 23.

(k) Middle Fork Flathead river in Flathead county from its mouth in T31N, R19W, Sec. 7 to the mouth of Cox creek in T27N, R12W, (a nonsectioned township).

(l) South Fork Flathead river in Flathead and Powell counties from its mouth at Hungry Horse reservoir in T26W, R16W, Sec. (unknown), to its source at the junction of Danaher and Youngs creeks in T20W, R13W, Sec. 36.

**History:** Ap. p. Sec. 1, p. 130, L. 1885; re-en. Sec. 1250, 5th Div. Comp. Stat. 1887; amd. Sec. 1880, Civ. C. 1895; en. Sec. 1, p. 152, L. 1901; re-en. Sec. 4840, Rev. C. 1907; amd. Sec. 1, Ch. 228, L. 1921; re-en. Sec. 7093, R. C. M. 1921; amd. Sec. 1, Ch. 345, L. 1969. Cal. Civ. C. Sec. 1410.

#### Amendments

The 1969 amendment designated the former section as subsection (1). and added subsection (2).

**89-801.1. Established rights of use unaffected.** Nothing herein contained shall in any way affect or diminish any rights to the use of the waters of such streams or portions of streams heretofore established nor any legal or statutory rights given in connection with such established uses.

**History:** En. Sec. 2, Ch. 345, L. 1969.

#### Title of Act

An act amending section 89-801, R. C. M. 1947, by reserving all the un-

appropriated water from certain enumerated streams for fishing and wildlife purposes except for future appropriations for municipal and individual water supplies.

**89-801.2. Notice of appropriation.** The appropriation hereby authorized shall be made by filing a written notice of appropriation in the office of the county clerk and recorder of each county through which flows the river on which the appropriation is made, and by filing a copy of such notice with the director of the Montana water resources board. The notice shall state the quantity of water claimed, measured as provided in Title 89, R. C. M. 1947, the purpose for which it is claimed, the name of the appropriator, and the date of appropriation.

**History:** En. Sec. 3, Ch. 345, L. 1969.

#### 89-803. (7095) Point of diversion may be changed—change of use.

##### Clearing Irrigation Ditch

Servient landowners did not have a right to relief where changes caused by a dozer in clearing irrigation ditch would not be considered substantial changes or

material alterations if they involved minor meandering along the course to account for topographical adjustments in the terrain. *Shammel v. Vogl*, 144 M 354, 396 P 2d 103, 109.

**89-810. (7100) Notice of appropriation.****Verification of Notice**

Where verification of notice of appropriation was not completed as prescribed by this section, the notice on the record

was not duly made, and was not entitled to prima facie evidentiary value under section 89-814. *Shammel v. Vogl*, 144 M 354, 396 P 2d 103, 111.

**89-813. (7103) Record of declaration.** Persons who have heretofore acquired rights to the use of water shall, within six (6) months after the publication of this chapter, file in the office of the county clerk of the county in which the water right is situated, a declaration in writing, except notice be already given of record as required by this chapter, or a declaration in writing be already filed as required by this section, containing the same facts as required in the notice provided for record in section 89-810 of this chapter, and verified as required in said last-mentioned section, in cases of notice of appropriation of water; provided, that a failure to comply with the requirements of this section shall in nowise work a forfeiture of such heretofore acquired rights, or prevent any such claimant from establishing such rights in the courts. From and after July 1, 1967, the county clerk and recorder shall forward to the water resources board a copy of any instrument of water appropriation or instrument transferring any water appropriation which is filed as provided in this section.

**History:** En. Sec. 9, p. 132, L. 1885; re-en. Sec. 1258, 5th Div. Comp. Stat. 1887; re-en. Sec. 1889, Civ. C. 1895; re-en. Sec. 4850, Rev. C. 1907; re-en. Sec. 7103, R. C. M. 1921; amd. Sec. 6, Ch. 158, L. 1967.

**Amendments**

The 1967 amendment added the last sentence.

**Repealing Clause**

Section 7 of Ch. 158, Laws 1967 read "Section 89-101, R. C. M. 1947, is repealed."

**89-814. (7104) Record prima facie evidence.****Defective Verification of Notice of Appropriation**

Where verification of notice of appropriation was not completed as prescribed by section 89-810 the notice on the record

was not duly made and was not entitled to prima facie evidentiary value under this section. *Shammel v. Vogl*, 144 M 354, 396 P 2d 103, 111.

**89-821, 89-822. (7111, 7112) Repealed.****Repeal**

These sections (Secs. 10, 11, p. 58, L. 1870), relating to ditches, dikes, flumes

and canals crossing highways, were repealed by Sec. 12-109, Ch. 197, Laws 1965, effective December 31, 1966.

**89-847. Declaration of policy as to adjudication of waters of the state.** It is hereby declared to be the policy of this state and necessary for the welfare of the state and its citizens, that the waters of this state and especially interstate streams arising out of the state be investigated and adjudicated as soon as possible in order to protect the rights of water users in this state and negotiate interstate compacts in relation thereto, and that the state water conservation board make investigations to secure necessary information and initiate and carry on actions therefor.

**History:** En. Sec. 1, Ch. 185, L. 1939; **Amendment**  
amd. Sec. 6, Ch. 280, L. 1965.

**Compiler's Notes**

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

The 1965 amendment deleted "and state engineer" after "state water conservation board" in the final clause.

**89-848.** Montana water resources board may bring action to adjudicate waters. The state water conservation board is hereby authorized to bring action to adjudicate the waters of any stream or of any stream and its tributaries in any county traversed by said stream.

**History:** En. Sec. 2, Ch. 185, L. 1939; **Amendment**  
amd. Sec. 7, Ch. 280, L. 1965.

**Compiler's Notes**

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

The 1965 amendment substituted "The state water conservation board" for "At the direction of the state water conservation board the state engineer" at the beginning of the section.

**89-849.** Appointment of referee to take testimony. In said actions the state water conservation board, or in any action pending for the adjudication of a water right, any party thereto, may make application to the court for the appointment of some competent person or persons to act as a referee or referees in said cause and to take testimony therein, and the court may appoint a referee or referees who shall proceed as herein set forth. In said order of reference the court may submit to said referee or referees any or all issues of fact in said cause.

**History:** En. Sec. 3, Ch. 185, L. 1939; **Amendment**  
amd. Sec. 8, Ch. 280, L. 1965.

**Compiler's Notes**

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

The 1965 amendment deleted "the state engineer, upon direction of" after "In said actions" at the beginning of the section.

**89-851.** Duties of Montana water resources board—scope of examination of streams—surveys, reports, maps and plats may be introduced as evidence. The state water conservation board shall either before or after the bringing of such action do all things, make all surveys, and perform all services required by said board in the securing of all necessary information and making same available to persons who may be interested therein including the courts of this state. The state water conservation board or some qualified employee may proceed to make an examination of any stream or streams as required by said board and the works diverting therefrom, said examination to include the measurement of the discharge of said stream and of the carrying capacity of the various ditches and canals, and examination of the irrigated lands and an approximate measurement of the lands irrigated from the various ditches and canals, and to take such other steps and gather such other data and information as may be essential to the proper understanding of the relative rights



of the parties interested, which said observation and measurement shall be reduced to writing and made a matter of record, and it shall be the duty of the state water conservation board to make or cause to be made such maps or plats thereof as deemed necessary or shall be required. Any or all such surveys, reports, maps and plats may be furnished to the judge of said court or the referee or referees mentioned herein and may be introduced as evidence in such proceedings; provided that the costs and expenses incurred in carrying out the provisions of this section shall be paid by the state water conservation board.

**History:** En. Sec. 5, Ch. 185, L. 1939; amd. Sec. 9, Ch. 280, L. 1965.

#### Compiler's Notes

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

#### Amendment

The 1965 amendment substituted "state water conservation board" for "state engineer" at the beginning of the section, at the beginning of the second sentence, and near the end of the second sentence; deleted "upon direction of the state water

conservation board or upon the direction of the court" before "do all things" in the first sentence; substituted "persons" for "said board or others" near the end of the first sentence; substituted "employee" for "assistant" near the beginning of the second sentence; deleted "at his office" after "matter of record" in the second sentence; deleted "by said board, and to file with said board a detailed report and copies of such maps or plats covering such information so acquired by him" at the end of the second sentence; and made other minor changes in phraseology.

### CHAPTER 9—YELLOWSTONE RIVER COMPACT—RATIFICATION OF

- Section 89-907. Filing written statement with Montana water resources board.  
 89-908. Duty to install weir or other measuring device.  
 89-909. Duty to measure water.  
 89-912. Montana water resources board to make rules and regulations.  
 89-914. Montana water resources board to make record available.

#### 89-907. Filing written statement with Montana water resources board.

Any person claiming an appropriative right to the use of any water of any interstate tributary which right was acquired after January 1, 1950, shall within sixty days after the approval of this act, or before he diverts any water, file with the state water conservation board at its office in Helena, Montana, a written statement containing the following information:

- (a) The name of the claimant and his address.
- (b) Date of appropriation or the date when the water was first applied to a beneficial use.
- (c) The quantity of water claimed.
- (d) The name of the stream, river or other source of water from which the diversion is made, if it has a name, and if it does not, such a description as will identify the same.
- (e) The purpose for which the water is claimed and the place of intended use.
- (f) The means of diversion.
- (g) Whether or not a weir or other device for measuring the water intended to be diverted has been installed in his ditch or other means of diversion.

(h) If a notice of appropriation was filed with the county clerk and recorder, as provided by section 89-810, the name of the county where it was filed.

(i) Whether the appropriation was made from an adjudicated or nonadjudicated stream, river or other source of water.

The written statement shall be verified by the affidavit of the claimant or someone in his behalf, which affidavit must state that the matters and facts contained in the written statement are true.

**History:** En. Sec. 3, Ch. 92, L. 1953;  
amd. Sec. 10, Ch. 280, L. 1965.

**Compiler's Notes**

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

**Amendment**

The 1965 amendment substituted "state water conservation board" for "state engineer" in the first paragraph; and made a minor change in phraseology.

**89-908. Duty to install weir or other measuring device.** Any person claiming an appropriative right to use any waters of any interstate tributary of the Yellowstone river which right was acquired subsequently to January 1, 1950, shall, after the approval of this act and before he diverts any such water, install in his ditch, or other means of diversion, a weir or other measuring device so that all of the water to be diverted by him can be accurately measured. The installation of a weir or other measuring device is subject to the approval of the state water conservation board, and if in its judgment such weir or other measuring device, or the installation of the same, is defective so that the water cannot be accurately measured, it may order the installation of an accurate measuring device and the claimant shall not divert any water until he complies with such order.

**History:** En. Sec. 4, Ch. 92, L. 1953;  
amd. Sec. 11, Ch. 280, L. 1965.

**Compiler's Notes**

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

**Amendment**

The 1965 amendment substituted "state water conservation board" for "state engineer" in the second sentence; and made minor changes in phraseology.

**89-909. Duty to measure water.** It shall be the duty of every said claimant to measure all the water being diverted by him and to keep accurate records thereof on forms prescribed and furnished by the state water conservation board, and within fifteen days after the first day of November of each year to file such written records with the state water conservation board at its office in Helena, Montana.

**History:** En. Sec. 5, Ch. 92, L. 1953;  
amd. Sec. 12, Ch. 280, L. 1965.

**Compiler's Notes**

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

**Amendment**

The 1965 amendment substituted "state water conservation board" for "state engineer" in two places; and made a minor change in phraseology.

89-912. Montana water resources board to make rules and regulations. The state water conservation board shall prescribe and enforce reasonable rules and regulations consistent with this act and the Yellowstone River Compact.

**History:** En. Sec. 8, Ch. 92, L. 1953; amd. Sec. 13, Ch. 280, L. 1965.

sources board. See paragraph (1), sec. 89-103 herein.

#### Compiler's Notes

The state water conservation board has been redesignated the Montana water re-

#### Amendment

The 1965 amendment substituted "state water conservation board" for "state engineer."

89-914. Montana water resources board to make record available. The state water conservation board shall furnish and make available to the Yellowstone river compact commission, from the records filed in its office, all appropriative rights to the use of the waters of the interstate tributaries of the Yellowstone river in the state of Montana, acquired after January 1, 1950, the amount of the annual diversions from said interstate tributaries and any other information that its records may disclose as may be required by the Yellowstone river compact commission.

**History:** En. Sec. 10, Ch. 92, L. 1953; amd. Sec. 14, Ch. 280, L. 1965.

#### Amendment

The 1965 amendment substituted "state water conservation board" for "state engineer"; and made minor changes in phraseology.

#### Compiler's Notes

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

## CHAPTER 10—WATER COMMISSIONERS—DETERMINATION OF JOINT RIGHTS

89-1001. (7136) Appointment of water commissioners—authority, etc.

#### References

Allen v. Wampler, 143 M 486, 392 P 2d 82.

89-1015. (7150) Complaint by dissatisfied user—procedure on.

#### Purpose of Summary Proceeding

The district court had no authority in a proceeding under this section to approve a method of distribution which changed the point of diversion of water to a tract and changed the transportation ditch

thereto, as the only function of the court in such a proceeding is to determine whether the water involved is being allocated in compliance with existing decrees and not to decree new water rights. Allen v. Wampler, 143 M 486, 392 P 2d 82.

## CHAPTER 12—IRRIGATION DISTRICTS—ORGANIZATION

Section 89-1201. Creation of irrigation districts—percentage of titleholders required—what constitutes evidence of title—report of Montana water resources board—payment of expenses.

89-1208. Compensation of commissioners—penalty for interest in contract—bonds of commissioners.

89-1201. (7166) Creation of irrigation districts—percentage of title holders required—what constitutes evidence of title—report of Montana water resources board — payment of expenses. (1) and (2). \* \* \* [Same as parent volume.]



(3) Before any such district shall be established, there shall be presented to the district court at the hearing on the petition for such establishment, a written report or opinion from the state water conservation board on the engineering features involved and the possibilities of water supplies accompanied by a copy of the decree of the district court showing the adjudicated water rights in said streams from which said waters are to be diverted. For this purpose, a copy of the petition provided for in section 89-1202 and of all maps and other papers filed with the same, shall be filed with the state water conservation board at the time the original petition is filed with the clerk of the district court. The expense, if any, incurred by the state water conservation board in the investigation and report upon the proposed district shall be certified, with the report, and that said board shall, within a period of one hundred twenty days from the filing of said petition with the state water conservation board, render its report, as herein provided, to the said district court, and shall be assessed as costs in said hearing, which costs shall be paid by the district in event of its establishment and in event such petition be denied, then such costs shall be paid by the petitioners; provided, however, that such report or opinion shall be not requested or obtained, and shall not be necessary, whenever it is proposed to co-operate with the United States under the federal reclamation laws heretofore or hereafter enacted, or under any act of Congress which shall permit of the performance by the United States of work in this state, for the purposes of construction of irrigation works, including drainage works, or for purchase, extension, operation or maintenance of constructed works, or for the assumption, as principal or guarantor, of indebtedness to the United States on account of district laws.

**History:** The first irrigation district act was Ch. 70, L. 1907, appearing as Secs. 2309-2402, Rev. C. 1907; repealed by Ch. 146, L. 1909.

This section en. Sec. 1, Ch. 146, L. 1909; amd. Sec. 1, Ch. 153, L. 1917; amd. Sec. 1, Ch. 116, L. 1919; re-en. Sec. 7166, R. C. M. 1921; amd. Sec. 1, Ch. 157, L. 1923; amd. Sec. 1, Ch. 112, L. 1925; amd. Sec. 15, Ch. 280, L. 1965.

#### Compiler's Notes

The state water conservation board has been redesignated the Montana water re-

sources board. See paragraph (1), sec. 89-103 herein.

#### Amendment

The 1965 amendment substituted "the state water conservation board" or "said board" for "the state engineer" or "said engineer" in five places in subsection (3); deleted "(other than his salary)" which followed "incurred by the state engineer" near the beginning of the third sentence of subsection (3); and made other minor changes in phraseology in subsection (3).

**89-1208. (7173) Compensation of commissioners—penalty for interest in contract—bonds of commissioners.** The commissioners, when sitting as a board or when engaged in the business of the district, shall each receive not to exceed ten dollars (\$10.00), per day for services, and, in addition thereto, their necessary expenses in attending meetings, or when otherwise engaged on district business, including premiums on qualifying bonds and any other bonds required of them in connection with their office, provided such expenses and per diem be approved by a unanimous vote of said board.

No commissioner or any other officer named in this act shall in any manner be interested directly or indirectly, in any contract awarded or to

be awarded by the board, or in the profits derived therefrom; and for any violation of this provision, such officer shall be deemed guilty of a misdemeanor and his conviction thereof shall work forfeiture of his office and he shall be punished by a fine not exceeding five hundred dollars (\$500.00), or by imprisonment in the county jail not exceeding six (6) months or by both such fine and imprisonment.

The commissioners of said irrigation district shall each furnish a bond in the penal sum of twenty-five hundred dollars (\$2500.00), with corporate surety conditioned for the faithful performance of their duties under this act, and the secretary shall furnish bond, with corporate surety, in the sum of one thousand dollars (\$1000.00), conditioned for the faithful performance of his duties pursuant to this act, and for the proper and safekeeping of the records and documents of said district, in all cases where the obligations of said district, either existing or proposed, total two hundred and fifty thousand dollars (\$250,000.00) or over. In all other cases the bond for said commissioners shall be in the sum of one thousand dollars (\$1000.00).

**History:** En. Sec. 8, Ch. 146, L. 1909; amd. Sec. 1, Ch. 120, L. 1921; re-en. Sec. 7173, R. C. M. 1921; amd. Sec. 3, Ch. 157, L. 1923; amd. Sec. 1, Ch. 116, L. 1927; amd. Sec. 1, Ch. 15, L. 1929; amd. Sec. 1, Ch. 62, L. 1965.

**Amendment**

The 1965 amendment increased the daily compensation of the commissioners set forth in the first paragraph from \$5 to \$10.

## CHAPTER 17—IRRIGATION DISTRICTS—BONDS

Section 89-1708. Delivery of bonds—disposition of proceeds.

89-1708. (7215) **Delivery of bonds—disposition of proceeds.** In the event that bonds are sold for cash, they shall be delivered by the board of commissioners to the county treasurer of the county wherein the office of the district is located, who shall deliver them to the purchaser upon receipt of the purchase price therefor, and after making a complete record of the same. Delivery of the bonds sold may be made by the county treasurer to the purchaser at any place or places within or without the state of Montana, and said county treasurer may receive the proceeds of the sale of said bonds at said place or places of delivery. The county treasurer shall thereupon place the proceeds of said sale to the credit of said district; and the same shall be paid out by the county treasurer only upon the written order of the board of commissioners, signed by the president and secretary under the seal of the district. Said proceeds shall be expended for the purpose or purposes for which said bonds were issued, and for no other. Provided, in case any portion of the funds realized from the sale of bonds are not needed immediately for the purpose for which said bonds were issued, the board of commissioners whenever, in its judgment, the same may be to the best interests of the district, shall have the power and authority to direct the investment of such funds, and any other surplus funds of the district, or any portion thereof, in interest-bearing securities of the United States, or of the state of Montana, or

in interest-bearing certificates of deposit of national or state banks approved by the state superintendent of banks; provided, however, that in the event of such deposit said banks shall first furnish an indemnity bond to be approved by said board of commissioners and the state superintendent of banks. The county treasurer shall transfer to the credit of the district, and place to the credit of such fund or funds as the board of commissioners may direct, all interest received upon money or securities of the district entrusted to his care.

**History:** En. Sec. 45, Ch. 146, L. 1909; re-en. Sec. 7215, R. C. M. 1921; amd. Sec. 10, Ch. 157, L. 1923; amd. Sec. 1, Ch. 258, L. 1967.

#### Amendments

The 1967 amendment inserted "and any other surplus funds of the district" after "investment of such fund" in the fifth sentence.

### CHAPTER 18—IRRIGATION DISTRICTS—TAXES AND ASSESSMENTS

#### 89-1832. (7250) Sale or transfer of lands.

##### Highway Condemnation

State highway commission acquiring land for highway purposes is not liable for assessment and taxes by irrigation district since land taken will no longer benefit from services provided by district,

notwithstanding contention of district that takings so reduced total irrigable acreage of district as to increase per-acre cost of operation and maintenance of remainder. *Helena Valley Irrig. Dist. v. State Highway Commission*, 150 M 192, 433 P 2d 791.

### CHAPTER 29—APPROPRIATION AND REGULATION OF GROUND WATER

Section 89-2911. Definitions.

89-2913. Filing—notice of appropriation—notice of completion.

**89-2911. Definitions.** As used in this act or regulations issued hereunder:

(a) to (e). \* \* \* [Same as parent volume.]

(f) "Administrator" means the state water conservation board.

(g). \* \* \* [Same as parent volume.]

**History:** En. Sec. 1, Ch. 237, L. 1961; amd. Sec. 16, Ch. 280, L. 1965.

#### Amendment

The 1965 amendment substituted "state water conservation board" for "state engineer" in paragraph (f).

##### Compiler's Notes

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

**89-2913. Filing—notice of appropriation—notice of completion.** (a) to (g). \* \* \* [Same as parent volume.]

(h) Persons who have put ground water to a beneficial use, including subirrigation or other natural process, prior to January 1, 1962, shall, within four (4) years after January 1, 1962, file a declaration in the office of the county clerk of the county in which the claimed right is situated. The declaration shall be made on a form known as a "declaration of vested ground water rights" and shall contain the following information: (1) the name and address of the claimant; (2) the beneficial use



on which the claim is based; (3) the date or approximate date of the earliest beneficial use, and how continuous the use has been; (4) the amount of ground water claimed; (5) if the beneficial use has been for irrigation, the acreage and description of the lands to which such water has been applied and the name of the owner thereof; (6) the means of withdrawing such water from the ground and the location of each well or other means of withdrawal; (7) the date of commencement and completion of the construction of the well, wells or other works for withdrawal of ground water; (8) the depth of water table; (9) so far as it may be available, the type, size and depth of each well or the general specifications of any other works for the withdrawal of ground water; (10) the estimated amount of ground water withdrawn each year; (11) the log of the formations encountered in the drilling of each well; and (12) such other information of a similar nature as may be useful in carrying out the policy of this act.

The county clerk shall transmit copies to the office of the administrator, and the bureau of mines and geology. The administrator shall attend to filing copies in any other counties affected by the appropriation.

The declaration of vested ground water rights herein provided for shall be taken and received in all courts of this state as prima facie evidence of the statements therein contained.

Failure to comply with this requirement shall in no wise work a forfeiture of such rights, or prevent any such claimant from establishing such rights in the courts, but he must maintain the burden of proving such unrecorded rights. Provided, however, that persons who have filed the water well log form, provided for in sections 1 and 2 of chapter 58, session laws of Montana, 1957, shall be deemed to have complied with the requirements of this section. These latter forms may be returned to the county clerks by the administrator for the purpose of correction or for the entry of material facts necessary to fully complete the filing.

History: En. Sec. 3, Ch. 237, L. 1961;  
amd. Sec. 1, Ch. 21, L. 1965.

#### Amendment

The 1965 amendment substituted "four (4) years" for "two (2) years" in the first sentence of subsection (h).

### CHAPTER 33—COUNTY AND MUNICIPAL PARTICIPATION IN FLOOD CONTROL AND WATER CONSERVATION

- Section 89-3301. Participation in projects authorized—work which may be undertaken.  
89-3302. Water conservation and flood control activities declared public purpose.  
89-3303. Acquisition of property—condemnation.  
89-3304. Acceptance of aid—assumption of remaining cost.  
89-3305. Right of way and construction costs.  
89-3306. Direction of project.  
89-3307. Contributions to right of way costs—agreement to maintain works.  
89-3308. Street or road fund used.  
89-3309. Levy of special assessment—apportionment to property benefited.  
89-3309.1. Charges to be levied.  
89-3310. Contracts for use of railroads and highways.  
89-3311. Division of work into parts—separate proceedings for parts.  
89-3312. Indebtedness and bonds—bond election—tax levy to pay indebtedness.  
89-3313. Powers additional.  
89-3314. Provisions to provide alternative method.

89-3301. Participation in projects authorized—work which may be undertaken. Cities, towns or counties, through their councils, boards of county commissioners, or other governing body, are hereby empowered, either individually or jointly, to engage or participate in the establishment of water conservation and flood control projects within the limits of such city, town or county for the protection or reclamation of property situated therein from floods or high waters and to protect property therein from the effects of flood water, and for the conservation, development, storage, distribution, drainage and utilization of water for purposes beneficial to the district, such purposes to include but not be limited to industrial and municipal water supply, recreation and wildlife, irrigation, streamflow stabilization, household and domestic use and pollution abatement, whenever the establishment of such a water conservation and flood control system shall, in the judgment of the city council, board of county commissioners or other governing body, be conducive to public convenience and welfare. Such cities, towns or counties may in accordance with the provisions of this act individually, jointly or severally, or in co-operation with the federal or state government or any department or agency thereof, and with each other, deepen, widen, straighten, alter, change, divert or otherwise improve the watercourses within or without their limits, by constructing levees, dikes, embankments, structures, impounding reservoirs or conduits, and improve, widen and establish streets, alleys and boulevards across and adjacent to the abandoned or new channel or conduit and provide for the payment of the cost and maintenance of such project or projects under the terms of this act. The boundaries of a project once established shall not be extended without the vote of a majority of the electors residing in the area proposed to be annexed. Such electors to be determined and such election to be held in accordance with the provisions of section 89-3312 of this act.

History: En. Sec. 1, Ch. 272, L. 1965; amd. Sec. 1, Ch. 284, L. 1967.

(\$1) from the general fund of the state of Montana for the biennium commencing July 1, 1965, containing a repealing clause and containing a savings clause.

#### Title of Act

An act authorizing cities, towns or counties to participate in flood control or flood prevention projects, to acquire property for such purpose, to accept federal aid for such purpose, providing for division of expenses in connection with such purpose, providing for assessments, permitting the cities, towns or counties to enter into certain contracts in pursuance of such purpose, authorizing the issuance of general obligation bonds for such purpose upon an election thereon, authorizing the state water conservation board to co-ordinate such activities when two or more counties are involved and for that purpose appropriating to the state water conservation board the sum of one dollar

#### Amendments

The 1967 amendment substituted "water conservation and flood control projects" for "a flood control or flood prevention project" after "establishment of" in the first sentence, inserted "and for the conservation, development, \* \* \* pollution abatement" before "whenever" and inserted "water conservation and" after "such a"; inserted "or state" after "federal" in the second sentence, substituted "such project or projects" for "such flood control project" before "under the terms" near the end of the second sentence and added the last sentence.

89-3302. Water conservation and flood control activities declared public purpose. Such water conservation and flood control activities, their establishment, construction, operation and maintenance as authorized by this act are declared to be for the protection of the tax base of the city,

town or county, for the protection of public roads, lands and improvements, and for the protection of the public health, sanitation, safety and for improvement of the general welfare.

**History:** En. Sec. 2, Ch. 272, L. 1965;  
amd. Sec. 2, Ch. 284, L. 1967.

conservation and" after "Such" at the beginning of the section and inserted "for improvement of the" before "general welfare" at the end of the section.

#### **Amendments**

The 1967 amendment inserted "water

**89-3303. Acquisition of property—condemnation.** Cities, towns and counties may acquire by gift, purchase or condemn and appropriate private property within the limits of the project, including the right to cross railroad right of way and property and highway right of way and property, so as not to impair the previous public use, as may be necessary to carry into effect the provisions of this act, and to provide an outlet for the watercourses, either natural or artificial, which may be deepened, widened, straightened, altered, changed, diverted or otherwise improved under the provisions of this act. All provisions of the laws of the state of Montana relating to the condemnation of lands for public purposes shall apply to the provisions thereof in and so far as applicable.

**History:** En. Sec. 3, Ch. 272, L. 1965;  
amd. Sec. 3, Ch. 284, L. 1967.

#### **Amendments**

The 1967 amendment deleted "flood control" before "project."

**89-3304. Acceptance of aid—assumption of remaining cost.** Cities, towns and counties may in accordance with the provisions of this act accept funds and property or other assistance, financial or otherwise, from federal, state and other public or private sources for the purpose of aiding the construction and maintenance of water conservation and flood control projects; and co-operate and contract with the state or federal government, or any department or agency thereof, in furnishing assurances and meeting local co-operation requirements of any project involving control, conservation and use of water.

**History:** En. Sec. 4, Ch. 272, L. 1965;  
amd. Sec. 4, Ch. 284, L. 1967.

use of water" for "federal aid in the doing of the acts provided in sections 1 and 3 hereof, and may assume such portion of the cost thereof not discharged by such federal aid" after "this act accept."

#### **Amendments**

The 1967 amendment substituted "funds and property or other assistance \* \* \* and

**89-3305. Right of way and construction costs.** The cost of all right of way acquired by purchase or condemnation may be borne by the city, town or county together with any other property rights which may be required in furtherance of such projects, and the work of actual construction and the cost thereof may be borne by the federal government.

**History:** En. Sec. 5, Ch. 272, L. 1965.

**89-3306. Direction of project.** This act contemplates that the actual direction of the project and the doing of the work in connection therewith is assumed by either the state or the federal government and the city, town or county provides and assumes the cost of necessary right of way over and above such contributions in that regard as the federal



government may choose to make. Under such limitation all appropriate portions of this act shall apply.

**History:** En. Sec. 6, Ch. 272, L. 1965;  
amd. Sec. 5, Ch. 284, L. 1967.

**Amendments**

The 1967 amendment inserted "either the state or" after "assumed by."

**89-3307. Contributions to right of way costs—agreement to maintain works.** Cities, towns and counties in furtherance of such water conservation and flood control projects may accept contributions to enable them to pay for necessary right of way. They may also enter into agreement with the federal government to maintain levees, dikes, or other construction and to do all other acts required by the federal government in maintaining the work when completed.

**History:** En. Sec. 7, Ch. 272, L. 1965;  
amd. Sec. 6, Ch. 284, L. 1967.

**Amendments**

The 1967 amendment inserted "water conservation and" before "flood control."

**89-3308. Street or road fund used.** The council, board or governing body shall have power to allocate a portion of the street or road fund, as the case may be, for the purpose of acquiring right of way or the operation and maintenance of completed projects.

**History:** En. Sec. 8, Ch. 272, L. 1965;  
amd. Sec. 7, Ch. 284, L. 1967.

**Amendments**

The 1967 amendment inserted "operation and" before "maintenance"; and deleted "flood control" before "projects."

**89-3309. Levy of special assessment—apportionment to property benefited.** Any city, town or county that shall establish a water conservation or flood control system or both pursuant to this act may for the purpose of providing funds for the operation and maintenance thereof levy an annual special assessment against all real property in the area benefiting from such system. Such special assessment shall be levied against each lot or parcel of land in the benefited area for that portion of the money required which its area bears to the total area of all of the lands to be assessed; or said assessment may, at the option of the governing body of the city, town or county, as the case may be, be based upon the taxable valuation, as stated in the last completed county assessment roll, of the lots or parcels of land exclusive of improvements thereon, within said benefited area, in which case each lot or parcel of land to be assessed shall be assessed with that part of the amount of money required which its taxable valuation bears to the total taxable valuation of all of the lands to be assessed. Provided, however, that where the benefited area lies in more than one county or lies both within a county and also a city or town, the same method of assessment shall be used for each governing body. Such special assessments for the operation and maintenance of any system authorized by this act shall be levied as are other special improvement levies as required by law.

**History:** En. Sec. 9, Ch. 272, L. 1965;  
amd. Sec. 8, Ch. 284, L. 1967.

**Amendments**

The 1967 amendment inserted "water conservation or" before "flood control"; inserted "or both" before "pursuant"; substituted the present second and third

sentences for former second sentence which read, "Such special assessment shall be apportioned among the several lots or parcels of real property in the benefited area in proportion to the benefit conferred"; and, in the last sentence deleted "flood control" before "system."

**89-3309.1. Charges to be levied.** Cities, towns and counties may for the purpose of providing funds for the operation and maintenance of completed projects, fix, maintain and collect fees, rents, tolls and other charges for services rendered or facilities provided. In fixing such rate, fee, toll or rent the governing body shall charge for water furnished for household use, domestic use, irrigation use, industrial use, municipal use and for water used for streamflow stabilization a fee sufficient to pay the proportionate share of the repairs, maintenance and operating expenses as such use bears in economic value, such economic value to be determined by the governing body, to the total economic value of the total use of said facilities of the project or projects. For the benefits received by areas within the boundaries of the project or projects for flood prevention, flood control and pollution abatement, the governing body shall determine a reasonable valuation or charge, which valuation or charge shall be certified by them to the county commissioners prior to the time general taxes are levied and assessed and it shall be the obligation of the county commissioners to levy a special assessment as provided for in section 89-3309 against such area or areas sufficient to provide revenues for the repairs, maintenance and operating expenses of the project. For recreation use the governing body shall first determine the share of the costs of operation, repairs and depreciation to be charged against such uses, and from this figure shall subtract the estimated amount of fees and tolls collected for such uses; the deficiency, if any, shall be certified to the county commissioners in the same way as the charges for flood prevention, flood control, etc. and special assessments be levied by the county commissioners in the manner set out herein. The council, board of county commissioners or other governing body shall also have the authority to receive and accept appropriations and contributions from any source of either money or property or other things of value, to be held, used, and applied for the purposes in this act provided.

**History:** En. Sec. 9, Ch. 284, L. 1967.

#### **Title of Act**

An act amending sections 89-3301, 89-3302, 89-3303, 89-3304, 89-3306, 89-3307, 89-3308, 89-3309, 89-3310, 89-3311, R. C. M. 1947, relating to city and county flood control projects, to authorize multiple use

water projects by cities and counties; to change the method of levying the special assessment to pay for such projects; authorizing cities and counties to charge fees for services and facilities provided by such projects; and providing an effective date.

**89-3310. Contracts for use of railroads and highways.** Any city, town or county may contract with any railroad company or with the state highway commission for the use of railroad or highway rights of way and embankments, and other railroad or highway property which can be utilized by such city, town or county for the purpose of water conservation or flood control or protection as part of its water conservation or flood control system, or both, for any period not exceeding ninety-nine (99) years.

**History:** En. Sec. 10, Ch. 272, L. 1965; amd. Sec. 10, Ch. 284, L. 1967.

conservation or" before "flood control" wherever found in this section; inserted "or both" before "for any period."

#### **Amendments**

The 1967 amendment inserted "water

**89-3311. Division of work into parts—separate proceedings for parts.** Whenever any city, town or county has begun a water conservation or flood control system, or both, under this act, the council, board or other governing body shall have the power to divide the work into parts, sections or districts; to omit parts of said work and to contract for any part or section separately and proceed therewith the same as if the entire work or improvements were contracted for, done or made.

**History:** En. Sec. 11, Ch. 272, L. 1965; conservation or" before "flood control";  
amd. Sec. 11, Ch. 284, L. 1967. and inserted "or both" before "under this  
act."

**Amendments**

The 1967 amendment inserted "water

**89-3312. Indebtedness and bonds—bond election—tax levy to pay indebtedness.** Cities, towns and counties are hereby authorized to contract indebtedness and to issue general obligation bonds to provide funds for the payment of the cost of improvements contemplated by this act by following the following procedures:

The governing body of the city, town or county may call a special election to vote upon the proposition of issuing said bonds or may submit the proposition as a special question at a regular municipal or general election. The notice of the election and the election itself shall be carried out in accordance with sections 11-2301 through 11-2330, Revised Codes of Montana, 1947, as amended, as to cities, and in accordance with sections 16-2002 through 16-2050, Revised Codes of Montana, 1947, as amended, as to the counties.

Taxes for the payment of said bonds shall be levied in accordance with sections 11-2301 through 11-2330 and sections 16-2002 through 16-2050, Revised Codes of Montana, 1947, as amended, as to cities and counties, respectively. The indebtedness incurred for the purposes herein provided shall not be considered an indebtedness for general or ordinary purposes and shall not be charged against or counted as part of the levies available for general or ordinary purposes.

**History:** En. Sec. 12, Ch. 272, L. 1965.

**89-3313. Powers additional.** This act, and each section thereof, shall be construed as granting additional power without limiting the power already existing in cities, towns and counties.

**History:** En. Sec. 13, Ch. 272, L. 1965.

**Appropriation**

Section 14 of Ch. 272, Laws 1965, appropriated \$1.00 to the water conservation board from the general fund for the biennium commencing July 1, 1965.

**Separability Clause**

Section 15 of Ch. 272, Laws 1965 read "If a part of this act shall be declared to be invalid, all valid parts that are sev-

erable from the invalid parts remain in effect. If a part of this act is declared to be invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

**Repealing Clause**

Section 16 of Ch. 272, Laws 1965 repealed all acts and parts of acts in conflict therewith.

**89-3314. Provisions to provide alternative method.** The provisions of this chapter and the methods of organization of water conservation and



flood control projects are hereby declared to be an alternative method to any other method proposed by any law now in existence or hereafter enacted for the creation of such projects and it is hereby declared that no provision hereof shall be amended or repealed by implication or otherwise as being in conflict with any existing law or future enactment unless specifically so declared by the legislature.

**History:** En. Sec. 12, Ch. 284, L. 1967.

vided the act should be in effect from and after its passage and approval. Approved March 2, 1967.

**Effective Date**

Section 13 of Ch. 284, Laws 1967 pro-

## CHAPTER 34—CONSERVANCY DISTRICTS

- Section 89-3401. Organization of conservancy districts and construction of works a public use—benefits.
- 89-3402. Purpose of act.
- 89-3403. Definitions.
- 89-3404. Preliminary survey—written request.
- 89-3405. Action by water board upon receipt of request.
- 89-3406. Hearing by water board.
- 89-3407. Feasibility study and report—adjustment of proposed boundaries.
- 89-3408. Procedure for organization of district.
- 89-3409. Court hearing on organization petition—election—voters needed to organize—no jurisdiction to determine priority of appropriation.
- 89-3410. Filing of documents after organization.
- 89-3411. Reimbursement for expenses of organizing election.
- 89-3412. Appointment of directors—terms of office—vacancies—first annual meeting—corporate surety bond.
- 89-3413. Selection of officers—bylaws and rules—minutes—regular and special meetings.
- 89-3414. Powers of directors.
- 89-3415. Participation in federal programs.
- 89-3416. Assessments.
- 89-3417. Notice of public budget hearing.
- 89-3418. Directors to inform county assessor and treasurer annually concerning budget, special assessments and realty—multi-county districts.
- 89-3419. Collection of special assessments—multi-county districts—investment of surplus funds—interest.
- 89-3420. Condemnation authorized—water rights.
- 89-3421. Annual written report of directors' activities.
- 89-3422. State examiner to examine financial records—report—fee.
- 89-3423. Persons entitled to vote.
- 89-3424. Election procedures.
- 89-3425. Challenging voters—oath—penalty for false subscription.
- 89-3426. Issuance of bonds—maximum term and interest rate—sale as single issue of multi-purpose bonds.
- 89-3427. Determination of amount of bonds to be issued.
- 89-3428. Resolution for issuance of bonds—notice—election.
- 89-3429. Approval of bond issue at election—authorizes assessments—recording of election results—validity of election—single proposition.
- 89-3430. Resolution providing for form, execution and issuance of bonds—bids—private sale—sale price—rejection of bids.
- 89-3431. Comparable to municipal bonds—exempt from taxation.
- 89-3432. Interim receipts—negotiability.
- 89-3433. Registration of bonds—copy to be furnished county treasurer.
- 89-3434. Deposit of sales proceeds—disposition—investment.
- 89-3435. Refunding bonds authorized—redemption.
- 89-3436. Fund for retirement of bonds—investment and disbursement.
- 89-3437. Revolving funds—purpose—excess money—funds deposited with county treasurer.
- 89-3438. Petition for merger of districts—hearing and notice—merger into new district—inclusion in another district—majority of electors may kill merger by petition—existing obligations.

- 89-3439. Procedure for annexing realty.
- 89-3440. Pre-annexation bonds not lien without prior agreement.
- 89-3441. Exclusion of territory from district—procedure.
- 89-3442. Procedure for dissolution of district.
- 89-3443. Dissolution election—majority approval required.
- 89-3444. Submission of termination plan—termination by directors or receiver—court order—retention of jurisdiction.
- 89-3445. Appointment of receiver—directors' authority ceases—assessments by receiver—annual assessments—disposition of assessments.
- 89-3446. Entry of dissolution order—certified copy.
- 89-3447. County general funds to receive funds remaining after dissolution—proportion.
- 89-3448. No power to generate, distribute or sell electric energy.
- 89-3449. Other agencies not affected.

**89-3401. Organization of conservancy districts and construction of works a public use—benefits.** To provide for the conservation and development of the water and land resources of the state of Montana, conserve Montana's water for utilization for beneficial purposes within the state, and provide for the greatest beneficial use of water within this state, the organization of conservancy districts and the construction of works as defined by the act are a public use and will:

(1) be essentially for the public benefit and advantage of the people of Montana;

(2) benefit all industries of the state;

(3) encourage economic growth;

(4) indirectly benefit the state by increasing property valuations;

(5) directly benefit municipalities by providing adequate supplies of water for domestic uses;

(6) directly benefit lands irrigated or drained by works constructed;

(7) directly benefit lands now irrigated by stabilizing the flow of water in streams and by increasing the flow and return flow of water to those streams;

(8) enhance fish and wildlife habitat;

(9) improve recreational facilities; and

(10) promote the comfort, safety, and welfare of the people of Montana.

**History:** En. Sec. 1, Ch. 100, L. 1969.

and development of water and land resources of Montana through the creation of conservancy districts.

**Title of Act**

An act providing for the conservation

**89-3402. Purpose of act.** The purpose of this act is to enable the formation of conservancy districts, comprised of area in one or more counties to promote the following purposes:

(1) prevent and control floods, erosion and sedimentation;

(2) provide for regulation of stream flows and lake levels;

(3) improve drainage and to reclaim wet or overflowed lands;

(4) promote recreation;

(5) develop and conserve water resources and related lands, forest, fish and wildlife resources;

(6) further provide for the conservation, development, and utilization of land and water for beneficial uses including, but not limited to, domestic water supply, fish, industrial water supply, irrigation, livestock water supply, municipal water supply, recreation, and wildlife.

History: En. Sec. 2, Ch. 100, L. 1969.

**89-3403. Definitions.** As used in this act unless the context clearly indicates otherwise:

(1) "District" means a conservancy district, which is a public corporation and a political subdivision of the state.

(2) "Directors" means the board of directors of a conservancy district.

(3) "Elector" means a person qualified to vote under section 23 [89-3423] of this act.

(4) "Court" means the district court of the judicial district in which the largest portion of the taxable valuation of real property of the proposed district is located and within the county in which the largest portion of the taxable valuation of real property of the proposed district is located within the judicial district.

(5) "Person" means a natural person; firm; partnership; co-operative; association; public or private corporation, including the state of Montana or the United States; foundation; state agency or institution; county; municipality; district or other political subdivision of the state; federal agency or bureau; or any other legal entity.

(6) "Water board" means the state water resources board.

(7) "Board of supervisors" means the board of supervisors of the soil and water conservation district in which the largest portion of the taxable valuation of real property of the proposed district is located.

(8) "Works" means all property, rights, easements, franchises, and other facilities including, but not limited to, land, reservoirs, dams, canals, dikes, ditches, pumping units, mains, pipelines, waterworks systems, recreational facilities, facilities for fish and wildlife, and facilities to control and correct pollution.

(9) "Cost of works" means the cost of construction, acquisition, improvement, extension and development of works, including financing charges, interest and professional services.

(10) "Applicants" means any person residing within the boundaries of the proposed district making a request for a study of the feasibility of forming a conservancy district.

(11) "Notice" means publication at least once each week for three (3) consecutive weeks in a newspaper published in each county, or if no newspaper is published in a county, a newspaper of general circulation in the county, or counties, in which a district is or will be located. The last published notice shall appear not less than five (5) days prior to any hearing or election held under this act.

(12) "Owners" are the person or persons who appear as owners of record of the legal title to real property according to the county rec-



ords whether such title is held beneficially or in a fiduciary capacity, except that a person holding a title for purposes of security is not an owner nor shall he affect the previous title for purposes of this act.

(13) "Taxable valuation" shall mean the valuation determined according to section 84-302, R. C. M., 1947, and does not mean assessed valuation.

**History:** En. Sec. 3, Ch. 100, L. 1969.

**89-3404. Preliminary survey—written request.** (1) To request a preliminary survey for a proposed conservancy district, the applicants shall present a written request to the water board.

(2) The request shall:

- (a) generally describe the proposed boundaries of the district;
- (b) specify the purpose or purposes of the district;
- (c) list the works contemplated.

(3) The water board may initiate a preliminary survey without any prior request.

**History:** En. Sec. 4, Ch. 100, L. 1969.

**89-3405. Action by water board upon receipt of request.** (1) Sooner than eleven (11) days after the request is received, the water board shall acknowledge the request.

(2) The water board shall itself, or through co-operating agencies, or together with co-operating agencies:

- (a) consult with the board of supervisors and all persons who may participate in the proposed project;
- (b) conduct a preliminary survey of the proposed district;
- (c) estimate costs of works, maintenance, and operation;
- (d) determine sources of financing;
- (e) reach a tentative decision on the feasibility, desirability and compatability with the state water plan of the proposed district;
- (f) adjust the boundaries of the proposed district to improve the feasibility, desirability or consistency with the state water plan;
- (g) sooner than six (6) months after receipt of the request, send a report of the preliminary survey to the applicants, the board of supervisors, fish and game commission, state soil conservation committee, state board of health, and other affected state and federal resource agencies for their comments.

**History:** En. Sec. 5, Ch. 100, L. 1969.

**89-3406. Hearing by water board.** (1) Upon receipt of the preliminary survey report the applicants, or any one of them, may request the water board to hold a hearing. The water board shall hold the hearing sooner than sixty-one (61) days after receipt of the request. Notice of the hearing shall be given in accordance with section 3, subsection (11) [89-3403 (11)] of this act.

(2) If the water board itself initiated the preliminary survey, it may hold such a hearing without being requested to do so.

**History:** En. Sec. 6, Ch. 100, L. 1969.

**89-3407. Feasibility study and report—adjustment of proposed boundaries.** After the hearing, the applicants, or any one of them, may request the water board to prepare a detailed feasibility study of the proposed district. If the water board concludes that the proposed district is feasible, desirable, and consistent with the state water plan, it shall prepare a feasibility report, and sooner than six (6) months after receipt of the request, send copies to the applicants, if any, the fish and game commission, state soil conservation committee, state board of health, and other affected state and federal water resource agencies. For good cause shown based upon the actual technical problems in completing the report, the water board may use necessary additional time to complete and distribute the report. The detailed feasibility report shall describe the proposed works and contain an estimate of the cost of the works, the means of financing, and the estimated costs of operation and maintenance. The water board may adjust the boundaries of the proposed district to improve the feasibility, desirability and consistency with the state water plan, and to exclude land which would receive no direct or indirect benefits from the proposed district.

**History:** En. Sec. 7, Ch. 100, L. 1969.

**89-3408. Procedure for organization of district.** If in the opinion of the water board the feasibility study shows that a district is feasible and consistent with the state water plan, the procedure for organization is:

(1) the water board shall file a petition requesting organization with the court;

(2) the petition shall:

(a) state the name of the proposed district;

(b) give a legal description of the boundaries of the proposed district, excluding therefrom lands which would receive no direct or indirect benefits from the proposed district;

(c) describe the purposes of the district;

(d) describe the works;

(e) indicate the estimated cost of works, means of financing, and estimated costs of operation and maintenance;

(f) list the taxable valuation of real property in the proposed district, which must be one hundred thousand dollars (\$100,000) or more;

(g) describe the means of repaying capital costs;

(h) propose the persons who should be represented and the number of directors.

(3) The petition shall be signed by owners of at least fifty-one per cent (51%) of the land outside the limits of an incorporated municipality, and not fewer than five per cent (5%) or one hundred (100), whichever

is the lesser, of the persons who would qualify as electors within an incorporated municipality.

**History:** En. Sec. 8, Ch. 100, L. 1969.

**89-3409. Court hearing on organization petition — election — voters needed to organize—no jurisdiction to determine priority of appropriation.** (1) Upon receipt of a petition for organizing a district, the court shall give notice and hold a hearing on the petition. If the courts shall find that the prayer of the petition should be granted, it shall:

(a) make and file findings of fact specifying those lands that will be directly or indirectly benefited by the proposed district, and exclude those lands which will not be so benefited;

(b) make an order fixing the time and place of an organizing election;

(c) give notice of an election in the way provided in section 3, subsection (11) [89-3403 (11)];

(d) provide for election judges and fix their compensation;

(e) fix the polling place or places as necessary;

(f) order the county clerk to provide pollbooks, ballots, poll lists and other necessary election supplies;

(g) provide for canvassing the results;

(h) declare the results;

(i) order and decree the district organized if the requisite number of eligible electors vote in favor of organization.

(2) In order for the district to be organized, fifty-one per cent (51%) or more of the eligible electors must vote in the election, and a majority of those voting must vote in favor of organization.

(3) This act shall not confer upon the court jurisdiction to hear, adjudicate, and settle questions concerning the priority of appropriation of water between districts and other persons. Jurisdiction to hear and determine priority of appropriation, and questions of right growing out of, or in any way connected with a priority of appropriation, are expressly excluded from this act and shall be determined as otherwise provided by the laws of Montana.

**History:** En. Sec. 9, Ch. 100, L. 1969.

**89-3410. Filing of documents after organization.** Sooner than thirty-one (31) days after the district has been decreed organized, the clerk of the court shall transmit to the secretary of state, water board, and to the county clerk and recorder in each of the counties having lands in the district, copies of the election results, the decree of the court incorporating the district, and a description of the boundaries of the district. Copies of the same documents shall be filed in the office of the secretary of state in the same manner as articles of incorporation are required to be filed under the laws governing corporations. Copies shall also be filed in the office of the county clerk and recorder of each



county in which a part of the district may be. The clerk and recorder of each county where the articles are filed and the secretary of state shall collect filing fees as provided by law.

History: En. Sec. 10, Ch. 100, L. 1969.

**89-3411. Reimbursement for expenses of organizing election.** If organized, the district shall reimburse the county, or counties, for the expenses incurred in the organizing election.

History: En. Sec. 11, Ch. 100, L. 1969.

**89-3412. Appointment of directors—terms of office—vacancies—first annual meeting—corporate surety bond.** If a district is organized, the court shall:

(1) establish by court order the number of persons who shall comprise the directors, appoint persons who are electors within the district to membership on the board of directors, and fix their compensation. The number shall not be less than three (3) nor more than eleven (11) persons. In fixing the number and making the appointments the court shall consider the interests and purposes to be served by the district. Upon a verified petition filed by a majority of the directors and for good cause shown, the court may enlarge or reduce the membership of the directors, but not to exceed eleven (11) nor to be less than three (3);

(2) fix the terms of office so that approximately one-third ( $\frac{1}{3}$ ) of the directors first appointed shall serve for one (1) year; approximately one-third ( $\frac{1}{3}$ ) shall serve two (2) years; and the remainder shall serve three (3) years. All succeeding terms shall be three (3) years. Unless excused for good cause, a director who misses three (3) consecutive regular meetings has vacated his position;

(3) fill all vacancies on the board by appointment or reappointment;

(4) specify a date for the first annual meeting of the directors;

(5) specify the amount and form of a corporate surety bond which each member of the directors shall furnish at the expense of the district, conditioned upon his faithful performance of his duties as a director.

History: En. Sec. 12, Ch. 100, L. 1969.

**89-3413. Selection of officers—bylaws and rules—minutes—regular and special meetings.** (1) The directors shall select from among themselves a chairman, vice-chairman, secretary, and other necessary officers. The directors shall adopt bylaws and rules for the conduct of meetings. All official acts of the directors shall be entered in a book of minutes to be kept by the secretary.

(2) The directors shall establish times for regular meetings and may hold special meetings upon the call of the chairman or any two (2) members, and (except in case of emergency) upon at least three (3) days notice of the time, place, and purpose of the meeting.

History: En. Sec. 13, Ch. 100, L. 1969.

**89-3414. Powers of directors.** On behalf of the district, the directors may:

- (1) adopt an official seal;
- (2) sue and be sued;
- (3) adopt rules to promote and encourage water recreation, including requirements concerning public access areas and facilities, and rules respecting the use of reservoirs and waters, picnic sites, and other recreational areas operated by the district. Rules adopted shall be filed with the secretary of directors and shall be available to any interested party upon reasonable request;
- (4) enter private property for the purposes of making surveys, provided that just compensation for actual damages is made;
- (5) provide for reimbursing of its members for actual expenses;
- (6) appropriate water and initiate or participate in the adjudication of streams;
- (7) acquire, undertake, construct, develop, improve, maintain, and operate works and all incidental facilities;
- (8) acquire by purchase, exchange, gift, lease, grant, devise, or otherwise, lands, water, water rights, or rights of way as necessary for the execution of any authorized function of the district. Title to all property (including water rights) shall be in the name of the district;
- (9) merge with other special districts as hereinafter provided;
- (10) hold and dispose of property as necessary or convenient in the performance of the functions of the district;
- (11) call upon the county attorney or attorney general for such legal services as the district may require, or in the discretion of the directors, employ private legal counsel;
- (12) withhold the delivery of water upon which there are any defaults or delinquencies of payment, and otherwise dispose of that water while the default or delinquency continues;
- (13) borrow money and incur indebtedness and issue bonds to finance works as provided by this act;
- (14) refund bonded indebtedness incurred by the district as provided by this act;
- (15) after a hearing held in accordance with section 17 [89-3417] of this act, make assessments sufficient to meet the budgetary requirements for the coming year;
- (16) contract for service, for water furnished, or for the sale of water with any person;
- (17) fix and revise from time to time and collect rates, fees, and other charges for the services, facilities, or water furnished by the district to any person;
- (18) allocate or reallocate unused waters of the district;
- (19) co-operate with; accept grants, loans, and other assistance from; act as agent for; and enter into agreements with any and all

state or federal agencies, and exercise all necessary or convenient powers in connection therewith;

(20) enter into any obligation or contract with an agency of the federal government for the construction, operation, and maintenance of works; or for the assumption as principal or guarantor of indebtedness to the United States on account of district lands under the provisions of the federal reclamation act and rules established under that act; or contract with an agency of the federal government for a water supply under any federal act providing for or permitting such a contract. However, the action must be approved by a majority of the electors voting at an election held as provided in section 24 [89-3424]. If a contract is made with an agency of the federal government, the directors may deposit bonds of the district with the United States at ninety per cent (90%) of their par value, to secure the amount to be paid by the district to the United States under any contract, the interest on the bonds of the district to be applied as specified by the contract. If bonds of the district are deposited with the United States, it is the duty of the directors to make an assessment sufficient to meet all payments accruing under the terms of any contract with the United States;

(21) accept appointment of the district as fiscal agent for the United States or authorization of the district to make collections of moneys for or on behalf of the United States in connection with any federal reclamation projects and the district is authorized to act and to assume the duties and liabilities incident to this action. However, the action must be approved by a majority of the electors voting at an election held as provided in section 24 [89-3424]. The directors may do all things required by federal statutes and rules and require prompt payment of all charges as a prerequisite to water service;

(22) in addition to all voted indebtedness, borrow money as necessary but the amount shall not at any one time exceed five per cent (5%) of the taxable valuation of real property in the district;

(23) mortgage property owned by the district if the terms of the mortgage are not inconsistent with the provisions of a resolution authorizing the sale of bonds;

(24) use any surplus funds to purchase outstanding bonds;

(25) make contracts incidental to the performance of the district's functions, and employ and fix the compensation of employees, agents or consultants as are deemed necessary, including but not limited to, a manager, attorneys, accountants, engineers, construction and financial experts;

(26) co-operate with soil and water conservation districts to obtain agreements to carry out soil conservation measures and proper farm plans from owners of lands situated in the drainage area above each retention reservoir to be installed with federal assistance.

**History:** En. Sec. 14, Ch. 100, L. 1969.

**89-3415. Participation in federal programs.** A district organized under this act, by itself or in conjunction with others, as a sponsoring or-



ganization to participate in all federal programs including, but not limited to, the Watershed Protection and Flood Prevention Act of 1954 (68 Stat. 666), the federal Water Project Recreation Act of 1965 (79 Stat. 213), the federal Reclamation Act of 1902 (32 Stat. 388), and amendments to those acts.

**History:** En. Sec. 15, Ch. 100, L. 1969.

**Compiler's Notes**

The Watershed Protection and Flood Prevention Act of 1954, referred to in this section, is compiled in the United States Code as Tit. 16, sec. 1001 et seq. and Tit. 33, sec. 701b note.

The federal Water Project Recreation Act of 1965 is compiled in the United States Code as Tit. 16, sec. 4601-12.

The federal Reclamation Act of 1902 is compiled in the United States Code as Tit. 43, sec. 371 et seq.

**89-3416. Assessments.** (1) To the extent that anticipated revenues from rates, fees, and other charges fixed pursuant to section 14, subsection (17) [89-3414 (17)] will not be sufficient to meet the district's anticipated obligations for annual operation, maintenance, and replacement or depreciation of works, or for payment of the interest and principal on bonded indebtedness, the directors may make an assessment of not more than two (2) mills on all taxable real property in the district for the purpose of fully meeting such obligations.

(2) In addition to the assessment authorized by subsection (1), the directors may annually make an assessment of up to three (3) mills on the taxable real property in the district to pay interest and principal on bonded indebtedness.

(3) The assessments are a lien upon each lot or parcel of land within the district to the extent of the assessment on each.

(4) All assessments have the same force and effect as other liens for taxes and their collection shall be enforced in the way provided for enforcement of liens for county taxes. Assessments, if not paid, become delinquent at the same time as county taxes.

(5) Except as provided in section 29 [89-3429], approval of the electors is not required for the making of these assessments.

**History:** En. Sec. 16, Ch. 100, L. 1969.

**89-3417. Notice of public budget hearing.** (1) The directors shall, prior to the first Monday in May of each year, give notice as provided in section 3, subsection (11) [89-3403 (11)] of this act of the intention to hold a public budget hearing. The notice shall include the date, time, place, and general agenda.

(2) At the hearing, the directors shall:

- (a) review the present budget;
- (b) present the budget for the next year;
- (c) hear and consider protests from any elector;
- (d) adopt the budget for the next year;
- (e) set the assessment for the next year.

**History:** En. Sec. 17, Ch. 100, L. 1969.

**89-3418. Directors to inform county assessor and treasurer annually concerning budget, special assessments and realty—multi-county districts.** (1) Before the second Monday in July of each year, the directors shall provide the county assessor and treasurer with:

- (a) the budget for the current fiscal year;
- (b) a statement of the amount of special assessments to be collected for the districts;
- (c) a listing of all real property within the district.

(2) If the district is located in more than one (1) county, the directors shall provide this information to each of the county assessors and treasurers.

**History:** En. Sec. 18, Ch. 100, L. 1969.

**89-3419. Collection of special assessments—multi-county districts—investment of surplus funds—interest.** (1) The treasurer of each county in which the district is located shall collect special assessments at the same time and in the same way as county taxes.

(2) If the district is located in more than one (1) county, all assessments collected shall be deposited with the treasurer of the county in which the assessments were collected.

(3) The directors shall direct the county treasurer to invest any surplus district funds in saving or time deposits in a state or national bank insured by the Federal Deposit Insurance Corporation or in direct obligations of the United States government payable within one hundred eighty (180) days from the time of investment. All interest collected on the deposits or investments shall be credited to the fund from which the money was withdrawn. However, five per cent (5%) of the interest shall be deposited in the general fund of the county.

**History:** En. Sec. 19, Ch. 100, L. 1969.

**89-3420. Condemnation authorized—water rights.** The district may exercise the right of eminent domain in the manner provided by the law to take private property for public use, with just compensation, where the taking is necessary for the purposes of the district. Water rights as such shall not be subject to such taking, but may be taken as an incident to the condemnation of land to which such rights are appurtenant, where the taking of the land is the principal purpose of the condemnation.

**History:** En. Sec. 20, Ch. 100, L. 1969.

**89-3421. Annual written report of directors' activities.** Before August 1 of each year, the directors shall send a written report of their activities during the previous fiscal year to the court and to the water board. Reports shall be in the form, and contain the information, prescribed by the water board.

**History:** En. Sec. 21, Ch. 100, L. 1969.

**89-3422. State examiner to examine financial records—report—fee.**

At least once each year the state examiner shall examine the financial records of each district and file a report of the examination with the water board and court. The state examiner shall collect a fee for the examination equal to that charged irrigation districts.

**History:** En. Sec. 22, Ch. 100, L. 1969.

**89-3423. Persons entitled to vote.** (1) Only persons who are taxpayers upon and owners of real property located within the district and whose names appear upon the last completed assessment roll of some county within the district for state, county and school district taxes are electors and shall be entitled to vote in elections, provided that:

- (a) an elector need not reside within the district in order to vote;
- (b) where a corporation owns taxable real property within the boundaries of the conservancy district, the authorized agent of such corporation shall be entitled to cast a vote on behalf of the corporation;
- (c) where land is under contract of sale to a purchaser and the contract is recorded, only the purchaser shall have the right to vote;
- (d) guardians, executors, administrators, and trustees of real property within the district, shall be entitled to cast the vote for the owner of the land.

(2) When voting, an agent of a corporation or of co-owners, or a guardian, executor, administrator, trustee, or purchaser under contract of sale, may be required to show his authority by the judges of the election.

**History:** En. Sec. 23, Ch. 100, L. 1969.

**89-3424. Election procedures.** Election procedures after organization are:

- (1) The directors shall designate the polling places, at least one (1) in each county, and hours when the polls will be open;
- (2) Notice shall be published of the location of polling places and hours when the polls are open as provided in section 3, subsection (11) [89-3403 (11)] of this act;
- (3) The directors shall appoint three (3) judges for each polling place and fix their compensation;
- (4) The judges shall appoint one (1) of their number as clerk of the election;
- (5) The clerks and recorders of the counties in which the election is to be held shall supply poll lists, registers, ballots, and other necessary election supplies;
- (6) The judges shall cause the ballots to be counted and certify the results to the directors;
- (7) The directors shall canvass the returns;
- (8) The directors shall reimburse the counties for actual expenses incurred in the election.

**History:** En. Sec. 24, Ch. 100, L. 1969.



**89-3425. Challenging voters — oath — penalty for false subscription.** An elector may challenge any person who claims the right to vote. Before voting, any person challenged must take and sign the following oath or affirmation administered by an election judge:

“I \_\_\_\_\_(name) solemnly swear (or affirm) that I am an elector of the district and have not voted today.”

False subscription to the oath or affirmation is perjury and punishable as such.

History: En. Sec. 25, Ch. 100, L. 1969.

**89-3426. Issuance of bonds—maximum term and interest rate—sale as single issue of multi-purpose bonds.** A district may issue bonds payable from revenues, assessments, or both, or the district may use other financing as provided by this act for the cost of works. Bonds issued shall be for a maximum term of not to exceed forty (40) years and a maximum rate of interest not more than six per cent (6%). Bonds for more than one purpose may be sold as a single issue.

History: En. Sec. 26, Ch. 100, L. 1969.

**89-3427. Determination of amount of bonds to be issued.** In determining the amount of bonds to be issued, the directors may include:

- (1) all costs of works;
- (2) all costs and estimated costs of issuance of the bonds;
- (3) interest which they estimate will accrue on money borrowed during the construction period and for six (6) months after the period.

History: En. Sec. 27, Ch. 100, L. 1969.

**89-3428. Resolution for issuance of bonds—notice—election.** When the directors find it necessary to issue bonds, the directors shall:

- (1) pass a resolution which includes:
  - (a) the purpose or purposes for which the bonds will be issued;
  - (b) the maximum amount and term of the bonds;
  - (c) the maximum interest rate the bonds will bear;
  - (d) whether the bonds will be repaid from revenues, assessments, or both.

- (2) give notice as provided in section 3, subsection (11) [89-3403 (11)] of this act which shall include the resolution adopted by the directors, location of polling places, and hours when the polls will be open;

- (3) hold an election as provided by section 24 [89-3424] of this act.

History: En. Sec. 28, Ch. 100, L. 1969.

**89-3429. Approval of bond issue at election—authorizes assessments—recording of election results—validity of election—single proposition.**

- (1) For a bond issue to be approved, forty per cent (40%) of the quali-

fied electors must vote thereon, and sixty per cent (60%) of those voting must approve the issue.

(2) Approval of the bond issue shall authorize the directors to make assessments as provided in section 16 [89-3416] necessary to pay the principal and interest on bonds issued.

(3) The directors shall enter the results of the election in their records.

(4) If otherwise fairly conducted, no irregularities or informalities shall invalidate the election.

(5) Bonds for more than one purpose may be submitted to the electors as a single proposition.

History: En. Sec. 29, Ch. 100, L. 1969.

**89-3430. Resolution providing for form, execution and issuance of bonds—bids—private sale—sale price—rejection of bids.** If a bond issue is approved, the directors shall by resolution provide for the form and execution of the bonds and for issuance of all or any part of the bonds. After adequate notice that sealed proposals will be received, the directors may award the purchase of all or a part of the issue to the best bidder or bidders, and may sell at private sale any or all bonds not sold on bids.

The said bonds will be sold for not less than their par value with accrued interest to date of delivery, and all bidders must state the lowest rate of interest at which they will purchase the bonds at par. The board shall reserve the right to reject any and all bids and to sell the said bonds at private sale.

History: En. Sec. 30, Ch. 100, L. 1969.

**89-3431. Comparable to municipal bonds—exempt from taxation.** Bonds issued under this act have the same force, value, and use as bonds issued by a municipality and are exempt from taxation as property within the state of Montana.

History: En. Sec. 31, Ch. 100, L. 1969.

**89-3432. Interim receipts—negotiability.** Pending preparation of the bonds sold under this act, receipts or certificates may be issued to purchasers in the form, and with provisions, as determined by the directors. Bonds and interim receipts or certificates are fully negotiable as provided by the Uniform Commercial Code—Investment Securities.

History: En. Sec. 32, Ch. 100, L. 1969.

**Cross-References**

Uniform Commercial Code—Investment Securities, sec. 87A-8-101 et seq.

**89-3433. Registration of bonds—copy to be furnished county treasurer.** (1) When duly executed, all bonds issued under this act shall be registered by the county treasurer of the county in which the largest portion of the taxable valuation of real property of the district is located. They shall be registered in a book provided for that purpose before being delivered to the purchaser.

(2) The registration shall show :

- (a) the number and amount of each bond ;
- (b) the date of issue and date redeemable ;
- (c) the name of the purchaser ;
- (d) the amount and due date of all payments required on the bonds.

(3) The directors shall provide the county treasurer with an unsigned and canceled printed copy of each issue of bonds of the district. The copy shall be preserved in his office.

**History:** En. Sec. 33, Ch. 100, L. 1969.

**89-3434. Deposit of sales proceeds — disposition — investment.** (1) Proceeds from the sales of bonds shall be deposited with the county in which the largest portion of the taxable valuation of real property of the district is located.

(2) The county treasurer shall place the proceeds of the bond sale to the credit of the district. The proceeds shall be paid by the county treasurer on written order of the directors. Proceeds shall only be spent for the purposes for which the bonds were issued.

(3) The directors shall instruct the county treasurer to deposit any part of the proceeds which is not immediately needed for the purpose for which the bonds were issued in a saving or time deposit in a state or national bank insured by the Federal Deposit Insurance Corporation or to invest in direct obligations of the United States government. The obligations shall be payable within not to exceed one hundred eighty (180) days from the time of deposit or investment.

**History:** En. Sec. 34, Ch. 100, L. 1969.

**89-3435. Refunding bonds authorized—redemption.** (1) Refunding bonds may be issued in the same way as any other bonds authorized by this act.

(2) All bonds, original issue or refunding issue, shall be redeemable when one-half ( $\frac{1}{2}$ ) of the term or ten (10) years of the term for which they were issued, whichever may be the less, has expired. Redemption may be made on any interest due date of any bond prior to its maturity after the bond shall be subject to redemption as herein provided. The right of redemption, as herein provided, must be stated on the face of each bond.

**History:** En. Sec. 35, Ch. 100, L. 1969.

**89-3436. Fund for retirement of bonds—investment and disbursement.** Revenue, assessment, and other funds on hand, including reserves pledged for the payment and security of outstanding bonds may be deposited in a fund created for the retirement of bonds and may be invested and disbursed as provided by this act, to the extent consistent with the resolution authorizing the outstanding bonds.

**History:** En. Sec. 36, Ch. 100, L. 1969.



**89-3437. Revolving funds—purpose—excess money—funds deposited with county treasurer.** (1) The directors by resolution may establish revolving funds to finance, on a reimbursable basis:

(a) construction, purchase, lease and operation of revenue-producing works;

(b) contracts to provide services or facilities.

(2) Money in the revolving fund shall not be spent for any purposes other than those specified in the resolution. However, excess money may be transferred to any sinking and interest fund of the district.

(3) The county treasurer of the county having the largest portion of the taxable valuation of real property of the district shall maintain a separate account for each revolving fund of the district, and all money collected under the resolution shall be deposited with the county treasurer.

**History:** En. Sec. 37, Ch. 100, L. 1969.

**89-3438. Petition for merger of districts—hearing and notice—merger into new district—inclusion in another district—majority of electors may kill merger by petition—existing obligations.** (1) In case two (2) or more districts have been organized in a territory which, in the opinion of the directors of each of the districts, should constitute but one (1) district, the directors of the districts may petition the court for an order merging the districts into a single district. The petition shall be filed in the office of the clerk of the district court in and for that county which has the largest portion of taxable valuation of property within the districts sought to be included, as shown by the tax rolls of the respective counties. The petition shall set forth facts showing that the purposes of this act would be served by the merging of the districts, and that the merger would promote the economical execution of the purposes for which the districts were organized. A copy of the petition shall be filed with the water board.

(2) Upon the filing of the petition, the court shall by order fix a time and place of hearing; and the clerk shall give notice as specified in section 3, subsection (11) [89-3403 (11)] of this act as well as by mail to the directors of the districts which would be merged. The notice shall contain the purpose, time, and the place of the hearing.

(3) Upon the hearing, should the court find that the averments of the petition are true and that the districts, or any of them, could feasibly and profitably be merged, it shall order that the merger take place and the districts shall be merged into one (1) district and proceed as such. The court shall designate the corporate name of the district, and further proceedings shall be taken as provided for in this act. The court shall by order appoint the directors of the district, who shall thereafter have powers and be subject to rules as are provided for directors in districts created in the first instance.

(4) Instead of organizing a new district from the constituent districts, the court may, in its discretion, direct that one (1) or more of the

districts described in the petition be included in another of the districts, which other shall continue under its original corporate name and organization; or the court may direct that the district or districts so absorbed shall be represented on the directors of the original districts, designating what members of the directors of the original district shall be retired from the new board, and what members representing the included district or districts shall take their places.

(5) If the court receives a petition opposing the merger, signed by a majority of the electors of any of the concerned districts, the court shall not grant the order and shall dismiss the petition.

(6) Upon merger or inclusion, existing obligations shall remain exclusively with those who bore them prior to the merger or inclusion, except with the written consent, given prior to the merger or inclusion, of those who did not bear the obligations.

**History:** En. Sec. 38, Ch. 100, L. 1969.

**89-3439. Procedure for annexing realty.** To annex real property to the district, the procedure is:

(1) The directors shall petition the court.

(2) The petition shall:

(a) give a general description of the real property to be annexed sufficient to enable a person to determine if his property is in the proposed annexation;

(b) describe the benefits to accrue to the real property as a result of the annexation.

(3) The court shall:

(a) give notice and hold a hearing on the petition;

(b) upon good cause shown, order or deny the annexation.

**History:** En. Sec. 39, Ch. 100, L. 1969.

**89-3440. Pre-annexation bonds not lien without prior agreement.** Real property annexed to a district shall not incur any liens by reason of bonds issued before annexation unless agreed to by the owners of the annexed property, in writing, prior to annexation.

**History:** En. Sec. 40, Ch. 100, L. 1969.

**89-3441. Exclusion of territory from district—procedure.** Any territory included within any district formed under the provisions of this act, and not benefited in any manner by such district, or its inclusion therein, may be excluded therefrom.

The procedure for exclusion is:

(1) A petition for exclusion shall be initiated by either the directors or the owner or owners of the land sought to be excluded.

(2) The petition shall give a description of the territory sought to be excluded sufficient to enable a person to determine if his property is in the proposed exclusion and shall set forth that such territory is not

benefited in any manner by the district or its continued inclusion therein, and shall request that such territory be excluded from the district.

(3) When owners of property initiate the petition for exclusion, the petition shall be filed with the secretary of the district and shall be accompanied by a deposit of one hundred dollars (\$100) to meet the costs incident to the process of exclusion. The unexpended balance of the deposit shall be returned to the petitioner.

(4) Upon the filing of such petition with the secretary of the district, the secretary shall duly call a meeting of the directors to consider the petition. The directors shall approve or disapprove of the merits of the petition. The secretary shall then file the petition, together with a copy of the action of the directors, with the court.

(5) The court shall give notice, hold a hearing, and issue an order either granting or denying the petition.

History: En. Sec. 41, Ch. 100, L. 1969.

**89-3442. Procedure for dissolution of district.** (1) The procedure for dissolution of a district is:

(a) a resolution shall be passed by the directors requesting dissolution; or

(b) a petition signed by twenty per cent (20%) of the electors representing ten per cent (10%) of the taxable valuation of real property in the district shall be presented to the directors; or

(c) if the district or its directors have been inactive for one (1) year or more, any elector may present a petition.

(2) The resolution or petition shall be presented to the court by the directors, or by the petitioners if the directors remain inactive.

(3) Not more than one (1) resolution or petition may be presented to the court in any twenty-four (24) month period, and no such petition may be presented during the first twenty-four (24) months after a district's initial organization.

History: En. Sec. 42, Ch. 100, L. 1969.

**89-3443. Dissolution election — majority approval required.** (1) After receipt of petition or resolution for dissolution, the court shall order an election in the way provided by section 24 [89-3424] of this act.

(2) For dissolution to be approved, a majority of the electors voting must favor dissolution.

History: En. Sec. 43, Ch. 100, L. 1969.

**89-3444. Submission of termination plan—termination by directors or receiver—court order—retention of jurisdiction.** (1) In the event the vote is for dissolution, any qualified elector, or the board of directors of the district may, within the time fixed by the court, present a written



plan for terminating the affairs of the district which shall include assignment of any water rights and works owned by the district.

(2) The plan may specify that the affairs of the district shall be terminated by the directors or by a receiver appointed by the court.

(3) On a day fixed by the court, the court shall consider the plan or plans and shall enter an order establishing a plan for the termination of the affairs.

(4) The court shall retain jurisdiction to modify the plan and shall supervise the termination.

**History:** En. Sec. 44, Ch. 100, L. 1969.

**89-3445. Appointment of receiver—directors' authority ceases—assessments by receiver—annual assessments—disposition of assessments.**

(1) If no plan is presented on or before the date set by the court, the court shall appoint a receiver to terminate the affairs of the district under the supervision of the court.

(2) Upon the appointment of any receiver all the authority of the directors shall cease. However, until dissolution, the receiver shall have authority to levy assessments for:

- (a) the payment of obligations of the district;
- (b) the costs of termination.

(3) The directors, or if there is a receiver, then the receiver with the approval of the court, shall make assessments each year in an amount large enough to retire the obligations of the district.

(4) If a receiver has been appointed, he shall direct, under court supervision, the disposition of all assessments collected.

**History:** En. Sec. 45, Ch. 100, L. 1969.

**89-3446. Entry of dissolution order—certified copy.** When it appears to the satisfaction of the court that:

- (1) all obligations of the district have been discharged;
- (2) all the costs of termination have been paid, the court shall enter an order dissolving the district. A certified copy of the order shall be recorded by the clerk of the court in all counties in which the district was situated and filed with the secretary of state.

**History:** En. Sec. 46, Ch. 100, L. 1969.

**89-3447. County general funds to receive funds remaining after dissolution—proportion.** All funds remaining after dissolution of a district shall be deposited in the general fund of the counties in which the district is located in proportion to the taxable value of property within the district in each county.

**History:** En. Sec. 47, Ch. 100, L. 1969.

**89-3448. No power to generate, distribute or sell electric energy.** Nothing in this act shall be construed to grant to the district the power to generate, distribute or sell electric energy.

**History:** En. Sec. 48, Ch. 100, L. 1969.

**89-3449. Other agencies not affected.** The provisions of this act shall not be construed to, in any manner, abrogate or limit the rights, powers, duties and functions of the water board, state soil conservation committee, soil and water conservation districts, state board of health, or the fish and game commission; but shall be held to be supplementary thereto and in aid thereof.

**History:** En. Sec. 49, Ch. 100, L. 1969.

**Separability Clause**

Section 50 of Ch. 100, Laws 1969 read "It is the intent of the legislative assembly that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its

applications, the part remains in effect in all valid applications that are severable from the invalid applications."

**Effective Date**

Section 51 of Ch. 100, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved February 24, 1969.

## TITLE 90—WEIGHTS—MEASURES AND GRADES—TIME— MONEY

Chapter 1. Standard weights and measures—state sealer, 90-153 to 90-194.

3. Bread—standard weight and loaf, Repealed—Section 3, Chapter 252, Laws of 1957; Section 24, Chapter 16, Laws of 1965; Section 27, Chapter 307, Laws of 1967.

6. Packaged commodities offered for sale, 90-621.

### CHAPTER 1—STANDARD WEIGHTS AND MEASURES—STATE SEALER

Section 90-153. Meaning of terms.

90-154. Systems of weights and measures.

90-155. Definitions of special units of measure.

90-156. State standards of weight and measure.

90-157. Field standards and equipment.

90-158. State sealer, chief sealer, and deputy sealers of weights and measures.

90-159. General powers and duties of sealer.

90-160. Specific powers and duties of sealer—regulations.

90-161. Sealer—testing at state-supported institutions.

90-162. Sealer—general testing.

90-163. Sealer—investigations.

90-164. Sealer—inspection of packages.

90-165. Sealer—stop-use, stop-removal, and removal orders.

90-166. Sealer—disposition of correct and incorrect apparatus.

90-167. Sealer—police powers—right of entry and stoppage.

90-168. Powers and duties of chief sealer and deputy sealers.

90-169. Duty of owners of incorrect apparatus.

90-170. Method of sale of commodities—general.

90-171. Method of sale of commodities—packages—declarations of quantity and origin—variations—exemptions.

90-172. Method of sale of commodities—declarations of unit price on random packages.

90-173. Method of sale of commodities—misleading packages.

90-174. Method of sale of commodities—advertising packages for sale.

90-175. Sale by net weight.

90-176. Misrepresentation of price.

90-177. Meat, poultry, and seafood.

90-178. Bread.

90-179. Butter, oleomargarine, and margarine.

90-180. Fluid dairy products.

90-181. Flour, corn meal, and hominy grits.

90-182. Bulk deliveries sold in terms of weight and delivered by vehicle.

90-183. Furnace and stove oil.

90-184. Berries and small fruits.

90-185. Construction of contracts.

90-186. Hindering or obstructing officer—penalties.

90-187. Impersonation of officer—penalties.

90-188. Offenses and penalties.

90-189. Injunction.

90-190. Presumptive evidence.

90-191. Validity of prosecutions.

90-192. Separability provision.

90-193. Repeal of conflicting laws.

90-194. Citation.

90-101 to 90-152. (4212 to 4229, 4230.1, 4232, 4234 to 4238, 4240 to 4264) Repealed.

#### Repeal

Sections 90-101 to 90-152 (Secs. 3120 to 3134, 3136, Pol. C. 1895; Sec. 1, p. 137, L. 1901; Sec. 1, Ch. 91, L. 1907; Secs. 1 to 4, 6 to 11, 13 to 16, 18 to 25, 28 to 31, Ch. 34, L. 1911; Secs. 1 to 4, 6 to 13,



15 to 21, Ch. 83, L. 1913; Secs. 1, 2, Ch. 19, L. 1917; Sec. 1, Ch. 74, L. 1921; Secs. 1, 3, Ch. 140, L. 1921; Sec. 2, Ch. 84, L. 1935; Secs. 1, 4 to 31, Ch. 146, L. 1939; Sec. 1, Ch. 27, L. 1941; Secs. 1 to 5, Ch. 110, L. 1945; Sec. 1, Ch. 174, L. 1949; Sec. 1, Ch. 130, L. 1951; Secs. 1 to 6, Ch. 143, L. 1951; Sec. 2, Ch. 158, L. 1953; Sec. 1, Ch. 131, L. 1955; Sec. 1, Ch. 84,

L. 1957; Sec. 1, Ch. 90, L. 1957; Sec. 1, Ch. 157, L. 1957; Sec. 1, Ch. 59, L. 1959; Sec. 1, Ch. 78, L. 1959; Sec. 1, Ch. 147, L. 1961; Sec. 44, Ch. 177, L. 1965), relating to standard weights and measures and the state sealer of weights and measures, were repealed by Sec. 24, Ch. 160, Laws 1965 and Sec. 43, Ch. 99, Laws 1969. For present law, see secs. 90-153 to 90-194.

**90-153. Meaning of terms.** When used in this act:

(1) The word "person" shall be construed to mean both the plural and singular, as the case demands, and shall include individuals, partnerships, corporations, companies, societies and associations.

(2) The words "weight(s) and (or) measure(s)" shall be construed to mean all weights and measures of every kind, instruments and devices for weighing and measuring, and any appliances and accessories associated with any or all such instruments and devices, except that the term shall not be construed to include meters for the measurement of electricity, gas (natural or manufactured), or water when the same are operated in a public utility system. Such electricity, gas, and water meters are hereby specifically excluded from the purview of this act, and none of the provisions of this act shall be construed to apply to such meters or to any appliances or accessories associated therewith.

(3) The words "sell" and "sale" shall be construed to mean barter and exchange.

(4) The term "sealer" shall be construed to mean the state sealer of weights and measures.

(5) The terms "chief sealer" and "deputy sealer" shall be construed to mean, respectively, the state chief sealer of weights and measures and the deputy sealer of weights and measures.

(6) The term "intrastate commerce" shall be construed to mean any and all commerce or trade that is begun, carried on, and completed wholly within the limits of the state of Montana, and the phrase "introduced into intrastate commerce" shall be construed to define the time and place at which the first sale and delivery of a commodity is made within the state, the delivery being made either directly to the purchaser or to a common carrier for shipment to the purchaser.

(7) The term "commodity in package form" shall be construed to mean commodity put up or packaged in any manner in advance of sale in units suitable for either wholesale or retail sale, exclusive, however, of any auxiliary shipping container enclosing packages that individually conform to the requirements of this act. An individual item or lot of any commodity not in package form as defined in this section, but on which there is marked a selling price based on an established price per unit of weight or of measure, shall be construed to be commodity in package form.

(8) A "consumer package" or "package of consumer commodity" shall be construed to mean a commodity in package form that is cus-

tomarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals or use by individuals for the purposes of personal care or in the performance of services ordinarily rendered in or about the household or in connection with personal possessions.

(9) A "nonconsumer package" or "package of nonconsumer commodity" shall be construed to mean any commodity in package form other than a consumer package, and particularly a package designed solely for industrial or institutional use or for wholesale distribution only.

**History:** En. Sec. 1, Ch. 99, L. 1969.

**Title of Act**

An act relating to weights and measures, providing for a state sealer of weights and measures, providing for a system of weights and measures, regulating the sale of commodities by weight and measure,

providing for enforcement: repealing sections 90-101 through 90-119, 90-120 through 90-129, 90-131, 90-133 through 90-143, 90-145 through 90-152, 90-601 through 90-620, 3-202, 3-2432, 3-2433, 11-958, 50-603, 50-408, 50-409, R. C. M., 1947.

**90-154. Systems of weights and measures.** The system of weights and measures in customary use in the United States and the metric system of weights and measures are jointly recognized, and either one or both of these systems shall be used for all commercial purposes in the state of Montana. The definitions of basic units of weight and measure, the tables of weight and measure, and weights and measures equivalents as published by the national bureau of standards are recognized and shall govern weighing and measuring equipment and transactions in the state.

**History:** En. Sec. 2, Ch. 99, L. 1969.

**90-155. Definitions of special units of measure.** The term "barrel" when used in connection with fermented liquor shall mean a unit of thirty-one (31) gallons. The term "ton" shall mean a unit of two thousand (2,000) pounds avoirdupois weight. The term "cord" when used in connection with wood intended for fuel purposes shall mean the amount of wood that is contained in a space of one hundred twenty-eight (128) cubic feet when the wood is ranked and well stowed.

**History:** En. Sec. 3, Ch. 99, L. 1969.

**90-156. State standards of weight and measure.** Such weights and measures in conformity with the standards of the United States as have been supplied to the state by the federal government or otherwise obtained by Montana for use as state standards shall, when the same shall have been certified as being satisfactory for use as such by the national bureau of standards, be the state standards of weight and measure. The state standards shall be kept in a safe and suitable place in the office or laboratory of the state division of weights and measures, they shall not be removed from the said office or laboratory except for repairs or for certification, and they shall be submitted at least once in ten years to the national bureau of standards for certification.

**History:** En. Sec. 4, Ch. 99, L. 1969.

**90-157. Field standards and equipment.** In addition to the state standards provided for in section 4 [90-156] of this act, there shall be supplied by the state such "field standards" and such equipment as may be found necessary to carry out the provisions of this act. The field standards shall be verified upon their initial receipt and at least once each year thereafter by comparison with the state standards.

**History:** En. Sec. 5, Ch. 99, L. 1969.

**90-158. State sealer, chief sealer, and deputy sealers of weights and measures.** There shall be a state sealer of weights and measures. The commissioner of agriculture shall be, ex officio, the state sealer. There shall be a chief sealer of weights and measures and deputy sealers of weights and measures, and necessary technical and clerical personnel, who shall be appointed by the sealer, and who shall hold office during good behavior, and who shall collectively comprise the state division of weights and measures, of which the chief sealer shall be the head.

**History:** En. Sec. 6, Ch. 99, L. 1969.

**90-159. General powers and duties of sealer.** The sealer shall have the custody of the state standards of weight and measure and of the other standards and equipment provided for by this act, and shall keep accurate records of the same. The sealer shall enforce the provisions of this act. He shall have and keep a general supervision over the weights and measures offered for sale, sold, or in use in the state.

**History:** En. Sec. 7, Ch. 99, L. 1969.

**90-160. Specific powers and duties of sealer — regulations.** The sealer shall issue from time to time reasonable regulations for the enforcement of this act, which regulations shall have the force and effect of law. These regulations may include (1) schedules of fees for testing and certification, (2) standards of net weight, measure, or count, and reasonable standards of fill for any commodity in package form, (3) rules governing the technical and reporting procedures to be followed and the report and record forms and marks of approval and rejection to be used by sealers of weights and measures in the discharge of their official duties, (4) exemptions from the sealing or marking requirements of section 14 [90-166] of this act with respect to weights and measures of such character or size that such sealing or marking would be inappropriate, impracticable, or damaging to the apparatus in question, and (5) rules governing the voluntary registration of servicemen and service agencies. These regulations shall include specifications, tolerances, and other technical requirements for weights and measures of the character of those specified in section 10 [90-162] of this act, designed to eliminate from use, without prejudice to apparatus that conforms as closely as practicable to the official standards, those (1) that are not accurate, (2) that are of such construction that they are faulty (that is, that are not reasonably permanent in their adjustment or will not repeat their indications correctly), or (3) that facilitate the perpetration of fraud. The



specifications, tolerances, and other technical requirements for commercial weighing and measuring devices, together with amendments thereto, as recommended by the national bureau of standards and published in national bureau of standards handbook 44 and supplements thereto, or in any publication revising or superseding handbook 44, shall be the specifications, tolerances, and other technical requirements for commercial weighing and measuring devices of the state of Montana, except in so far as specifically modified, amended, or rejected by a regulation issued by the sealer. For the purposes of this act, apparatus shall be deemed to be "correct" when it conforms to all applicable requirements promulgated as specified in this section. Other apparatus shall be deemed to be "incorrect."

**History:** En. Sec. 8, Ch. 99, L. 1969.

**90-161. Sealer—testing at state-supported institutions.** The sealer shall from time to time test all weights and measures used in checking the receipt or disbursement of supplies in every institution for the maintenance of which moneys are appropriated by the legislature, reporting his findings, in writing, to the supervisory board and to the executive officer of the institution concerned.

**History:** En. Sec. 9, Ch. 99, L. 1969.

**90-162. Sealer—general testing.** When not otherwise provided by law, the sealer shall have the power to inspect and test, to ascertain if they are correct, all weights and measures kept, offered, or exposed for sale. It shall be the duty of the sealer, within a twelve-month period, or less frequently if in accordance with a schedule issued by him, and as much oftener as he may deem necessary, to inspect and test, to ascertain if they are correct, all weights and measures commercially used (1) in determining the weight, measurement, or count of commodities or things sold, or offered or exposed for sale, on the basis of weight, measure, or of count, or (2) in computing the basic charge or payment for services rendered on the basis of weight, measure, or of count: Provided, that with respect to single-service devices (that is, devices designed to be used commercially only once and to be then discarded) and with respect to devices uniformly mass-produced, as by means of a mold or die, and not susceptible of individual adjustment, tests may be made on representative samples of such devices; and the lots of which such samples are representative shall be held to be correct or incorrect upon the basis of the results of the inspections and tests on such samples: And provided further, that any itinerant peddler or hawker, using weights and measures, shall register his name and address with the chief sealer of weights and measures, in order that his equipment can be tested in accordance with the provisions of this law.

**History:** En. Sec. 10, Ch. 99, L. 1969.

**90-163. Sealer—investigations.** The sealer shall investigate complaints made to him concerning violations of the provisions of this act, and shall, upon his own initiative, conduct such investigations as he

deems appropriate and advisable to develop information on prevailing procedures in commercial quantity determination and on possible violations of the provisions of this act and to promote the general objective of accuracy in the determination and representation of quantity in commercial transactions.

**History:** En. Sec. 11, Ch. 99, L. 1969.

**90-164. Sealer—inspection of packages.** The sealer shall, from time to time, weigh or measure and inspect packages or amounts of commodities kept, offered, or exposed for sale, sold, or in the process of delivery, to determine whether the same contain the amounts represented and whether they be kept, offered, or exposed for sale or sold in accordance with law. When such packages or amounts of commodities are found not to contain the amounts represented, or are found to be kept, offered, or exposed for sale in violation of law, the sealer may order them off sale and may so mark or tag them as to show them to be illegal. In carrying out the provisions of this section, the sealer may employ recognized sampling procedures under which the compliance of a given lot of packages will be determined on the basis of the result obtained on a sample selected from and representative of such lot. No person shall (1) sell, or keep, offer, or expose for sale, in intrastate commerce, any package or amount of commodity that has been ordered off sale or marked or tagged as provided in this section unless and until such package or amount of commodity has been brought into full compliance with all legal requirements, or (2) dispose of any package or amount of commodity that has been ordered off sale or marked or tagged as provided in this section and that has not been brought into compliance with legal requirements, in any manner, except with the specific approval of the sealer.

**History:** En. Sec. 12, Ch. 99, L. 1969.

**90-165. Sealer—stop-use, stop-removal, and removal orders.** The sealer shall have the power to issue stop-use orders, stop-removal orders, and removal orders with respect to weights and measures being, or susceptible of being, commercially used, and to issue stop-removal orders and removal orders with respect to packages or amounts or commodities kept, offered, or exposed for sale, sold, or in process of delivery, whenever in the course of his enforcement of the provisions of this act he deems it necessary or expedient to issue such orders, and no person shall use, remove from the premises specified, or fail to remove from the premises specified, any weight, measure, or package or amount of commodity contrary to the terms of a stop-use order, stop-removal order, or removal order issued under the authority of this section.

**History:** En. Sec. 13, Ch. 99, L. 1969.

**90-166. Sealer—disposition of correct and incorrect apparatus.** The sealer shall approve for use, and seal or mark with appropriate devices, such weights and measures as he finds upon inspection and test to be "correct" as defined in section 8 [90-160] of this act, and shall reject

and mark or tag as "rejected" such weights and measures as he finds, upon inspection or test, to be "incorrect" as defined in section 8 [90-160] of this act, but which in his best judgment are susceptible of satisfactory repair: Provided, that, such sealing or marking shall not be required with respect to such weights and measures as may be exempted therefrom by a regulation of the sealer issued under the authority of section 8 [90-160] of this act. The sealer shall condemn, and may seize and destroy, weights and measures found to be incorrect that, in his best judgment, are not susceptible of satisfactory repair. Weights and measures that have been rejected may be confiscated and may be destroyed by the sealer if not corrected as required by section 17 [90-169] of this act, or if used or disposed of contrary to the requirements of section 17 [90-169] of this act.

**History:** En. Sec. 14, Ch. 99, L. 1969.

**90-167. Sealer—police powers—right of entry and stoppage.** With respect to the enforcement of this act and any other acts dealing with weights and measures that he is or may be empowered to enforce, the sealer is hereby vested with special police powers, and is authorized to arrest, without formal warrant, any violator of the said acts, and to seize for use as evidence, without formal warrant, incorrect or unsealed weights and measures or amounts of packages of commodity found to be used, retained, offered, or exposed for sale or sold in violation of law. In the performance of his official duties, the sealer is authorized to enter and go into or upon, without formal warrant, any structure or premises, and to stop any person whatsoever and to require him to proceed, with or without any vehicle of which he may be in charge, to some place which the sealer may specify.

**History:** En. Sec. 15, Ch. 99, L. 1969.

**90-168. Powers and duties of chief sealer and deputy sealers.** The powers and duties, given to and imposed upon the sealer by sections 9, 10, 11, 12, 13, 14, 15, and 37 [90-161, 90-162, 90-163, 90-164, 90-165, 90-166, 90-167, and 90-189] of this act are hereby given to and imposed upon the chief sealer and deputy sealers also when acting under the instructions and at the direction of the state sealer.

**History:** En. Sec. 16, Ch. 99, L. 1969.

**90-169. Duty of owners of incorrect apparatus.** Weights and measures that have been rejected under the authority of the sealer or of a deputy sealer shall remain subject to the control of the rejecting authority until such time as suitable repair or disposition thereof has been made as required by this section. The owners of such rejected weights and measures shall cause the same to be made correct within thirty (30) days or such longer period as may be authorized by the rejecting authority; or, in lieu of this, may dispose of the same, but only in such manner as is specifically authorized by the rejecting authority. Weights and measures that have been rejected shall not again be used com-



mercially until they have been officially re-examined and found to be correct, or until specific written permission for such use is issued by the rejecting authority, or until the rejection tag has been removed and the rejected device repaired and placed in service by a person duly registered to perform such acts under a regulation issued by the sealer for the registration of weights and measures servicemen and service agencies.

**History:** En. Sec. 17, Ch. 99, L. 1969.

**90-170. Method of sale of commodities—general.** Commodities in liquid form shall be sold only [by] liquid measure or by weight, and, except as otherwise provided in this act, commodities not in liquid form shall be sold only by weight, by measure of length or area, or by count: Provided, that liquid commodities may be sold by weight and commodities not in liquid form may be sold by count only if such methods give accurate information as to the quantity of commodity sold: And provided further, that the provisions of this section shall not apply (1) to commodities when sold for immediate consumption on the premises where sold, (2) to vegetables when sold by the head or bunch, (3) to commodities in containers standardized by a law of this state or by federal law, (4) to commodities in package form when there exists a general consumer usage to express the quantity in some other manner, (5) to concrete aggregates, concrete mixtures, and loose solid materials such as earth, soil, gravel, crushed stone, and the like, when sold by cubic measure, or (6) to unprocessed vegetable and animal fertilizer when sold by cubic measure. The sealer may issue such reasonable regulations as are necessary to assure that amounts of commodity sold are determined in accordance with good commercial practice and are so determined and represented as to be accurate and informative to all parties at interest.

**History:** En. Sec. 18, Ch. 99, L. 1969.

**Compiler's Notes**

The compiler has inserted the bracketed word "by" in the first sentence.

**90-171. Method of sale of commodities—packages—declarations of quantity and origin—variations—exemptions.** Except as otherwise provided in this act, any commodity in package form introduced or delivered for introduction into or received in intrastate commerce, kept for the purpose of sale, or offered or exposed for sale in intrastate commerce, shall bear on the outside of the package such definite, plain, and conspicuous declarations of (1) the identity of the commodity in the package unless the same can easily be identified through the wrapper or container, (2) the net quantity of the contents in terms of weight, measure, or count, and (3) in the case of any package kept, offered, or exposed for sale, or sold in any place other than on the premises where packed, the name and place of business of the manufacturer, packer, or distributor, as may be prescribed by regulation issued by the director: provided, that, in connection with the declaration required under clause (2), neither the qualifying term "when packed" or any words of similar import, nor any term qualifying a unit of weight, measure, or count (for

example, "jumbo," "giant," "full," and the like) that tends to exaggerate the amount of commodity in a package shall be used: And provided further, that under clause (2) the sealer shall, by regulation, establish (a) reasonable variations to be allowed, which may include variations below the declared weight or measure caused by ordinary and customary exposure, only after the commodity is introduced into intrastate commerce, to conditions that normally occur in good distribution practice and that unavoidably result in decreased weight or measure, (b) exemptions as to small packages, and (c) exemptions as to commodities put up in variable weights or sizes for sale intact and either customarily not sold as individual units or customarily weighed or measured at time of sale to the consumer.

History: En. Sec. 19, Ch. 99, L. 1969.

**90-172. Method of sale of commodities—declarations of unit price on random packages.** In addition to the declarations required by section 19 [90-171] of this act, any commodity in package form, the package being one of a lot containing random weights, measures, or counts of the same commodity and bearing the total selling price of the package, shall bear on the outside of the package a plain and conspicuous declaration of the price per single unit of weight, measure, or count.

History: En. Sec. 20, Ch. 99, L. 1969.

**90-173. Method of sale of commodities — misleading packages.** No commodity in package form shall be so wrapped, nor shall it be in a container so made, formed, or filled as to mislead the purchaser as to the quantity of the contents of the package, and the contents of a container shall not fall below such reasonable standard of fill as may have been prescribed for the commodity in question by the sealer.

History: En. Sec. 21, Ch. 99, L. 1969.

**90-174. Method of sale of commodities—advertising packages for sale.** Whenever a commodity in package form is advertised in any manner and the retail price of the package is stated in the advertisement, there shall be closely and conspicuously associated with such statement of price a declaration of the basic quantity of contents of the package as is required by law or regulation to appear on the package: provided, that, where the law or regulation requires a dual declaration of net quantity to appear on the package, only the declaration that sets forth the quantity in terms of the smaller unit of weight or measure (the declaration that is required to appear first and without parenthesis on the package) need appear in the advertisement: And provided further, that there shall not be included as part of the declaration required under this section such qualifying terms as "when packed," "minimum," "not less than," or any other terms of similar import, nor any term qualifying a unit of weight, measure, or count (for example, "jumbo," "giant," "full," and the like) that tends to exaggerate the amount of commodity in the package.

History: En. Sec. 22, Ch. 99, L. 1969.

**90-175. Sale by net weight.** The word “weight” as used in this act in connection with any commodity shall mean net weight. Whenever any commodity is sold on the basis of weight, the net weight of the commodity shall be employed, and all contracts concerning commodities shall be so construed.

**History:** En. Sec. 23, Ch. 99, L. 1969.

**90-176. Misrepresentation of price.** Whenever any commodity or service is sold, or is offered, exposed, or advertised for sale, by weight, measure, or count, the price shall not be misrepresented, nor shall the price be represented in any manner calculated or tending to mislead or deceive an actual or prospective purchaser. Whenever an advertised, posted, or labeled price per unit of weight, measure, or count includes a fraction of a cent, all elements of the fraction shall be prominently displayed and the numeral or numerals expressing the fraction shall be immediately adjacent to, of the same general design and style as, and at last one-half ( $\frac{1}{2}$ ) the height and width of the numerals representing the whole cents.

**History:** En. Sec. 24, Ch. 99, L. 1969.

**90-177. Meat, poultry, and seafood.** Except for immediate consumption on the premises where sold, or as one of several elements comprising a ready-to-eat meal sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat products, poultry (whole or parts), and all seafood except shellfish, offered or exposed for sale or sold as food shall be offered or exposed for sale and sold by weight. When meat, poultry, or seafood is combined with or associated with some other food element or elements to form either a distinctive food product or a food combination, such food product or combination shall be offered or exposed for sale and sold by weight, and the quantity representation may be the total weight of the product or combination, and a quantity representation need not be made for each of the several elements of the product or combination.

**History:** En. Sec. 25, Ch. 99, L. 1969.

**90-178. Bread.** Each loaf of bread and each unit of a twin or multiple loaf of bread [manufactured] or procured for sale, kept, offered, exposed for sale, or sold, whether or not the bread is wrapped or sliced, shall weigh one-half ( $\frac{1}{2}$ ) pound, one (1) pound, one and one-half ( $1\frac{1}{2}$ ) pounds, or a multiple of one (1) pound, avoirdupois weight, within reasonable variations or tolerances that shall be promulgated by regulation by the sealer: provided, that the provisions of this section shall not apply to biscuits, buns, or rolls weighing eight (8) ounces or less, or to “stale bread” sold and expressly represented at the time of sale as such, and that the marking provisions of section 19 [90-171] shall not apply to unwrapped loaves of bread.

**History:** En. Sec. 26, Ch. 99, L. 1969.

**Compiler's Notes**

The compiler has inserted the bracketed word “manufactured” near the beginning of the section.



**90-179. Butter, oleomargarine, and margarine.** Butter, oleomargarine, and margarine shall be offered and exposed for sale and sold by weight, and only in units of one-fourth ( $\frac{1}{4}$ ) pound, one-half ( $\frac{1}{2}$ ) pound, one (1) pound, or multiples of one (1) pound, avoirdupois weight.

**History:** En. Sec. 27, Ch. 99, L. 1969.

**90-180. Fluid dairy products.** All fluid dairy products, including but not limited to whole milk, skimmed milk, cultured milk, sweet cream, sour cream, and buttermilk, shall be packaged for retail sale only in units of one (1) gill, one-half ( $\frac{1}{2}$ ) liquid pint, ten (10) fluid ounces, one (1) liquid pint, one (1) liquid quart, one-half ( $\frac{1}{2}$ ) gallon, one (1) gallon, one and one-half ( $1\frac{1}{2}$ ) gallons, two (2) gallons, two and one-half ( $2\frac{1}{2}$ ) gallons, or multiples of one (1) gallon: provided, that packages in units of less than one (1) gill shall be permitted.

**History:** En. Sec. 28, Ch. 99, L. 1969.

**90-181. Flour, corn meal, and hominy grits.** When in package form, and when packed, kept, offered, or exposed for sale or sold, wheat flour, whole wheat flour, graham flour, self-rising wheat flour, phosphated wheat flour, bromated flour, enriched flour, enriched self-rising flour, enriched bromated flour, corn flour, corn meal, and hominy grits shall be packaged only in units of two (2), five (5), ten (10), twenty-five (25), fifty (50), or one hundred (100) pounds, avoirdupois weight: provided, that packages in units of less than two (2) pounds or more than one hundred (100) pounds shall be permitted.

**History:** En. Sec. 29, Ch. 99, L. 1969.

**90-182. Bulk deliveries sold in terms of weight and delivered by vehicle.** When a vehicle delivers to an individual purchaser a commodity in bulk, and the commodity is sold in terms of weight units, the delivery shall be accompanied by a duplicate delivery ticket with the following information clearly stated, in ink or by means of other indelible marking equipment and, in clarity, equal to type or printing, (1) the name and address of the vendor, (2) the name and address of the purchaser, and (3) the net weight of the delivery expressed in pounds, and, if the net weight is derived from determinations of gross and tare weights, such gross and tare weights also shall be stated in terms of pounds. One of these tickets shall be retained by the vendor, and the other shall be delivered to the purchaser at the time of delivery of the commodity, or shall be surrendered, on demand, to the sealer, or the chief sealer or deputy sealer, who, if he desires to retain it as evidence, shall issue a weight slip in lieu thereof for delivery to the purchaser: provided, that, if the purchaser, himself, carries away his purchase, the vendor shall be required only to give to the purchaser at the time of sale a delivery ticket stating the number of pounds of commodity delivered to him.

**History:** En. Sec. 30, Ch. 99, L. 1969.

**90-183. Furnace and stove oil.** All furnace and stove oil shall be sold by liquid measure or by net weight in accordance with the provi-

sions of section 18 [90-170] of this act. In the case of each delivery of such liquid fuel not in package form and in an amount greater than ten (10) gallons in the case of sale by liquid measure or one hundred (100) pounds in the case of sale by weight, there shall be rendered to the purchaser, either (a) at the time of delivery or (b) within a period mutually agreed upon in writing or otherwise between the vendor and the purchaser, a delivery ticket or a written statement on which, in ink or by means of other indelible marking equipment and, in clarity, equal to type or printing, there shall be clearly stated (1) the name and address of the vendor, (2) the name and address of the purchaser, (3) the identity of the type of fuel comprising the delivery, (4) the unit price (that is, the price per gallon or per pound, as the case may be) of the fuel delivered, (5) in the case of sale by liquid measure, the liquid volume of the delivery, together with any meter readings from which such liquid volume has been computed, expressed in terms of the gallon and its binary or decimal subdivisions, and (6) in the case of sale by weight, the net weight of the delivery, together with any weighing scale readings from which such net weight has been computed, expressed in terms of tons or pounds avoirdupois.

**History:** En. Sec. 31, Ch. 99, L. 1969.

**90-184. Berries and small fruits.** Berries and small fruits shall be offered and exposed for sale and sold by weight, or by measure in open containers having capacities of one-half ( $\frac{1}{2}$ ) dry pint, one (1) dry pint, or one (1) dry quart: provided, that the marking provisions of section 19 [90-171] of this act shall not apply to such containers.

**History:** En. Sec. 32, Ch. 99, L. 1969.

**90-185. Construction of contracts.** Fractional parts of any unit of weight or measure shall mean like fractional parts of the value of such unit as prescribed or defined in sections 2 and 3 [90-154 and 90-155] of this act, and all contracts concerning the sale of commodities and services shall be construed in accordance with this requirement.

**History:** En. Sec. 33, Ch. 99, L. 1969.

**90-186. Hindering or obstructing officer—penalties.** Any person who shall hinder or obstruct in any way the sealer, the chief sealer, or any one of the deputy sealers, in the performance of his official duties shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty dollars (\$20.00) or more than two hundred dollars (\$200.00), or by imprisonment for not more than three (3) months, or by both such fine and imprisonment.

**History:** En. Sec. 34, Ch. 99, L. 1969.

**90-187. Impersonation of officer—penalties.** Any person who shall impersonate in any way the sealer, the chief sealer, or any one of the deputy sealers, by the use of his seal or a counterfeit of his seal, or in any other manner, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred

dollars (\$100.00) or more than five hundred dollars (\$500.00), or by imprisonment for not more than one (1) year, or by both such fine and imprisonment.

History: En. Sec. 35, Ch. 99, L. 1969.

**90-188. Offenses and penalties.** Any person who, by himself, or by his servant or agent, or as the servant or agent of another person, performs any one of the acts enumerated in subparagraphs (1) through (9) of this section shall be guilty of a misdemeanor and, upon a first conviction thereof, shall be punished by a fine of not less than twenty dollars (\$20.00) or more than two hundred dollars (\$200.00), or by imprisonment for not more than three (3) months, or by both such fine and imprisonment. Upon a second or subsequent conviction thereof, he shall be punished by a fine of not less than fifty dollars (\$50.00) or more than five hundred dollars (\$500.00), or by imprisonment for not more than one (1) year, or by both such fine and imprisonment.

(1) Use or have in possession for the purpose of using for any commercial purpose specified in section 10 [90-162], sell, offer, or expose for sale or hire, or have in possession for the purpose of selling or hiring, an incorrect weight or measure or any device or instrument used to or calculated to falsify any weight or measure.

(2) Use, or have in possession for the purpose of current use for any commercial purpose specified in section 10 [90-162], a weight or measure that does not bear a seal or mark such as is specified in section 14 [90-166], unless such weight or measure has been exempted from testing by the provisions of section 10 [90-162] or by a regulation of the sealer issued under the authority of section 8 [90-160], or unless the device has been placed in service as provided by a regulation of the sealer issued under the authority of section 8 [90-160] of this act: provided, that, any person or persons making use of weighing or measuring devices subject to this act must report to the sealer of weights and measures or his deputies, in writing, the number and location of said weighing or measuring device and must promptly report the installation of any new weighing or measuring device.

(3) Dispose of any rejected or condemned weight or measure in a manner contrary to law or regulation.

(4) Remove from any weight or measure, contrary to law or regulation, any tag, seal, or mark placed thereon by the appropriate authority.

(5) Sell, or offer or expose for sale, less than the quantity he represents of any commodity, thing, or service.

(6) Take more than the quantity he represents of any commodity, thing, or service, when, as buyer, he furnishes the weight or measure by means of which the amount of the commodity, thing, or service is determined.

(7) Keep for the purpose of sale, advertise, or offer or expose for sale, or sell any commodity, thing, or service in a condition or manner contrary to law or regulation.



(8) Use in retail trade, except in the preparation of packages put up in advance of sale and of medical prescriptions, a weight or measure that is not so positioned that its indications may be accurately read and the weighing or measuring operation observed from some position which may reasonably be assumed by a customer.

(9) Violate any provision of this act or of the regulations promulgated under the provisions of this act for which a specific penalty has not been prescribed.

**History:** En. Sec. 36, Ch. 99, L. 1969.

**Conduct Amounting to False Pretenses**

Misdemeanors under former Packaged Commodities Offered for Sale Act and former False Weight and Measures Act were not lesser included offenses of felony of obtaining money by false pretenses since above acts required "sale" while

felony statute does not; state has discretionary power to choose under which law it will charge defendant and the fact that two statutes overlap in prohibiting same act does not mean that the defendant can only be prosecuted under statute providing lesser penalty. *State v. Lagerquist*, — M —, 445 P 2d 910.

**90-189. Injunction.** The sealer is authorized to apply to any court of competent jurisdiction for, and such court upon hearing and for cause shown may grant, a temporary or permanent injunction restraining any person from violating any provision of this act.

**History:** En. Sec. 37, Ch. 99, L. 1969.

**90-190. Presumptive evidence.** For the purposes of this act, proof of the existence of a weight or measure or a weighing or measuring device in or about any building, inclosure, stand, or vehicle in which or from which is shown that buying or selling is commonly carried on, shall, in the absence of conclusive evidence to the contrary, be presumptive proof of the regular use of such weight or measure or weighing or measuring device for commercial purposes and of such use by the person in charge of such building, inclosure, stand, or vehicle.

**History:** En. Sec. 38, Ch. 99, L. 1969.

**90-191. Validity of prosecutions.** Prosecutions for violation of any provision of this act are declared to be valid and proper, notwithstanding the existence of any other valid general or specific act of this state dealing with matters that may be the same as or similar to those covered by this act.

**History:** En. Sec. 39, Ch. 99, L. 1969.

**90-192. Separability provision.** If any provision of this act is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the act and the applicability thereof to other persons and circumstances shall not be affected thereby.

**History:** En. Sec. 40, Ch. 99, L. 1969.

**90-193. Repeal of conflicting laws.** All laws and parts of laws contrary to or inconsistent with the provisions of this act are hereby repealed.

**History:** En. Sec. 41, Ch. 99, L. 1969.

**90-194. Citation.** This act may be cited as the "Weights and Measures Act of Montana."

**History:** En. Sec. 42, Ch. 99, L. 1969.

**Repealing Clause**

Section 43 of Ch. 99, Laws 1969 read "Sections 90-101 through 90-119, 90-120

through 90-129, 90-131, 90-133 through 90-143, 90-145 through 90-152, 90-601 through 90-620, 3-202, 3-2432, 3-2433, 11-958, 50-603, 50-408, 50-409, R. C. M., 1947, are repealed."

**CHAPTER 3—BREAD—STANDARD WEIGHT AND LOAF**

(Repealed—Section 3, Chapter 252, Laws of 1957; Section 24, Chapter 16, Laws of 1965; Section 27, Chapter 307, Laws of 1967)

**90-301. (4273) Repealed.**

**Repeal**

This section (Sec. 1, Ch. 155, L. 1919; Sec. 2, Ch. 252, L. 1957), relating to stand-

ard weights for bread, was repealed by Sec. 24, Ch. 160, Laws 1965. For present law, see sec. 90-178.

**90-301.1. Repealed.**

**Repeal**

This section (Sec. 1, Ch. 252, L. 1957), relating to the manufacture of bakery

products, was repealed by Sec. 27, Ch. 307, Laws 1967.

**90-304. (4276) Repealed.**

**Repeal**

This section (Sec. 4, Ch. 155, L. 1919), relating to the violation of laws pertain-

ing to the manufacture and sale of bread, was repealed by Sec. 27, Ch. 307, Laws 1967.

**CHAPTER 6—PACKAGED COMMODITIES OFFERED FOR SALE**

Section 90-621. Supplement clause.

**90-601 to 90-620. Repealed.**

**Repeal**

Sections 90-601 to 90-620 (Secs. 1 to 20, Ch. 160, L. 1965), relating to packaged commodities offered for sale, were

repealed by Sec. 43, Ch. 99, Laws 1969. For present law, see secs. 90-153, 90-163 to 90-165, 90-167, 90-170 to 90-178, 90-184 to 90-186, 90-188 and 90-189.

**90-621. Supplement clause.** This act is intended to be supplementary, and is not intended to repeal sections 90-140 and 90-141, R. C. M. 1947, or any other law relating to weights and measures.

**History:** En. Sec. 23, Ch. 160, L. 1965.

**Repealing Clause**

**Compiler's Notes**

Sections 90-140 and 90-141, referred to in this section, were repealed by Sec. 43, Ch. 99, Laws 1969.

Section 24 of Ch. 160, Laws 1965 read "Repealing section. Sections 90-130, 90-132, 90-144 and 90-301, R. C. M. 1947, are repealed."





















# REVISED CODES OF MONTANA

## VOLUME 6

### Part 2

### 1969 Cumulative Pocket Supplement

#### *Containing*

AMENDMENTS TO ACTS AND NEW LAWS ENACTED BY THE  
LEGISLATIVE ASSEMBLY SINCE PUBLICATION OF  
REPLACEMENT VOLUME 6 (PART 2) OF  
THE 1947 REVISED CODES

#### AND

ANNOTATIONS SUPPLEMENTING REPLACEMENT VOLUME 6  
(PART 2) THROUGH VOLUME 447, PACIFIC  
REPORTER (2ND SERIES)

#### *Edited by*

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## NEW LAWS IN VOLUME 6 (Part 2)

For index see pocket supplement to Replacement Volume 9

### ENACTED IN 1965

Fiduciary sales, validation, 91-4324.

### ENACTED IN 1967

Fiduciary sales, validation, 91-4325.

### ENACTED IN 1969

Fiduciary sales, validation, 91-4326.

Proceedings in lieu of probate, 91-5301 to 91-5312.

Surviving spouse's withdrawal of funds from financial institutions without probate proceedings, 91-2212, 91-2213.

Waiver of inheritance tax of surviving spouse, 91-4414.1.

Workmen's compensation, advanced rate for dangerous place of employment, 92-1105.1.

## AMENDMENTS IN VOLUME 6 (Part 2)

Administrators,

Order of persons entitled to administer, 91-1401.

Persons incompetent to administer, 91-1405.

Estate tax, 91-4411, 91-4414.

Guardians of incompetent veterans, compensation for, 91-4812.

Guardians' sale of realty, 91-5015.

Industrial accident board, 92-104, 92-827, 92-834.

Inheritance tax, 91-4414 to 91-4418.

Occupational Disease Act, 92-1304, 92-1311, 92-1313.

Public administrators,

Compensation, 91-628.

Summary settlement of estates, 91-623.

State institutions, gifts to, 91-105, 91-106.

Terms for sale of estate realty, 91-3009.

Trusts continuing after distribution, jurisdiction as to, 91-4201.

Workmen's compensation, 92-101, 92-111, 92-118, 92-204, 92-410, 92-413, 92-417, 92-418, 92-438, 92-614, 92-701 to 92-704, 92-706, 92-707, 92-709, 92-902, 92-1101, 92-1103, 92-1104, 92-1105, 92-1108.





# MONTANA REVISED CODES

## TITLE 91—WILLS, SUCCESSION, PROBATE AND GUARDIANSHIP

- Chapter 1. Wills—execution and revocation, 91-105, 91-106.
6. Probate proceedings—public administrator, 91-623, 91-628.
  14. Persons to whom and order in which letters of administration are granted, 91-1401, 91-1405.
  22. Inventory and appraisement—possession of estate, 91-2212, 91-2213.
  30. Sales of real estate and contracts for purchase of land, 91-3009.
  42. Settlement of accounts of trustees after distribution of estate, 91-4201.
  43. Probate proceedings, miscellaneous—citations—appeals, etc., 91-4324 to 91-4326.
  44. Inheritance tax, 91-4411, 91-4414 to 91-4418.
  48. Guardianship of incompetent veterans, minors, and other beneficiaries of the veterans administration, 91-4812.
  50. Sale of property by guardians—investment of proceeds, 91-5015.
  53. Proceedings in lieu of probate—estates of less than ten thousand dollars, 91-5301 to 91-5312.

### CHAPTER 1—WILLS—EXECUTION AND REVOCATION

- Section 91-105. State institutions which may take by gift, bequest or grant.  
91-106. Persons who may make gifts to state institution.

#### 91-103. (6976) Will, or part thereof, procured by fraud.

##### Undue Influence

Substantial evidence of undue influence was shown where beneficiary under a second will was never close to the testator until learning of his bank account, and importuned upon him, while in a weakened condition, so that the testator rejected his friends. In re Maricich's Estate, 145 M 146, 400 P 2d 873.

The contestant has the burden of showing undue influence. In re Maricich's Estate, 145 M 146, 400 P 2d 873.

In considering undue influence, the court may take into account confidential relationship of person attempting to influence testator, his physical and mental condition as it affects his ability to withstand influence, the unnaturalness of the disposition, and the demands made upon the testator in light of the circumstances. In re Maricich's Estate, 145 M 146, 400 P 2d 873.

91-105. (6978) State institutions which may take by gift, bequest or grant. The state of Montana, units of the university of Montana, the state school for the deaf and blind, all institutions in the department of institutions, and any and all institutions now created or established, or which may hereafter be created or established, and supported in whole or in part by the state of Montana for any purpose, are hereby empowered and given the right to accept, receive, take, hold, own, and possess gifts, donations, grants, devises, or bequests of real or personal property from any source whatsoever; and said gifts, donations, grants, bequests, or devises may be made direct to the state of Montana, or in the name of any of said institutions, or to any officer or board of said institutions, or to any

person in trust for said institutions; but in the event the same shall be made direct to any such institution, or to any officer or board of any such institution, such gift, donation, grant, devise, or bequest shall be construed as a gift, donation, grant, devise, or bequest to the state of Montana, and shall be administered and used by the state of Montana for the particular purpose for which the same was given, donated, granted, bequeathed, or devised; and in the event no particular purpose is mentioned in such gift, grant, devise, or bequest, then the same shall be used for the general support, maintenance or improvement of such institution by the state of Montana.

**History:** En. Sec. 1, Ch. 17, L. 1913; re-en. Sec. 6978, R. C. M. 1921; amd. Sec. 96, Ch. 199, L. 1965.

#### **Amendment**

The 1965 amendment inserted "units of" before "the university of Montana"; deleted "the state normal college, the state orphans' home" after "university of Mon-

tana"; and substituted "all institutions in the department of institutions" for "the state school of mines, the state reform school, the soldiers' home, the Montana state tuberculosis sanitarium, the state asylum for the insane, the state penitentiary" after "school for the deaf and blind."

**91-106. (6979) Persons who may make gifts to state institution.** A donation, gift, grant, bequest, devise, or testamentary disposition of property, real or personal, may be made by any person over the age of eighteen years, of sound mind, to the state of Montana, a unit of the university of Montana, the state school for deaf and blind, an institution in the department of institutions, and any and all institutions now created or established, or which may hereafter be created or established and supported, in whole or in part, by the state of Montana for any purpose. And any person, corporation, or association of persons may make any gift, donation, or grant of property, real or personal, to the state of Montana, or to any of the institutions above-named or referred to; but in the event any gift, donation, grant, devise, or bequest shall be made to any such institution, or to any officer or board of any such institution, the same shall be construed as a gift, donation, grant, devise, or bequest to the state of Montana, and shall be administered and used for the state of Montana for the particular purpose for which the same was given, donated, granted, bequeathed, or devised; and in the event no particular purpose is mentioned in such gift, grant, devise, or bequest, then the same shall be used for the general support, maintenance, or improvement of such institution by the state of Montana.

**History:** En. Sec. 2, Ch. 17, L. 1913; re-en. Sec. 6979, R. C. M. 1921; amd. Sec. 97, Ch. 199, L. 1965.

#### **Amendment**

The 1965 amendment inserted "a unit of" before the university of Montana; deleted "the state normal college, the state

orphans' home" after "university of Montana"; and substituted "an institution in the department of institutions" for "the state school of mines, the state reform school, the soldiers' home, the state asylum for the insane, the state penitentiary" after "school for deaf and blind."

**91-136. (7009) Children or issue of children of testator, etc.**

#### **References**

In re Jones' Estate, 146 M 439, 408 P 2d 482.



CHAPTER 2—WILLS—INTERPRETATION

91-209. (7024) Words to receive an operative construction.

References

In re Jones' Estate, 146 M 439, 408 P 2d 482.

91-210. (7025) Intestacy to be avoided.

References

In re Jones' Estate, 146 M 439, 408 P 2d 482.

CHAPTER 4—SUCCESSION

91-403. (7073) Succession to and distribution of estates.

Compiler's Notes

The case of Brundy v. Canby, 50 M 454, 148 P 315, annotated under this section in the parent volume, was decided in 1915, before the 1941 amendment of this section. The reasons for the decision would no longer apply under the present version of the statute. See the first sentence, subdivision 2 of this section.

Surviving Parent

Where decedent left no surviving wife nor children and his father was dead, his mother would be the sole beneficiary of his estate under this section. Cowan v. Pacific Gamble Robinson Co., 232 F Supp 403, 405.

CHAPTER 5—ESCHEATED ESTATES—INHERITANCE BY  
NONRESIDENT ALIENS—DISPOSAL OF UNCLAIMED PROPERTY

91-520. Conditions under which aliens in foreign country may inherit.

Injunction

Residents of Romania could not enjoin enforcement of statute while probate case was at intermediate stage since state is

free to fashion procedure for applying statute in manner not offensive to constitution. Gorun v. Fall, 287 F Supp 725, affirmed, 89 S Ct 678.

CHAPTER 6—PROBATE PROCEEDINGS—PUBLIC ADMINISTRATOR

Section 91-623. Estates less than fifteen hundred dollars (\$1,500).

91-628. Compensation of public administrator.

91-623. (10012) Estates less than fifteen hundred dollars (\$1,500).

If the statement or statements furnished the public administrator in accordance with the provisions of section 91-621 show that the aggregate market value of the estate of such deceased person is fifteen hundred dollars (\$1,500) or less in value, then, upon demand of the public administrator, the person, firm, bank, or corporation holding, controlling, or owning the same, or any part thereof, shall turn over, endorse, or surrender the same to such public administrator at once, without the issuance of letters of administration to him. The public administrator shall, upon receipt of the money, evidence of indebtedness, or other personal property, issue a receipt to the person, firm, bank, or corporation delivering the same to him fully describing the property received. Such receipt, signed by the public administrator, shall fully discharge the person, firm, bank, or corporation receiving the same from all further liability to

the estate of said deceased person, to the amount of money or for the property set out in said receipt.

**History:** En. Sec. 3, Ch. 134, L. 1909; re-en. Sec. 10012, R. C. M. 1921; amd. Sec. 1, Ch. 36, L. 1929; amd. Sec. 1, Ch. 222, L. 1969.

#### Amendments

The 1969 amendment substituted "fifteen hundred dollars (\$1,500)" for "five hundred dollars (\$500.00)" after "estate of such deceased person is" in the first sentence.

**91-628. (10017) Compensation of public administrator.** The public administrator shall receive as full compensation for his services, including attorney's fees, a commission of fifteen per cent (15%) of the total amount of money received by him in any estate provided for in this act; provided, that in no case shall the compensation be less than twenty-five dollars (\$25).

**History:** En. Sec. 8, Ch. 134, L. 1909; re-en. Sec. 10017, R. C. M. 1921; amd. Sec. 1, Ch. 3, L. 1969.

#### Amendments

The 1969 amendment raised the administrator's minimum compensation from "five dollars" to "twenty-five dollars."

### CHAPTER 11—PROBATE PROCEEDINGS—CONTESTING WILLS AFTER PROBATE

**91-1101. (10042) The probate may be contested within six months.**

#### Issuance of Citation

Petition contesting will was properly dismissed where the citation was not issued within the statutory period follow-

ing admission of will to probate. In re Estate of Willner, 147 M 538, 416 P 2d 24, 25.

**91-1102. (10043) Citation to be issued to parties interested.**

#### Timely Issuance of Citation

Petition contesting will was properly dismissed where the citation was not

issued within statutory period following admission of will to probate. In re Estate of Willner, 147 M 538, 416 P 2d 24, 25.

### CHAPTER 13—PROBATE PROCEEDINGS—EXECUTIVES AND ADMINISTRATORS—ISSUANCE OF LETTERS TESTAMENTARY AND OF ADMINISTRATION

**91-1301. (10056) To whom letters on proved will to issue.**

#### Duty of Court

Statute gives power to nominate executor to testator, so that court must appoint as executor person named in will unless he is incompetent under 91-1302. In re

Estate of Graf, 150 M 577, 437 P 2d 371.

#### References

In re Maricich's Estate, 145 M 146, 400 P 2d 873.

**91-1302. (10057) Who are incompetent as executors or administrators, etc.**

#### Causes for Disqualifying

Fact that named executors may have used undue influence in obtaining property of testator before death, thereby giving rise to claim in behalf of estate against

executors, is not in itself evidence of want of integrity such as will disqualify executors. In re Estate of Graf, 150 M 577, 437 P 2d 371.

## CHAPTER 14—PERSONS TO WHOM AND ORDER IN WHICH LETTERS OF ADMINISTRATION ARE GRANTED

Section 91-1401. Order of persons entitled to administer—partner not to administer.  
 91-1405. Who are incompetent to act as administrators.

**91-1401. (10068) Order of persons entitled to administer—partner not to administer.** Administration of estate of all persons dying intestate and of all persons dying testate without appointing an executor who qualified for appointment must be granted to some one or more of the persons hereinafter mentioned or to persons nominated by them, and they are respectively entitled to preference thereto in the following order the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof;

1. The surviving husband or wife.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. A beneficiary under the will of the decedent.
9. The public administrator.
10. A creditor.
11. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of the estate.

**History:** En. Sec. 55, p. 253, L. 1877; re-en. Sec. 55, 2nd Div. Rev. Stat. 1879; amd. Sec. 55, 2nd Div. Comp. Stat. 1887; amd. Sec. 2430, C. Civ. Proc. 1895; re-en. Sec. 7432, Rev. C. 1907; re-en. Sec. 10068, R. C. M. 1921; amd. Sec. 1, Ch. 219, L. 1939; amd. Sec. 1, Ch. 68, L. 1969. Cal. C. Civ. Proc. Sec. 1365.

#### Amendments

The 1969 amendment inserted "and of all persons \* \* \* qualified for appoint-

ment," after "persons dying intestate" and "or to persons nominated by them" after "hereinafter mentioned" and added "the relatives of the decedent \* \* \* some portion thereof" at the end of the first paragraph; deleted ", or some competent person whom he or she may request to have appointed" from paragraph 1; inserted new paragraph 8, and redesignated former paragraphs 8 to 10 as new paragraphs 9 to 11.

**91-1405. (10072) Who are incompetent to act as administrators.** No person is competent or entitled to serve as administrator or administratrix who is:

1. \* \* \* [Same as parent volume.]
2. Not a bona fide resident of the state; but if a person otherwise entitled to serve is not a resident of the state, he may nominate a resident of the state to serve as administrator, and the court or judge must order letters issued to the nominee.
3. and 4. \* \* \* [Same as parent volume.]



**History:** En. Sec. 59, p. 254, L. 1877; re-en. Sec. 59, 2nd Div. Rev. Stat. 1879; re-en. Sec. 59, 2nd Div. Comp. Stat. 1887; amd. Sec. 2434, C. Civ. Proc. 1895; amd. Sec. 1, p. 137, L. 1899; re-en. Sec. 7436, Rev. C. 1907; re-en. Sec. 10072, R. C. M. 1921; amd. Sec. 1, Ch. 59, L. 1969. Cal. C. Civ. Proc. Sec. 1369.

#### **Amendments**

The 1969 amendment deleted "and either the husband, wife, or child, or parent, or brother, or sister of the deceased, he may request the court or judge to appoint a

resident of the state to serve as administrator, and such person may be appointed, but no other nonresident than a surviving husband, wife, or child, or parent, or brother, or sister shall have such right to request an appointment, and" after "resident of the state," inserted, in place thereof, "he may nominate a resident of the state to serve as administrator," substituted "nominee" for "applicant" after "letters issued to the" and deleted "entitled thereto under the provisions of this chapter" at the end of paragraph 2.

### **CHAPTER 21—REMOVAL AND SUSPENSION OF EXECUTORS AND ADMINISTRATORS**

#### **91-2101. (10124) Suspension of powers of executor.**

##### **Causes for Removal**

Administratrix who failed to file inventory and appraisement within three months after appointment, failed to file first accounting within six months after appointment, failed to make money from sale of property available to heirs, failed

to provide estate with interest on money from sale of property, lost inheritance tax credit and allowed tax penalties to be assessed against estate was properly removed. In re Estate of Smith, 149 M 326, 426 P 2d 575.

#### **91-2102. (10125) Executor to have notice of his suspension, etc.**

##### **Causes for Removal**

Administratrix who failed to file inventory and appraisement within three months after appointment, failed to file first accounting within six months after appointment, failed to make money from sale of property available to heirs, failed

to provide estate with interest on money from sale of property, lost inheritance tax credit and allowed tax penalties to be assessed against estate was properly removed. In re Estate of Smith, 149 M 326, 426 P 2d 575.

### **CHAPTER 22—INVENTORY AND APPRAISEMENT—POSSESSION OF ESTATE**

Section 91-2212. Funds on deposit at financial institution—surviving spouse may withdraw—affidavit required.

91-2213. Affidavit sufficient to require release of funds—liability of financial institutions and their representatives discharged.

#### **91-2201. (10129) Inventory to be returned, including the homestead.**

##### **Causes for Removal**

Administratrix who failed to file inventory and appraisement within three months after appointment, failed to file first accounting within six months after appointment, failed to make money from sale of property available to heirs, failed

to provide estate with interest on money from sale of property, lost inheritance tax credit and allowed tax penalties to be assessed against estate was properly removed. In re Estate of Smith, 149 M 326, 426 P 2d 575.

91-2212. Funds on deposit at financial institution—surviving spouse may withdraw—affidavit required. Whether a person dies testate or intestate, and irrespective of the character of his or her property, if the value of the estate does not exceed five thousand dollars (\$5,000), the spouse of the decedent may collect from any bank, banking institution, savings and loan association or credit union, any moneys held to the

credit of the decedent not to exceed the total sum of one thousand dollars (\$1,000), without procuring letters testamentary or of administration, upon furnishing such bank or organization with an affidavit showing the right of the affiant to receive such money.

**History:** En. Sec. 1, Ch. 119, L. 1969.

**Title of Act**

An act providing that a surviving spouse

may withdraw funds from financial institutions without probate proceedings in certain cases.

**91-2213. Affidavit sufficient to require release of funds—liability of financial institutions and their representatives discharged.** The receipt of such affiant or affiants shall constitute sufficient acquittance for the payment of money made pursuant to the provisions of this act, and shall fully discharge such person, representative, officer, bank, institution, corporation or body from any further liability with reference thereto, without the necessity of inquiring into the truth of any of the facts stated in the affidavit. But such payment shall not preclude administration of the estate of the decedent when necessary to enforce payment of the decedent's debts.

**History:** En. Sec. 2, Ch. 119, L. 1969.

## CHAPTER 27—CLAIMS AGAINST ESTATE

### 91-2701. (10170) Notice to creditors, etc.

**Time for Presenting Claims**

All claims against estate arising from contract must be presented to executor

within four months of first publication of notice to creditors. *Brown v. Midland Nat. Bank*, 150 M 422, 435 P 2d 878.

### 91-2704. (10173) Time within which claims against an estate, etc.

**Actual Notice Unnecessary**

Bank which failed to present claim on note against decedent's estate within statutory time was barred where notice by publication appeared in only newspaper in community of 1,800 citizens of which both bank and decedent were residents; bank's contention that it received no actual notice which could have been accomplished with ease and that to bar claim under such circumstances was deprivation of property without due process of law was rejected. *Baker Nat. Bank v. Henderson*, 151 M 526, 445 P 2d 574.

**Contract Claims**

All claims against estate arising from contract must be presented to executor within four months of first publication of notice to creditors. *Brown v. Midland Nat. Bank*, 150 M 422, 435 P 2d 878.

**Mechanic's Lien**

A mechanic's lien under sections 45-501 to 45-512 is not a claim arising upon a contract within the meaning of this section and the lien is not lost because creditor's claim is not filed. *Hammer v. Chapin*, 256 F Supp 818, 820.

### 91-2709. (10178) Limitation of actions on rejected claim.

**Exclusive Nature of Procedure**

Rule 41(e), M. R. Civ. P., providing for dismissal of action for failure to serve summons as provided therein, does not apply to service of summons in suit on rejected claim in probate which is governed exclusively by statute providing for contesting rejected claims in probate. *Werning v. McFarland*, 149 M 137, 423 P 2d 851.

**Suit after Discharge**

Summons, in suit on rejected claim filed within three month statutory limit, served after discharge in probate was not substantial compliance with statutory requirement to "bring suit" within three months of rejection of claim. *Werning v. McFarland*, 149 M 137, 423 P 2d 851.

**Variance between Claim and Suit**

Claim sued upon must be within scope

of claim presented to executor, so that action for breach of contract to bequeath could not be predicated upon creditor's

claim to recover debt. *Brown v. Midland Nat. Bank*, 150 M 422, 435 P 2d 878.

### 91-2711. (10180) Claims must be presented before suit.

#### Variance between Claim and Suit

Claim sued upon must be within scope of claim presented to executor, so that action for breach of contract to bequeath

could not be predicated upon creditors' claim to recover debt. *Brown v. Midland Nat. Bank*, 150 M 422, 435 P 2d 878.

## CHAPTER 30—SALES OF REAL ESTATE AND CONTRACTS FOR PURCHASE OF LAND

Section 91-3009. Contents of order of sale—conditions of sale—public or private.

**91-3009. (10218) Contents of order of sale—conditions of sale—public or private.** The order of sale must describe the lands to be sold and the terms of sale which may be for cash, or for part cash and the balance on a credit not exceeding five (5) years where the sales price is five thousand dollars (\$5,000) or less, payable in gross or in installments, with interest, as the court or judge may direct. For sales where the sales price exceeds five thousand dollars (\$5,000), deferred payments may be extended not to exceed twenty (20) years. The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court or judge otherwise specially directs. If it appears that any part of such real estate has been devised, and not charged in such devise with the payment of debts or legacies, the court or judge must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless, in the opinion of the court or judge, it would benefit the estate to sell the whole or some part of such real estate at private sale. The court or judge may, if the same is asked for in the petition, order or direct such real estate, or any part thereof, to be sold at either public or private sale, if the executor or administrator shall deem it to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order, and as directed therein, he may be compelled to sell, by order of the court or judge, made on motion, after due notice by any party interested.

**History:** En. Sec. 194, p. 290, L. 1877; re-en. Sec. 194, 2nd Div. Rev. Stat. 1879; re-en. Sec. 194, 2nd Div. Comp. Stat. 1887; amd. Sec. 2678, C. Civ. Proc. 1895; re-en. Sec. 7569, Rev. C. 1907; re-en. Sec. 10218, R. C. M. 1921; amd. Sec. 1, Ch. 49, L. 1943; amd. Sec. 1, Ch. 64, L. 1969. Cal. C. Civ. Proc. Sec. 1544.

#### Amendments

The 1969 amendment inserted "where the sales price is five thousand dollars (\$5,000) or less," after "not exceeding five (5) years" in the first sentence; and inserted the present second sentence.

## CHAPTER 32—GENERAL POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS

### 91-3202. (10258) Executors and administrators may sue and be sued.

#### Failure To Join Beneficiary

Although proper procedure was fol-

lowed in bringing suit against administrator of estate without joining all



beneficiaries, conduct of parties in perpetrating fraud on court required that judgment be vacated on motion of aggrieved

beneficiary who was not party to suit. *Selway v. Burns*, 150 M 1, 429 P 2d 640.

#### CHAPTER 34—LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS

##### 91-3407. (10287) Compensation of executors and administrators.

###### Neglect and Mismanagement of Estate

Removed administratrix and her attorneys who had failed to make money from sale of property available to heirs, failed to provide for interest on money from sale of property for benefit of estate, lost inheritance tax credit and allowed tax

penalties to be assessed against estate were properly awarded fees less than those provided for by statute which applies only to fees for successful completion of estate. In re Estate of Smith, 149 M 326, 426 P 2d 575.

#### CHAPTER 35—ACCOUNTING AND SETTLEMENT BY EXECUTORS AND ADMINISTRATORS

##### 91-3501. (10288) Exhibit of receipts and disbursements, etc.

###### Inventory of Assets

Administratrix who failed to file inventory and appraisal within three months after appointment, failed to file first accounting within six months after appointment, failed to make money from sale of property available to heirs,

failed to provide estate with interest on money from sale of property, lost inheritance tax credit and allowed tax penalties to be assessed against estate was properly removed. In re Estate of Smith, 149 M 326, 426 P 2d 575.

##### 91-3507. (10294) Repealed.

###### Repeal

Section 91-3507 (Sec. 260, p. 307, L. 1877), relating to the rendering of ac-

counts after notice to creditors, was repealed by Sec. 1, Ch. 272, Laws 1969.

##### 91-3516. (10303) Settlement of account to be conclusive, etc.

###### Effect of Fraud

Final decree of distribution and discharge in probate will not be set aside on ground of inadvertence or fraud under statute or Rule 60(b), M. R. Civ. P., in absence of manifest abuse of court's dis-

cretion to grant relief thereunder in case where moving party had every opportunity to protect his claim in probate and failed to do so. *Werning v. McFarland*, 149 M 137, 423 P 2d 851.

#### CHAPTER 36—DEBTS OF THE ESTATE—PAYMENT OF

##### 91-3606. (10312) Provision for disputed and contingent claims.

###### Summons after Discharge

Summons, in suit on rejected claim filed within three-month statutory limit, served after discharge in probate was not substantial compliance with statutory require-

ment to "bring suit" within three months of rejection of claim and relieved executrix of statutory duty to pay amount of disputed claim into court. *Werning v. McFarland*, 149 M 137, 423 P 2d 851.

#### CHAPTER 42—SETTLEMENT OF ACCOUNTS OF TRUSTEES AFTER DISTRIBUTION OF ESTATE

Section 91-4201. Court not to lose jurisdiction of trusts by distribution—accounts of trustees.

91-4201. (10352) Court not to lose jurisdiction of trusts by distribution—accounts of trustees. Where any trust has been created by

or under any will to continue after distribution, the district court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust as provided in Title 86.

**History:** En. Sec. 2900, C. Civ. Proc. 1895; re-en. Sec. 7698, Rev. C. 1907; re-en. Sec. 10352, R. C. M. 1921; amd. Sec. 2, Ch. 24, L. 1969. Cal. C. Civ. Proc. Sec. 1699.

#### **Amendments**

The 1969 amendment added "as provided in Title 86" at the end of the first sentence; and deleted the former second through the fifth sentences. For text, see parent volume.

### **CHAPTER 43—PROBATE PROCEEDINGS, MISCELLANEOUS— CITATIONS—APPEALS, ETC.**

**Section 91-4324.** Validation of fiduciary sales before 1965.  
**91-4325.** Validation of fiduciary sales before 1967.  
**91-4326.** Validation of fiduciary sales before 1969.

**91-4324. Validation of fiduciary sales before 1965.** All sales, provided no action is now pending to set aside such deed or conveyance, by trustees, executors, administrators and guardians which previous to the effective date of this act, were made to purchasers for a valuable consideration, which consideration has been paid by such purchasers in good faith, and such sales shall not have been set aside by the district or probate court having jurisdiction thereof, shall be sufficient to sustain a trustee's, executor's, administrator's or guardian's deed or conveyance to such purchaser, and, in case such deed or conveyance shall not have been given, shall entitle such purchaser to such deed or conveyance; and such deed or conveyance, if now executed or when executed, shall be sufficient to convey to such purchaser all the title that such beneficiary, decedent or ward had in said real or personal property; and all irregularities in obtaining the order of the court for such sale, and all irregularities or defects in making or conducting such sale by said trustee, executor, administrator or guardian, shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

**History:** En. Sec. 1, Ch. 60, L. 1965.

defects and irregularities in such sales, containing a repealing clause.

#### **Title of Act**

An act validating deeds and conveyances in sales of land and personal property heretofore made by trustees, executors, administrators and guardians, curing

#### **Repealing Clause**

Section 2 of Ch. 60, Laws 1965 repealed all acts and parts of acts in conflict therewith.

**91-4325. Validation of fiduciary sales before 1967.** All sales, provided no action is now pending to set aside such deed or conveyance, by trustees, executors, administrators and guardians which previous to January 1, 1967, were made to purchasers for a valuable consideration, which consideration has been paid by such purchasers in good faith, and such sales shall not have been set aside by the district or probate court having jurisdiction thereof, shall be sufficient to sustain a trustee's, executor's, administrator's or guardian's deed or conveyance to such purchaser, and, in case such deed or conveyance shall not have been given, shall entitle such purchaser to such deed or conveyance; and such

deed or conveyance, if now executed or when executed, shall be sufficient to convey to such purchaser all the title that such beneficiary, decedent or ward had in said real or personal property; and all irregularities in obtaining the order of the court for such sale, and all irregularities or defects in making or conducting such sale by said trustee, executor, administrator or guardian, shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

**History:** En. Sec. 1, Ch. 182, L. 1967.

erty made by trustees, executors, administrators and guardians prior to January 1, 1967, curing defects and irregularities in such sales.

**Title of Act**

An act validating deeds and conveyances in sales of land and personal prop-

**91-4326. Validation of fiduciary sales before 1969.** All sales, provided no action is now pending to set aside such deed or conveyance, by trustees, executors, administrators and guardians which previous to January 1, 1969, were made to purchasers for a valuable consideration, which consideration has been paid by such purchasers in good faith, and such sales shall not have been set aside by the district or probate court having jurisdiction thereof, shall be sufficient to sustain a trustee's, executor's, administrator's, or guardian's deed or conveyance to such purchaser, and in case such deed or conveyance shall not have been given, shall entitle such purchaser to such deed or conveyance; and such deed or conveyance, if now executed or when executed, shall be sufficient to convey to such purchaser all the title that such beneficiary, decedent or ward had in said real or personal property; and all irregularities in obtaining the order of the court for such sale, and all irregularities or defects in making or conducting such sale by said trustee, executor, administrator or guardian, shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

**History:** En. Sec. 1, Ch. 75, L. 1969.

made by trustees, executors, administrators and guardians prior to January 1, 1969, curing defects and irregularities in such sales.

**Title of Act**

An act validating deeds and conveyances in sales of land and personal property

CHAPTER 44—INHERITANCE TAX

- Section 91-4411. Estate tax.  
 91-4414. Exemptions from first \$25,000.  
 91-4414.1. Discretionary waiver of inheritance tax of surviving spouse.  
 91-4415. When payment due—lien of tax—liability for payment—place of payment—receipts—receipt or bond required before final accounting allowed.  
 91-4416. Discount—interest.  
 91-4417. Powers of representative in collection and payment of tax—collection from legatees or distributees.  
 91-4418. Refunding of tax—when authorized—manner of refunding—advance payment of tax for relief from penalty and interest.

**91-4401. (10400.1) Taxes on transfer—when and how imposed.**

**Tenants in Common**

Where husband died after he and his wife had conveyed land owned as tenants

in common to sons, reserving a life estate with right of survivorship, wife, who obtained deceased husband's one-half inter-



est in land was subject to inheritance tax on husband's interest under section 91-4405, but sons' interests were not taxable

until termination of the mother's life estate. In re Hess' Estate, 145 M 552, 403 P 2d 748.

### 91-4402. (10400.1) Transfers in contemplation of death.

#### Possession Postponed

Where husband and wife held real property as tenants in common, but transferred one half of the property to one son, and the other half to the other son, reserving a life estate in each piece of

property with right of survivorship, on father's death sons were not subject to inheritance tax until termination of the mother's intervening life estate. In re Hess' Estate, 145 M 552, 403 P 2d 748.

### 91-4405. (10400.1) Joint estates, government bonds, tenants, etc.

#### Applicable Property

Since the 1951 amendment, this section, including the clause excepting from taxation property shown to have belonged to the survivor and not the decedent, applies whether the property is tangible or intangible or whether the purchase price or the actual property is the subject of the joint tenancy. In re Parks' Estate, 145 M 333, 401 P 2d 83.

#### Corporate Stock

Corporate stock registered in both the husband's and wife's names, but purchased by the wife, and in her possession, was not subject to inheritance tax on death of husband. In re Parks' Estate, 145 M 333, 401 P 2d 83.

#### Nontaxable Transfers

The 1951 amendment, stipulating that upon the death of one of the spouses, "the right of the survivor or survivors to the immediate possession or ownership is a taxable transfer," when read in conjunction with the clause excepting property shown to have belonged originally to the survivor, shows that a "transfer" is taxed, but what in reality is not a "transfer" is not taxed. In re Parks' Estate, 145 M 333, 401 P 2d 83.

#### References

In re Hess' Estate, 145 M 552, 403 P 2d 748.

### 91-4407. (10400.1) Tax on clear market value—deductions.

#### References

Cited in Salvation Army v. State, 144 M 415, 396 P 2d 463, 466.

**91-4411. (10400.3a) Estate tax.** (a) In addition to the taxes hereinabove imposed, an estate tax is hereby imposed upon the transfer of all estates which are subject to an estate tax under the provisions of the Internal Revenue Code of 1954, and amendments thereto, where the decedent, at the time of his decease, was a resident of this state. The amount of said estate tax shall be equal to the extent, if any, of the excess of the credit of not exceeding eighty per cent (80%), allowable under said Internal Revenue Code, over the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent. Provided, that such estate tax hereby imposed shall in no case exceed the extent to which its payments will effect a saving or diminution in the amount of the United States estate tax payable by, or out of the estate of the decedent, had subdivisions (a) to (h) not been enacted. The tax imposed herein shall be collected by the several county treasurers or the state treasurer and distributed as hereafter provided.

(b) to (f). \* \* \* [Same as parent volume.]

(g) Intent of subdivisions (a) to (h). It is hereby declared to be the intent and purpose of subdivisions (a) to (h) to obtain for this state the benefit of the credit allowed under the provisions of said Internal Revenue Code, to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes and the same shall be liberally construed to effect this purpose.

(h). \* \* \* [Same as parent volume.]

**History:** En. Sec. 2, Ch. 48, Ex. L. 1933; amd. Sec. 1, Ch. 360, L. 1969.

"United States Revenue Act" in subsections (a) and (g).

#### Amendments

The 1969 amendment substituted "Internal Revenue Code of 1954" for "United States Revenue Act of 1926" in subsection (a); and "Internal Revenue Code" for

#### Effective Date

Section 2 of Ch. 360, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 14, 1969.

**91-4414. (10400.4) Exemptions from first \$25,000.** The following exemptions from the tax are hereby allowed, the exemption allowed to each person, institution, association, corporation and body politic to be taken out of the first twenty-five thousand dollars passing by any such transfer to such person, institution, association, corporation or body politic:

(1). \* \* \* [Same as parent volume.]

(2) \$20,000; \$5,000; \$2,000 exempt, when. Property of the clear value of twenty thousand dollars (\$20,000), transferred to the wife or to the husband of the decedent, five thousand dollars (\$5,000) transferred to each minor lineal issue of the decedent, or any child adopted as such in conformity with law, or any child to whom such decedent for not less than ten (10) years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth (15) birthday, and was continuous for ten (10) years, or any lineal issue of such adopted or mutually acknowledged child, and two thousand dollars (\$2,000) transferred to each of the lineal issue who have attained majority and to each of the other persons described in the first subdivision of section 91-4409 shall be exempt. Such exemption to the widow shall include all her statutory dower and other allowances. Any child of the decedent shall be entitled to credit for so much of the tax paid by the widow as applied to any property which shall thereafter be transferred by or from such widow to any such child, provided the widow does not survive said decedent to exceed ten years.

(3) and (4). \* \* \* [Same as parent volume.]

**History:** En. Sec. 4, Ch. 65, L. 1923; amd. Sec. 1, Ch. 105, L. 1953; amd. Sec. 1, Ch. 218, L. 1963; amd. Sec. 1, Ch. 244, L. 1965; amd. Sec. 1, Ch. 343, L. 1969.

#### Amendments

The 1965 amendment increased exemptions specified in the first sentence of paragraph (2) from \$17,500 to \$20,000 for the wife of the decedent, and from \$5,000 to \$10,000 for the husband of the decedent.

The 1969 amendment increased exemptions specified in the first sentence of paragraph (2) from \$10,000 to \$20,000 for the husband of decedent; inserted \$5,000 exemption for transfers to children; and included decedent's lineal issue who have attained majority under the \$2,000 exemption.

**91-4414.1. Discretionary waiver of inheritance tax of surviving spouse.** Notwithstanding any provision of law or statute in conflict herewith, the state board of equalization, in its discretion, is authorized to issue a waiver of inheritance tax in the event of the death of any person leaving any real property or personal property, or both, in joint tenancy with a surviving spouse if the value of the property of the decedent is less than the inheritance exemption allowed by law to the surviving spouse.

**History:** En. Sec. 1, Ch. 147, L. 1969.

**Title of Act**

An act allowing the state board of equalization, in its discretion, to issue a waiver of inheritance tax in the event of

the death of any person leaving any real property or personal property, or both, in joint tenancy with a surviving spouse if the value of the property of the decedent is less than the inheritance exemption allowed by law to the surviving spouse.

**91-4415. (10400.5) When payment due—lien of tax—liability for payment—place of payment—receipts—receipt or bond required before final accounting allowed.** All taxes imposed by this act shall be due and payable at the time of the death of the decedent, except as hereinafter provided; and every such tax shall be and remain a lien upon the property transferred for a period of ten years from the time of the death of the decedent, whether said death occurred before or after the effective date of this act, unless sooner paid, and the person to whom the property is transferred and the administrators, executors, and trustees of every estate so transferred shall be personally liable for such tax until its payment.

The tax shall be paid to the state treasurer or to the treasurer of the county in which the district court is situated having jurisdiction as herein provided, and if paid to the county treasurer said treasurer shall make triplicate receipts of such payment, one of which he shall immediately send to the state treasurer, whose duty it shall be to charge the county treasurer so receiving the tax, with the amount thereof, and the other receipt shall be delivered to the executor, administrator, or trustee, whereupon it shall be a proper voucher in the settlement of his accounts. One he shall keep on file in his office.

No executor, administrator, or trustee shall be entitled to a final accounting of an estate, in settlement of which a tax is due under the provisions of this act, unless he shall produce such receipt or a certified copy thereof or unless a bond shall have been filed as prescribed by section 91-4419.

**History:** En. Sec. 5, Ch. 65, L. 1923; amd. Sec. 1, Ch. 16, L. 1951; amd. Sec. 1, Ch. 99, L. 1965.

**Amendment**

The 1965 amendment inserted "whether said death occurred before or after the effective date of this act" in the first paragraph.

**91-4416. (10400.6) Discount—interest.** If such tax is paid within eighteen (18) months from the accruing thereof, a discount of five per cent (5%) shall be allowed and deducted therefrom. The deduction of this discount of five per cent (5%) shall be accomplished by paying within the eighteen (18) month period from the date that the tax accrues an amount equal to ninety-five per cent (95%) of the total tax declared



due by the person making payment. If such tax is not paid within eighteen (18) months from the accruing thereof, interest shall be charged and collected thereon at the rate of ten per cent (10%) per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax shall not be determined and paid as herein provided, in which case interest at the rate of six per cent (6%) shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per cent (10%) shall be charged, provided that litigation to defeat the payment of the tax shall not be considered necessary litigation. In all cases when a bond shall be given under the provisions of section 91-4419, interest shall be charged at the rate of six per cent (6%) after one (1) year from the date of death, until the date of payment thereof.

**History:** En. Sec. 6, Ch. 65, L. 1923;      **Amendments**  
amd. Sec. 1, Ch. 15, L. 1967.

The 1967 amendment inserted the figures in parentheses and added the present second sentence.

**91-4417. (10400.7) Powers of representative in collection and payment of tax—collection from legatees or distributees.** Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such administrator, executor, or trustee, having in charge or in trust any legacy or property for distribution, subject to such tax, shall deduct the tax therefrom; and within thirty days therefrom shall pay over the same to the county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof, from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this law, to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the administrator, executor, or trustee, and the tax shall remain a lien or charge on such real property for the period provided in section 91-4415, and the payment thereof shall be enforced by the executor, administrator, or trustee in the same manner that payment of the legacy might be enforced, or by the attorney general under section 91-4440. If any such legacy shall be given in money to any such person for a limited period, the administrator, executor, or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him to make an apportionment if the case require it, of the sum to be paid into the hands of such legatees, and for such further order relative thereto as the case may require.

**History:** En. Sec. 7, Ch. 65, L. 1923;      **Amendment**  
amd. Sec. 2, Ch. 99, L. 1965.

The 1965 amendment substituted "for the period provided in section 91-4415" for "until paid" following "charge on such real property" in the fifth sentence.

**91-4418. (10400.8) Refunding of tax—when authorized—manner of refunding—advance payment of tax for relief from penalty and interest.** If any debt shall be proved against the estate of the decedent, after the payment of any legacy or distributive share thereof, from which any such tax has been deducted, or upon which it has been paid by the person entitled to such legacy or distributive share and such person is required by the order of the district court having jurisdiction of the tax so deducted or paid, to refund the amount of such debts or any part thereof, an equitable proportion thereof shall be repaid to such person by the executor, administrator or trustee, if the said tax has not been paid to the county treasurer or state treasurer, or by them, in the proper proportionate shares, if it has been so paid.

Any person from whom such tax is or may be due may make an estimate of and pay the same to the clerk of court, who shall receipt therefor, at any time before the same is determined by the court, and shall thereupon be relieved from any interest or penalty upon the amount so paid in the same manner as if the tax were then determined. In the event the person making payment has done so in accordance with the provisions of section 91-4416, pertaining to the allowance of a five per cent (5%) discount, the person making payment shall be relieved from any interest or penalty and shall be allowed the five per cent (5%) discount upon the amount which he so declared due as his inheritance tax liability. The tax may be declared to be due by the filing with the clerk of court of a statement of such declaration or by paying the amount estimated by the taxpayer to be due. The money shall be paid to the clerk of the district court who must deposit same with the county treasurer for credit to the clerk of the district court's deposit or trust fund until the correct amount of the tax has been determined. As soon as the correct amount of inheritance tax has been determined, any excess so paid shall be refunded to the person so paying or entitled thereto by such clerk of court out of said trust fund, and the county treasurer shall receipt for the amount of the inheritance tax so determined by the court.

**History:** En. Sec. 8, Ch. 65, L. 1923; amd. Sec. 1, Ch. 47, L. 1935; amd. Sec. 7, Ch. 126, L. 1963; amd. Sec. 2, Ch. 15, L. 1967.

#### **Effective Date**

Section 3 of Ch. 15, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved February 3, 1967.

#### **Amendments**

The 1967 amendment inserted the second and third sentences in the second paragraph.

**91-4432. (10400.22) Appraisal at clear market value at time of death, etc.**

#### **References**

In re Hess' Estate, 145 M 552, 403 P 2d 748.

## **CHAPTER 45—GUARDIAN AND WARD**

**91-4515. (5878) Rules of awarding custody of minors.**

#### **Death of Both Parents**

In a custody dispute between maternal grandparents and father of children whose

mother died prior to action, where father to whom children were awarded also died pending hearing on motion for new trial,

maternal grandparents who had filed motion for new trial and who had already been determined by court to be fit and proper persons for custody of children would have been entitled to custody without new trial but for second wife of deceased husband who was entitled to hearing on petition to intervene as party to whom deceased father wished children to go. State ex rel. Ross v. District Court, Fourth Judicial Dist., 150 M 233, 433 P 2d 778.

#### **Welfare of Child Paramount**

District court did not abuse its discre-

tion in awarding custody of two younger children to father, who had moved to California, since children had a good home with their father and paternal grandparents, were well cared for and happy, were given more than adequate educational and religious training and had lived with their father for more than five years. Anderson v. Anderson, 145 M 244, 400 P 2d 632.

#### **References**

Hurly v. Hurly, 147 M 118, 411 P 2d 359.

### **CHAPTER 48—GUARDIANSHIP OF INCOMPETENT VETERANS, MINORS, AND OTHER BENEFICIARIES OF THE VETERANS ADMINISTRATION**

Section 91-4812. Compensation of guardians.

**91-4812. Compensation of guardians.** Compensation payable to guardians shall be based upon services rendered and shall not exceed five per cent (5%) of the amount of moneys received during the period covered by the account, or a minimum of one hundred dollars (\$100) whichever is the greater, the decision as to such amount of compensation, however, to be at the discretion of the district court. In the event of extraordinary services by any guardian, the court, upon petition and hearing thereon may authorize reasonable additional compensation therefor. A copy of the petition and notice of hearing thereon shall be given the proper office of the veterans' administration in the manner provided in the case of hearing on a guardian's account or other pleading. No commission or compensation shall be allowed on the moneys or other assets received from a prior guardian nor upon the amount received from liquidation of loans or other investments.

**History:** En. Sec. 12, Ch. 58, L. 1943; amd. Sec. 1, Ch. 25, L. 1969.

#### **Amendments**

The 1969 amendment added "or a minimum of one hundred dollars \* \* \* district court" to the first sentence.

### **CHAPTER 49—GUARDIAN'S POWERS AND DUTIES**

**91-4906. (10422) Guardian to return inventory of estate of ward, etc.**

#### **Failure To File Inventory**

Court on own motion could require guardian to appear and account for funds in his possession, where he neglected to file inventory and appraisalment within

three-month period as required by statute, notwithstanding that parties to action were still before court. State ex rel. Ross v. District Court, Fourth Judicial Dist., 150 M 233, 433 P 2d 778.

### **CHAPTER 50—SALE OF PROPERTY BY GUARDIANS—INVESTMENT OF PROCEEDS**

Section 91-5015. Conditions of sales of real estate of wards—bond and mortgage to be given for deferred payments.

**91-5015. (10442) Conditions of sales of real estate of wards—bond and mortgage to be given for deferred payments.** All sales of real



estate of wards, where the sales price is five thousand dollars (\$5,000) or less, must be for cash, or for part cash and part deferred payments, the credit in no case to exceed three years from the date of sale, as in the discretion of the court or judge is most beneficial to the ward. For sales of real estate of wards where the sales price exceeds five thousand dollars (\$5,000), deferred payments may be extended not to exceed twenty (20) years. Guardians making sales must demand and receive from the purchasers, in case of deferred payments, notes and mortgage or trust indenture or contract for deed; on the real estate sold, with such additional security as the court or judge deems necessary and sufficient to secure the prompt payment of the amounts so deferred, and the interest thereon.

**History:** En. Sec. 390, p. 340, L. 1877; re-en. Sec. 390, 2nd Div. Rev. Stat. 1879; re-en. Sec. 390, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3014, C. Civ. Proc. 1895; re-en. Sec. 7794, Rev. C. 1907; re-en. Sec. 10442, R. C. M. 1921; amd. Sec. 1, Ch. 27, L. 1969. Cal. C. Civ. Proc. Sec. 1791.

#### Amendments

The 1969 amendment inserted "where the sales price is five thousand dollars (\$5,000) or less" after "real estate of

wards" in the first sentence; inserted the second sentence; and, in the third sentence, deleted "a" before "mortgage" and inserted "or trust indenture or contract for deed" after "mortgage."

#### Effective Date

Section 2 of Ch. 27, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved February 13, 1969.

### CHAPTER 52—GUARDIANSHIP—GENERAL AND MISCELLANEOUS PROVISIONS

#### 91-5201. (10455) Examination of persons suspected of defrauding wards, etc.

##### Examination of Administrator

In a proceeding for removal of administrator for misappropriation of funds of estate, administrator could be examined as adverse witness as provided in Rule 43, and Rule 81, excluding statutory proceed-

ings from Rules of Civil Procedure to extent that statutory proceedings are contrary to Rules, does not bar examination of administrator as adverse witness. In re Estate & Guardianship of Wyman, 149 M 525, 429 P 2d 629.

### CHAPTER 53—PROCEEDINGS IN LIEU OF PROBATE—ESTATES OF LESS THAN TEN THOUSAND DOLLARS

Section 91-5301. Estate may be set aside to surviving spouse or minor child—net value of estate must be less than ten thousand dollars.

91-5302. Value of joint property and property transferred during lifetime giving rise to tax liability—included in determination of net value of estate.

91-5303. Termination of life estate or joint tenancy—combined with proceeding to set aside property.

91-5304. Petition to set aside estate—requirements.

91-5305. Notice—contents.

91-5306. Notice—time and manner of giving.

91-5307. Special appraiser—duties, powers and compensation.

91-5308. Court decree—conditions—assignment to surviving spouse or minor child—title vested—subject to encumbrances—exemptions limiting assignment.

91-5309. Jurisdiction of court cannot be collaterally attacked when decree final in the absence of fraud.

91-5310. When estate shall be administered in the usual manner.

91-5311. Pending actions excepted.

91-5312. Existing statutes not repealed.

**91-5301. Estate may be set aside to surviving spouse or minor child—net value of estate must be less than ten thousand dollars.** If a resident decedent leaves a surviving spouse or minor child or minor children, and the net value of the whole estate, over and above all liens and encumbrances at the date of death and over and above the value of any homestead interest set apart out of decedent's estate under chapter 25, Title 91, R. C. M. 1947, does not exceed the sum of ten thousand dollars (\$10,000), the same may be set aside to the surviving spouse, if there be one, and if there be none, then to the minor child or minor children of the decedent.

**History:** En. Sec. 1, Ch. 51, L. 1969. **Title of Act**

An act to provide for summary proceedings in lieu of probate for specified estates of less than ten thousand dollars.

**91-5302. Value of joint property and property transferred during lifetime giving rise to tax liability—included in determination of net value of estate.** The value of decedent's interest in any joint property at the time of his death, which might give rise to tax liability under section 91-4405, R. C. M. 1947, and the value of any property transferred by the decedent during his lifetime which might give rise to tax liability under section 91-4402, R. C. M. 1947, shall be included to determine if the net value of the whole estate of the decedent does exceed the sum of ten thousand dollars (\$10,000) as provided in the preceding section.

**History:** En. Sec. 2, Ch. 51, L. 1969.

**91-5303. Termination of life estate or joint tenancy—combined with proceeding to set aside property.** An action or proceedings to terminate a life estate or joint tenancy may be combined with an action or proceedings to set aside property under this act, where otherwise proper under the provisions of this act, and of section 91-4321, R. C. M. 1947.

**History:** En. Sec. 3, Ch. 51, L. 1969.

**91-5304. Petition to set aside estate—requirements.** Allegations showing that this act is applicable together with a prayer that the estate be set aside as provided in this act may be included alternately in the petition for probate of the will, or for letters of administration; or such allegations and prayer may be presented by separate petition filed by the personal representative of the decedent, or the surviving spouse, or the guardian of the minor child or children, filed at any time before the hearing on the petition for the probate of the will or for letters of administration or after the filing of the inventory. In all cases the petition must be verified; and the allegation shall include a specific description and an estimate of the value of all of the decedent's property, a list of all liens and encumbrances at the date of death, and a designation of any property as to which a homestead is or may be set aside.

**History:** En. Sec. 4, Ch. 51, L. 1969.

**91-5305. Notice—contents.** If the allegations and prayer as provided in the preceding section are included in the petition for probate of the will or for letters of administration, the notice of hearing shall

include a statement that a prayer for setting aside the estate to the surviving spouse or the minor child or minor children as the case may be, is included in the petition.

**History:** En. Sec. 5, Ch. 51, L. 1969.

**91-5306. Notice—time and manner of giving.** If a separate petition is filed under the provisions of this act, notice thereof shall be given in the manner and for the time required for a petition for letters of administration. If a separate petition for probate of the will of the decedent, as for letters of administration of his estate, be filed, such petitions shall be heard at the same time as a petition under this act, and for that purpose the court may continue the hearing on any such petition, so that at least ten (10) days notice is given for each such petition pending before the court.

**History:** En. Sec. 6, Ch. 51, L. 1969.

**91-5307. Special appraiser—duties, powers and compensation.** Upon the filing of any petition provided for in this act, unless the whole estate consists of money, the court shall forthwith appoint a special appraiser as provided in section 91-4427, R. C. M. 1947, who shall have the duty, powers and compensation provided by law with respect to the property described in such petition.

**History:** En. Sec. 7, Ch. 51, L. 1969.

**91-5308. Court decree—conditions—assignment to surviving spouse or minor child—title vested—subject to encumbrances—exemptions limiting assignment.** If upon the hearing of any petition provided for by this act, the court finds that the net value of the estate of the decedent, determined as provided in this act, does not exceed the sum of ten thousand dollars (\$10,000), as of the date of death of the decedent, and that the expenses of the last illness, funeral and burial charges and expenses of administration and all other creditors have been paid, it shall, by decree for that purpose, assign such estate to the surviving spouse; if there be no such surviving spouse, at the time of such decree, then to such child or children as may then be minors; all subject to whatever mortgages, liens or encumbrances upon such estate there may be at the time of the death of the decedent. The title to such estate so assigned or set aside shall vest absolutely in the person or persons named in the decree, subject to mortgages, liens or encumbrances as here provided, and there must be no further proceedings in the administration, unless further estate be discovered. But no surviving spouse or minor child shall be entitled to such an assignment where the net value of the whole estate transferring to them from the decedent including the value of decedent's interest in any joint property owned by the decedent at the time of his death, and the value of any property transferred by the decedent in contemplation of decedent's death, exceeds, as to such spouse, or such minor child, respectively, the exemptions provided for them in section 91-4414, R. C. M. 1947.

**History:** En. Sec. 8, Ch. 51, L. 1969.



**91-5309. Jurisdiction of court cannot be collaterally attacked when decree final in the absence of fraud.** In the absence of fraud in the procurement, a decree assigning an estate pursuant to the provisions of this act, when it becomes final, is a conclusive determination of the jurisdiction of the court, except when based upon an erroneous assumption of death, and cannot be collaterally attacked.

**History:** En. Sec. 9, Ch. 51, L. 1969.

**91-5310. When estate shall be administered in the usual manner.** If the court finds that the net value of the estate determined as provided in this act exceeds the sum of ten thousand dollars (\$10,000) or that the surviving spouse, or minor child or minor children, are not entitled to an assignment under this act, or that there is neither a surviving spouse or surviving minor child of the decedent, the petition to set aside property of the decedent shall be denied, and the estate shall be then administered in the usual manner.

**History:** En. Sec. 10, Ch. 51, L. 1969.

**91-5311. Pending actions excepted.** This act shall not apply to estates of decedents filed or pending in any court prior to the effective date of this act.

**History:** En. Sec. 11, Ch. 51, L. 1969.

**Compiler's Notes**

This act became effective July 1, 1969.

**91-5312. Existing statutes not repealed.** This act shall not be construed to repeal any other existing statutes relating to probate proceedings.

**History:** En. Sec. 12, Ch. 51, L. 1969.



## TITLE 92—WORKMEN'S COMPENSATION ACT

- Chapter 1. Industrial accident board—creation and powers, 92-101, 92-104, 92-111, 92-118.
2. Defenses—election to come under act, 92-204.
  4. Meaning of words employed in act, 92-410, 92-413, 92-417, 92-418, 92-438.
  6. Claims—liability for injury under different plans of act, 92-614.
  7. Compensation for various injuries—amount—payment, 92-701 to 92-704, 92-706, 92-707, 92-709.
  8. Miscellaneous regulations—powers of board—rehearings and appeals, 92-827, 92-834.
  9. Compensation plan No. 1, 92-902.
  11. Compensation plan No. 3, 92-1101, 92-1103 to 92-1105.1, 92-1108.
  12. Safety provisions, Repealed—Sections 6 to 8, Chapter 176, Laws of 1957; Section 30, Chapter 341, Laws of 1969.
  13. Occupational Disease Act, 92-1304, 92-1311, 92-1313.

### CHAPTER 1—INDUSTRIAL ACCIDENT BOARD— CREATION AND POWERS

- Section 92-101. Name of act—what each part to contain.
- 92-104. Industrial accident board—compensation—terms and salaries.
- 92-111. Office and furnishings—quarters.
- 92-118. Reports and bulletins which may be published.

**92-101. (2816) Name of act—what each part to contain.** This act shall be known and may be cited as the Workmen's Compensation Act. Part I (sections 92-101 to 92-843) shall contain those sections which have a general application to the whole of the act, and may be referred to as the "general provisions"; part II (sections 92-901 to 92-908) shall contain those sections which refer to compensation plan number one; part III (sections 92-1001 to 92-1012) shall contain those sections which refer to compensation plan number two; part IV (sections 92-1101 to 92-1123) shall contain those sections which refer to compensation plan number three.

**History:** En. Sec. 1, Ch. 96, L. 1915; re-en. Sec. 2816, R. C. M. 1921; amd. Sec. 29, Ch. 341, L. 1969.

#### Compiler's Notes

Sections 92-106 and 92-107, contained in the reference to section 92-101 to 92-843 in this section, were repealed by Sec. 51, Ch. 177, Laws 1965.

Sections 92-1106 and 92-1107, contained in the reference to sections 92-1101 to 92-1123 in this section, were repealed by Sec. 3, Ch. 233, Laws 1969.

#### Amendments

The 1969 amendment deleted "part V

(sections 92-1201 to 92-1222) shall contain those sections which may be referred to as the 'safety provisions' " from the end of the section.

#### Repealing Clause

Section 30 of Ch. 341, Laws 1969 read "Sections 41-1701 through 41-1707, 92-1201 through 92-1210 and 92-1214 through 92-1222, R. C. M. 1947, are repealed."

#### References

Benoit v. Murphy Corp., 143 M 463, 391 P 2d 350.

**92-104. (2819) Industrial accident board—compensation—terms and salaries.** There is hereby created a board to consist of three (3) members. The commissioner of labor and industry shall be one (1) member, the



director of the bureau of vocational rehabilitation shall be one (1) member, and one (1) member shall be appointed by the governor, by and with the consent of the senate. The board shall be known as the industrial accident board and shall have the powers, duties, and functions herein-after conferred. The term of office of the appointed member of the board shall be four (4) years and until his successor shall have been appointed and confirmed. He shall receive an annual salary in such amount as may be specified by the legislative assembly in the appropriation to the industrial accident board, payable monthly and shall be chairman of the board. If the legislative assembly does not specify the maximum salary for the chairman of the board, it shall be fixed by the board after approval by the board of examiners. Before approving any salary increase, the board of examiners shall review the salaries of comparable positions in Montana state government, other states, and private industry. The board shall elect one (1) of their own number as treasurer of the board.

**History:** En. Sec. 2, Ch. 96, L. 1915; amd. Sec. 1, Ch. 95, L. 1919; amd. Sec. 1, Ch. 254, L. 1921; re-en. Sec. 2819, R. C. M. 1921; amd. Sec. 1, Ch. 161, L. 1953; amd. Sec. 1, Ch. 231, L. 1959; amd. Sec. 1, Ch. 148, L. 1961; amd. Sec. 9, Ch. 225, L. 1963; amd. Sec. 15, Ch. 237, L. 1967.

#### Amendments

The 1967 amendment substituted "in such amount \* \* \* to the industrial accident board" for "of not more than ten thousand dollars (\$10,000)" in the fifth sentence; and inserted the sixth and seventh sentences.

### 92-106, 92-107. (2821, 2822) Repealed.

#### Repeal

These sections (Sec. 2, Ch. 96, L. 1915; Sec. 1, Ch. 81, L. 1941; Sec. 1, Ch. 235, L. 1947), relating to bonds of member and employees of the industrial accident com-

mission, were repealed by Sec. 51, Ch. 177, Laws 1965. For new provisions relating to bonds for state officers and employees, see sec. 6-105 et seq.

**92-111. (2826) Office and furnishings — quarters.** The board shall keep its principal office in the capital of the state. It may rent or lease quarters for the conduct of its administrative duties.

**History:** En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2826, R. C. M. 1921; amd. Sec. 1, Ch. 234, L. 1969.

#### Amendments

The 1969 amendment deleted "and shall be provided with suitable rooms,

necessary office furniture, stationery, and other supplies" from the end of the first sentence and substituted the present second sentence for one reading, "For the purpose of holding sessions in other places the board shall have power to rent temporary quarters."

**92-118. (2833) Reports and bulletins which may be published.** The board shall have the power and authority to publish and distribute at its discretion from time to time, in addition to its report required by section 2 [82-4002] of this act, such further reports and bulletins covering its operations, proceedings, and matters relative to its work as it may deem advisable.

**History:** En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2833, R. C. M. 1921; amd. Sec. 41, Ch. 93, L. 1969.

#### Amendments

The 1969 amendment substituted the reference to the reporting requirements of section 82-4002 for former reference to annual reports.

## CHAPTER 2—DEFENSES—ELECTION TO COME UNDER ACT

Section 92-204. Election of employer and employee to come under act—action against third party causing injury.

**92-204. (2839) Election of employer and employee to come under act—action against third party causing injury.** Where both the employer and employee have elected to come under this act, the provisions of this act shall be exclusive, and such election shall be held to be a surrender by such employer and the servants, and employees of such employer and such employee, as among themselves, of their right to any other method, form or kind of compensation, or determination thereof, or to any other compensation, or kind of determination thereof, or cause of action, action at law, suit in equity, or statutory or common-law right or remedy, or proceeding whatever, for or on account of any personal injury to or death of such employee, except as such rights may be hereinafter specifically granted; and such election shall bind the employee himself, and in case of death shall bind his personal representative, and all persons having any right or claim to compensation for his injury or death, as well as the employer, and the servants and employees of such employer, and those conducting his business during liquidation, bankruptcy or insolvency. Provided, that whenever such employee shall receive an injury while performing the duties of his employment and such injury or injuries, so received by such employee, are caused by the act or omission of some persons or corporations other than his employer, or the servants or employees of his employer, then such employee, or in case of his death his heirs or personal representatives, shall, in addition to the right to receive compensation under the Workmen's Compensation Act, have a right to prosecute any cause of action he may have for damages against such persons or corporations, causing such injury. Further provided, that whenever such employee shall receive an injury while performing the duties of his employment and such injury or injuries, so received by such employee, are caused by the intentional and malicious act or omission of a servant or employee of his employer, then such employee, or in case of his death, his heirs or personal representatives, shall, in addition to the right to receive compensation under the Workmen's Compensation Act, have a right to prosecute any cause of action he may have for damages against such servants or employees of his employer, causing such injury. In the event said employee shall prosecute an action for damages for or on account of such injuries so received, he shall not be deprived of his right to receive compensation but such compensation shall be received by him in addition to and independent of his right to bring action for such damages, provided, that in the event said employee, or in case of his death, his personal representative, shall bring such action, then the employer or insurance carrier paying such compensation shall be subrogated only to the extent of either one-half ( $\frac{1}{2}$ ) of the gross amount paid at time of bringing action and the amount eventually to be awarded to such employee as compensation under the workmen's compensation law or one-half ( $\frac{1}{2}$ ) of the amount recovered and paid to such employee in settlement of, or by judgment in

said action, whichever is the lesser amount. All expense of prosecuting such action shall be borne by the employee, or if the employee shall fail to bring such action or make settlement of his cause of action within six (6) months from the time such injury is received, the employer or insurance carrier who pays such compensation may thereafter bring such action and thus become entitled to all of the amount received from the prosecution of such action up to the amount paid the employee under the Workmen's Compensation Act, and all over that amount shall be paid to the employee. In the event that the amount of compensation payable under this act shall not have been fully determined at the time such employee shall receive settlement of his action, prosecuted as aforesaid, then the industrial accident board shall determine what proportion of such settlement the insurance carrier would be entitled to receive under its right of subrogation and such finding of the board shall be conclusive. Such employer or insurance carrier shall have a lien on such cause of action for one-half ( $\frac{1}{2}$ ) of the amount paid to such employee as compensation under the Workmen's Compensation Act or one-half ( $\frac{1}{2}$ ) of the amount recovered and paid to such employee in settlement of, or by judgment in said action, whichever is the lesser amount, which shall be a first lien thereon.

**History:** En. Sec. 3, Ch. 96, L. 1915; re-en. Sec. 2839, R. C. M. 1921; amd. Sec. 1, Ch. 138, L. 1933; amd. Sec. 1, Ch. 230, L. 1943; amd. Sec. 2, Ch. 235, L. 1947; amd. Sec. 1, Ch. 270, L. 1969.

#### Amendments

The 1969 amendment, in the first sentence, inserted "and the servants, and employees of such employer" after "employer" in two places and substituted "among themselves" for "between themselves" before "of their right to any other method"; in the second sentence, inserted "or the servants or employees of his employer" after "employer"; and inserted the present third sentence.

#### Exclusive Remedy

Employee, having elected to be bound by workmen's compensation law, and being compensated thereunder, was not entitled to maintain an action against employer for negligence, notwithstanding contention that employer's actions were willful and therefore not within statute barring employee's action against employer for common-law negligence; em-

ployee was not third-party beneficiary of safety clauses in contract between employer and United States and could not maintain action against employer for common-law negligence in absence of express promise in contract between employer and United States to pay damages to employee for employer's negligence. *Hensley v. United States*, 279 F Supp 458.

#### Joint Venture As Employer

Individual members of joint venture are "employers" within act and as such are immune from tort actions for death of employees of joint venture. *Hamman v. United States*, 267 F Supp 420.

#### Right To Sue Third Party

Employee of joint venture was entitled to sue engineering firm in relation of independent contractor as to joint venture for engineering firm's negligence causing injury to employee under that portion of statute (prior to 1969 amendment) giving right of action against third parties when injuries are caused by act of some person other than employer. *Hamman v. United States*, 267 F Supp 420.

### 92-207. (2841) Employers engaged in hazardous industries, etc.

#### References

*Simons v. Fisher*, 146 M 526, 409 P 2d 449.

### 92-211. (2846) Act applies to all inherently hazardous occupations, etc.

#### References

*Simons v. Fisher*, 146 M 526, 409 P 2d 449.



## CHAPTER 4—MEANING OF WORDS EMPLOYED IN ACT

- Section 92-410. Employer defined.  
 92-413. Beneficiary defined.  
 92-417. Child defined, to include whom.  
 92-418. Injury or injured defined.  
 92-438. Independent contractor defined.

**92-410. (2862) Employer defined.** "Employer" means the state and each county, city and county, city school district, irrigation district, all other districts established by law and all public corporations and quasi-public corporations and public agencies therein and every person, every prime contractor and every independent contractor, firm, voluntary associations and private corporation, including any public service corporation and including an independent contractor, who has any person in service, in hazardous employment, under any appointment or contract of hire, expressed or implied, oral or written, and the legal representative of any deceased employer or the receiver or trustee thereof.

**History:** En. Sec. 6, Ch. 96, L. 1915;  
 re-en. Sec. 2862, R. C. M. 1921; amd.  
 Sec. 2, Ch. 121, L. 1925; amd. Sec. 1,  
 Ch. 50, L. 1965.

**Joint Ventures**

Individual members of joint venture are "employers" within meaning of act and as such are immune from tort actions for death of employees of joint venture. Hamman v. United States, 267 F Supp 420.

**Amendment**

The 1965 amendment inserted "every prime contractor and every independent contractor" after "every person."

**92-413. (2865) Beneficiary defined.** "Beneficiary" means and shall include a surviving wife or husband and a surviving child or children under the age of eighteen years, or an unmarried child under the age of twenty-one (21) years who is a full-time student in an accredited school, and an invalid child or invalid children over the age of eighteen years, or if no surviving wife or husband then a surviving child or children under the age of eighteen years and an invalid child or invalid children over the age of eighteen years; provided, however, that no invalid child over the age of eighteen years shall be considered a beneficiary unless dependent upon the decedent for support at the time of injury.

**History:** En. Sec. 6, Ch. 96, L. 1915;  
 re-en. Sec. 2865, R. C. M. 1921; amd. Sec.  
 4, Ch. 121, L. 1925; amd. Sec. 1, Ch. 92,  
 L. 1969.

**Amendments**

The 1969 amendment inserted ", or an unmarried child \* \* \* accredited school" after "under the age of eighteen years."

**92-417. (2869) Child defined, to include whom.** "Child" shall include a posthumous child, a dependent stepchild, a child legally adopted prior to the injury, an illegitimate child legitimized prior to the injury.

**History:** En. Sec. 6, Ch. 96, L. 1915;  
 re-en. Sec. 2869, R. C. M. 1921; amd. Sec.  
 2, Ch. 92, L. 1969.

**Amendments**

The 1969 amendment inserted "dependent" before "stepchild."

**92-418. (2870) Injury or injured defined.** "Injury" or "injured" means a tangible happening of a traumatic nature from an unexpected cause, or unusual strain, resulting in either external or internal physical harm,

and such physical condition as a result therefrom and excluding disease not traceable to injury.

**History:** En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2870, R. C. M. 1921; amd. Sec. 6, Ch. 162, L. 1961; amd. Sec. 6, Ch. 149, L. 1965; amd. Sec. 1, Ch. 270, L. 1967.

#### Amendments

The 1965 amendment made no apparent change. But see *Lupien v. Montana Record Publishing Co.*, 143 M 415, 390 P 2d 455, 457.

The 1967 amendment inserted "or unusual strain" after "an unexpected cause."

#### Repealing Clause

Section 2 of Ch. 270, Laws 1967 repealed all acts and parts of acts in conflict therewith.

#### Effective Date

Section 3 of Ch. 270, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved March 2, 1967.

#### Aggravation of Pre-existing Condition

Four-year-old back injury aggravated by lifting heavy piece of material on job was not injury within purview of statute since claimant must establish that injury for which he seeks to recover is new injury resulting from unexpected cause. *Phelan v. Vogel*, 148 M 422, 422 P 2d 80.

#### Aneurysm

Workman who suffered aneurysm when right middle cerebral artery ruptured did not suffer compensable injury as defined in statute in light of evidence that at time of injury, he was engaged in performing ordinary activities of employment which would not cause aneurysm. *Miller v. Sundance Recreation, Inc.*, 151 M 223, 441 P 2d 194.

#### Heart Attack

Where employee suffered fatal myocardial infarction at work but expert cardiologist testified that the attack was not a result of his employment, recovery was denied even though absolute proof was not possible. *Ness v. Diamond Asphalt Co.*, 143 M 560, 393 P 2d 43.

#### Relationship between Accident and Disability

Evidence of claimant's mental problems existing prior to accident and doctor's testimony that it was speculation that claimant's failure to return to work was caused by accident was sufficient to sustain judgment denying recovery under statute for claimant's failure to establish direct relationship between industrial accident and physical condition after such accident. *Schwartzkopf v. Industrial Accident Board*, 149 M 488, 428 P 2d 468.

#### Spinal Cancer

Workmen's compensation was properly denied where claimant's decedent's death resulted from a spinal cancer that was neither caused by nor contributed to by accident in which decedent fractured his dorsal spine, there being no causal connection between the fracture and the cancerous tumor of the spine which caused death. *Stordahl v. Rush Implement Co.*, 148 M 13, 417 P 2d 95, 98. (Dissenting opinion, 148 M 13, 417 P 2d 95, 99.)

#### Unusual Strain

Evidence that claimant, while in course and scope of employment, picked up heavy tray of dirty dishes from floor and suffered back strain and testimony of doctor that subsequent back condition resulted from unusual strain was sufficient to support claim of accidental injury within meaning of phrase "unusual strain" as used in statute. *Jones v. Bair's Cafes*, — M —, 445 P 2d 923.

### DECISIONS UNDER FORMER LAW

#### Disease Not Traceable to Injury

Where claimant was being treated for bursitis prior to time she lifted box which allegedly caused injury to her shoulder, and surgeon who had operated on shoulder admitted only to the "possibility" of a supraspinatus tendon tear, there was insufficient evidence upon which either the industrial accident board or district court could base award. *La Forest v. Safeway Stores, Inc.*, 147 M 431, 414 P 2d 200.

#### Unexpected Cause

Claimant, whose routine job was lifting fifteen-pound blocks, was not entitled to compensation for back injury since strain from lifting blocks was not an injury resulting from an "unexpected cause." *James v. V. K. V. Lumber Co.*, 145 M 466, 401 P 2d 282.

**92-422. (2874) Week defined.****References**

Simons v. C. G. Bennett Lumber Co.,  
146 M 129, 404 P 2d 505.

**92-423. (2875) Wages defined.****References**

Simons v. C. G. Bennett Lumber Co.,

146 M 129, 404 P 2d 505; Mahlum v.  
Broeder, 147 M 386, 412 P 2d 572.

**92-438. (2890) Independent contractor defined.** "An independent contractor" is one who renders service in the course of an occupation, representing the will of his employer only as the result of his work, and not as to the means by which it is accomplished. But the legal defense of independent contractor shall not bar otherwise compensable industrial accident claims against employers except when such defense is interposed on behalf of a party who has previously required the claimant's immediate employer to come within the Workmen's Compensation Act.

**History:** En. Sec. 6, Ch. 96, L. 1915;  
re-en. Sec. 2890, R. C. M. 1921; amd.  
Sec. 1, Ch. 49, L. 1965.

**Amendment**

The 1965 amendment added the second sentence.

## CHAPTER 6—CLAIMS—LIABILITY FOR INJURY UNDER DIFFERENT PLANS OF ACT

Section 92-614. Who liable for injuries under the different plans of act and in what amounts, extraterritorial application and reciprocity.

**92-601. (2899) Claims must be presented within what time.****References**

Stokes v. Delaney & Sons, Inc., 143 M  
516, 391 P 2d 698; Meyer v. Noble Drill-  
ing, Inc., 259 F Supp 110, 112.

**92-608. (2905) Compensation in case of death of employee, etc.****Death from Cause other than Injury**

Clause providing that "if the employee shall die from some cause other than the injury, there shall be no liability for compensation after his death" means that if employee is receiving compensation as result of industrial injury and subsequently dies from causes other than injury, liability for further compensation by way of death benefits or continuing disability benefits is cut off; but statute does not terminate liability for compensation accrued prior to death and unpaid at time of death; thus, compensation for permanent partial disability existing between time of injury and time of death is payable even after death. Breen v. Industrial Accident Board, 150 M 463, 436 P 2d 701.

**"Proximate Cause" Defined**

"Proximate cause" as used in statute, means that cause which in natural and

continuous sequence, unbroken by any new and independent cause produces death, without which it would not have occurred; it does not mean that injury must be sole cause of death but that injury must be substantial contributing cause in sense that death would not have occurred but for injuries. Head injury received in compensable industrial accident occurring more than two years previous to death was not proximate cause of death in view of evidence that deceased drank to excess before and after accident, that immediate cause of death was suffocation from vomit after drinking bout and that even if deceased had taken six nembutal tablets given on prescription of doctor to relieve headaches, it could not have caused or contributed to death. Breen v. Industrial Accident Board, 150 M 463, 436 P 2d 701.



92-614. (2911) Who liable for injuries under the different plans of act and in what amounts, extraterritorial application and reciprocity. Every employer who shall become bound by and subject to the provisions of compensation plan number one (1), and every employer and insurer who shall become bound by and subject to the provisions of compensation plan number two (2), and the industrial accident fund where the employer of the injured employee has become bound by and subject to the provisions of compensation plan No. 3, shall be liable for the payment of compensation in the manner and to the extent hereinafter provided to an employee who has elected to come under this act, and who shall receive an injury arising out of and in the course of his employment, or, in the case of his death from such injury, to his beneficiaries, if any; or, if none, to his major dependents, if any; or, if none, to his minor dependents, if any.

If a workman employed in this state who is subject to the provisions of this act temporarily leaves the state incidental to that employment and receives an injury arising out of and in the course of such employment, the provisions of this act shall apply to such workman as though he were injured within this state.

If a workman from another state and his employer from another state are temporarily engaged in work within this state, this act shall not apply to them

(a) if the employer and employee are bound by the provisions of the Workmen's Compensation Law or similar law of such other state which applies to them while they are in the state of Montana, and

(b) if the Workmen's Compensation Act of this state is recognized and given effect as the exclusive remedy for workmen employed in this state who are injured while temporarily employed in such other state.

A certificate from an authorized officer of the workmen's compensation department or similar agency of another state certifying that an employer of such other state is bound by the Workmen's Compensation Act of the state and that its act will be applied to employees of the employer while in the state of Montana shall be prima facie evidence of the application of the Workmen's Compensation Law of the certifying state.

The industrial accident board shall have authority, with the approval of the governor, to enter into agreements with workmen's compensation agencies of other states for the purpose of promulgating regulations not inconsistent with the provisions of this act to carry out the extraterritorial application of the workmen's compensation laws of the agreeing states.

History: En. Sec. 16, Ch. 96, L. 1915;  
re-en. Sec. 2911, R. C. M. 1921; amd. Sec.  
1, Ch. 70, L. 1967.

#### Amendments

The 1967 amendment inserted figures after the written numbers in the first paragraph; and added everything after the first paragraph.

## CHAPTER 7—COMPENSATION FOR VARIOUS INJURIES— AMOUNT—PAYMENT

Section 92-701. Compensation for injury producing temporary total disability.

92-702. Compensation for injury producing total disability permanent in character.

- 92-703. For partial disability.
- 92-704. Compensation for injury causing death.
- 92-706. Medical and hospital services and such other treatment as approved by the board to be furnished.
- 92-707. Compensation from what date paid.
- 92-709. Compensation in case of specified injuries.

**92-701. (2912) Compensation for injury producing temporary total disability.** Where the injured employee has no wife, child, father, mother, brother, or sister residing within the United States who would be entitled to compensation in case of his death, fifty per centum (50 %) of the weekly wages received at the time of the injury, subject to a maximum compensation of forty-two dollars (\$42) per week; where the injured employee has a wife, or child, or father or mother, or brother or sister residing within the United States, who would be entitled to compensation in case of his death, fifty-five per centum (55%) of the weekly wages received at the time of the injury, subject to a maximum compensation of forty-five dollars (\$45) per week; where the injured employee has a wife and one (1) child, or two (2) children, or a father and mother, or two (2) or more brothers and/or sisters residing within the United States who would be entitled to compensation in case of his death, sixty per centum (60%) of the weekly wages received at the time of the injury, subject to a maximum compensation of fifty dollars (\$50) per week; where the injured employee has a wife and two (2) children, or three (3) children residing within the United States who would be entitled to compensation in case of his death, sixty-two and one-half per centum ( $62\frac{1}{2}$ ) of the weekly wages received at the time of the injury, subject to a maximum compensation of fifty-five dollars (\$55) per week; where the injured employee has a wife and three (3) children, or four (4) children residing within the United States who would be entitled to compensation in case of his death, sixty-five per centum (65%) of the weekly wages received at the time of his injury, subject to a maximum compensation of sixty dollars (\$60) per week; where the injured employee has a wife and four (4) or more children, or five (5) or more children residing in the United States who would be entitled to compensation in case of his death, sixty-six and two-thirds per centum ( $66\frac{2}{3}$ %) of the weekly wages received at the time of the injury, subject to a maximum compensation of sixty-five dollars (\$65) per week, and subject in all cases to a minimum compensation of thirty-nine and 50/100 dollars (\$39.50) per week, and subject to change when the number of beneficiaries or dependents increases by birth, or decreases. Such compensation shall be paid during the period of disability, but for the period not exceeding three hundred (300) weeks from the date of injury provided that after twenty-six (26) weeks of disability such compensation shall be decreased by the sum of five dollars (\$5) per week during the remaining period of disability.

**History:** En. Sec. 16, Ch. 96, L. 1915; 1951; amd. Sec. 1, Ch. 38, L. 1953; amd. amd. Sec. 4, Ch. 100, L. 1919; re-en. Sec. Sec. 1, Ch. 253, L. 1955; amd. Sec. 1, Ch. 2912, R. C. M. 1921; amd. Sec. 10, Ch. 121, 234, L. 1957; amd. Sec. 1, Ch. 162, L. 1961; L. 1925; amd. Sec. 12, Ch. 177, L. 1929; amd. Sec. 1, Ch. 149, L. 1965; amd. Sec. 1, Ch. 230, L. 1947; amd. Sec. 1, 1, Ch. 207, L. 1967; amd. Sec. 1, Ch. 285, Ch. 7, L. 1949; amd. Sec. 1, Ch. 48, L. L. 1969.

### Amendments

The 1965 amendment increased the maximum weekly compensation set forth in the various clauses from \$29 to \$35, from \$32 to \$38, from \$36 to \$42, from \$40 to \$46, from \$45 to \$51, and from \$50 to \$56; and increased the minimum weekly compensation from \$25.50 to \$31.50.

The 1967 amendment increased the maximum weekly compensation set forth in the various clauses from \$35 to \$37 per week; from \$38 to \$40 per week; from \$42 to \$45 per week; from \$46 to \$50 per week; from \$51 to \$55 per week; from \$56 to \$60 per week; and increased the minimum payments in all cases from \$31.50 to \$34.50 per week.

The 1969 amendment increased the maximum weekly compensation set forth in the various clauses from \$37 to \$42 per week; from \$40 to \$45 per week; from \$45 to \$50 per week; from \$50 to \$55 per week; from \$55 to \$60 per week; from \$60 to \$65 per week; increased the minimum weekly compensation from \$34.50 to \$39.50; and added the proviso decreasing benefits in all categories by \$5 after termination of first twenty-six weeks of disability.

### References

Jones v. Claridge, 145 M 326, 400 P 2d 888; Mahlum v. Broeder, 147 M 386, 412 P 2d 572.

92-702. (2913) **Compensation for injury producing total disability permanent in character.** Where the injured employee has no wife, child, father, mother, brother or sister residing within the United States who would be entitled to compensation in case of his death, fifty per centum (50%) of the weekly wages received at the time of the injury, subject to a maximum compensation of thirty-seven dollars (\$37.00) per week; where the injured employee has a wife, or child, or father, or mother, or brother or sister residing within the United States who would be entitled to compensation in case of his death, fifty-five per centum (55%) of the weekly wages received at the time of the injury, subject to a maximum compensation of forty dollars (\$40.00) per week; where the injured employee has a wife and one (1) child, or two (2) children, or a father and mother, or two (2) or more brothers and/or sisters, residing within the United States who would be entitled to compensation in case of his death, sixty per centum (60%) of the weekly wages received at the time of the injury, subject to a maximum compensation of forty-five dollars (\$45.00) per week; where the injured employee has a wife and two (2) children, or three (3) children residing within the United States who would be entitled to compensation in case of his death, sixty-two and one-half per centum ( $62\frac{1}{2}\%$ ) of the weekly wages received at the time of the injury, subject to a maximum compensation of fifty dollars (\$50.00) per week; where the injured employee has a wife and three (3) children, or four (4) children residing within the United States who would be entitled to compensation in case of his death, sixty-five per centum (65%) of the weekly wages received at the time of the injury, subject to a maximum compensation of fifty-five dollars (\$55.00) per week; where the injured employee has a wife and four (4) children, or five (5) or more children residing within the United States who would be entitled to compensation in case of his death, sixty-six and two-thirds per centum ( $66\frac{2}{3}\%$ ) of the weekly wages received at the time of the injury, subject to a maximum compensation of sixty dollars (\$60.00) per week; and subject in all cases to a minimum compensation of thirty-four and 50/100 dollars (\$34.50) per week; and subject to change when the number of beneficiaries or dependents increases by birth, or decreases. Such compensation shall be paid during the period of disability, but for the period not exceeding



five hundred (500) weeks from the date of injury. Provided, that in cases of hardship and where the board, in its discretion, deems it necessary, the board may order compensation for such further period as it decides proper. Such additional compensation, if ordered, shall be limited to cases of total disability, permanent in character resulting from loss of or the loss of use of both hands, or both arms, or both feet, or both legs, or both eyes. Nothing herein contained shall be constructed to affect the maximum of five hundred (500) weeks in computing lump-sum settlements for partial disability or total disability or the maximum of six hundred (600) weeks in cases of compensation for injury causing death.

**History:** En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 5, Ch. 100, L. 1919; re-en. Sec. 2913, R. C. M. 1921; amd. Sec. 11, Ch. 121, L. 1925; amd. Sec. 13, Ch. 177, L. 1929; amd. Sec. 2, Ch. 230, L. 1947; amd. Sec. 2, Ch. 7, L. 1949; amd. Sec. 2, Ch. 48, L. 1951; amd. Sec. 2, Ch. 38, L. 1953; amd. Sec. 2, Ch. 253, L. 1955; amd. Sec. 2, Ch. 234, L. 1957; amd. Sec. 2, Ch. 162, L. 1961; amd. Sec. 2, Ch. 149, L. 1965; amd. Sec. 2, Ch. 207, L. 1967; amd. Sec. 1, Ch. 279, L. 1969.

#### Amendments

The 1965 amendment increased the maximum weekly compensation set forth in the various clauses from \$29 to \$35, from \$32 to \$38, from \$36 to \$42, from \$40 to \$46, from \$45 to \$51, and from \$50 to \$56; and increased the minimum weekly compensation from \$25.50 to \$31.50.

The 1967 amendment increased the maximum weekly compensation set forth in the various clauses from \$35 to \$37

per week; from \$38 to \$40 per week; from \$42 to \$45 per week; from \$46 to \$50 per week; from \$51 to \$55 per week; from \$56 to \$60 per week; and increased the minimum payments in all cases from \$31.50 to \$34.50 per week.

The 1969 amendment added the last three sentences.

#### Effective Date

Section 2 of Ch. 279, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved March 10, 1969.

#### Repealing Clause

Section 3 of Ch. 279, Laws 1969 repealed all acts and parts of acts in conflict therewith.

#### References

Jones v. Claridge, 145 M 326, 400 P 2d 888; Mahlum v. Broeder, 147 M 386, 412 P 2d 572.

**92-703. (2914) For partial disability.** Where the injured employee has no wife, child, father, mother, brother or sister residing within the United States who would be entitled to compensation in case of his death, fifty per centum (50 %) of the difference between the wages received at the time of the injury and the wages that such injured employee is able to earn thereafter, subject to a maximum compensation of thirty-seven dollars (\$37.00) per week; where the injured employee has a wife, or child, or father, or mother, or brother or sister residing within the United States who would be entitled to compensation in case of his death, fifty-five per centum (55%) of the difference between the wages received at the time of the injury and the wages that such injured employee is able to earn thereafter, subject to a maximum compensation of forty dollars (\$40.00) per week; where the injured employee has a wife and one (1) child, or two (2) children, or a father and mother, or two (2) or more brothers and/or sisters residing within the United States who would be entitled to compensation in case of his death, sixty per centum (60%) of the difference between the wages received at the time of the injury and the wages that such injured employee is able to earn thereafter, subject to a maximum compensation of forty-five dollars (\$45.00) per week; where the injured employee has a wife and two (2) children, or three (3) children

residing within the United States who would be entitled to compensation in case of his death, sixty-two and one-half per centum (62½%) of the difference between the wages received at the time of the injury and the wages that such injured employee is able to earn thereafter, subject to a maximum compensation of fifty dollars (\$50.00) per week; where the injured employee has a wife and three (3) children, or four (4) children residing within the United States who would be entitled to compensation in case of his death, sixty-five per centum (65%) of the difference between the wages received at the time of the injury and the wages that such injured employee is able to earn thereafter, subject to a maximum compensation of fifty-five dollars (\$55.00) per week; where the injured employee has a wife and four (4) or more children, or five (5) or more children residing within the United States who would be entitled to compensation in case of his death, sixty-six and two-thirds per centum (66⅔%) of the difference between the wages received at the time of the injury and the wages that such injured employee is able to earn thereafter, subject to a maximum compensation of sixty dollars (\$60.00) per week; not exceeding however, the maximum compensation allowed in cases of total disability, and not exceeding in amount or duration the total compensation provided in the act for the total loss of the member causing such partial disability. Such compensation shall be paid during the period of disability, not exceeding however, five hundred (500) weeks in cases of permanent partial disability, and fifty (50) weeks in cases of temporary partial disability, subject to change when the number of dependents increases by birth, or decreases, provided, however, that compensation for partial disability resulting from the loss of or injury to any member shall not be payable for a greater number of weeks than is specified in section 92-709 for the loss of such member.

**History:** En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 6, Ch. 100, L. 1919; re-en. Sec. 2914, R. C. M. 1921; amd. Sec. 2, Ch. 177, L. 1929; amd. Sec. 3, Ch. 230, L. 1947; amd. Sec. 3, Ch. 7, L. 1949; amd. Sec. 3, Ch. 48, L. 1951; amd. Sec. 3, Ch. 38, L. 1953; amd. Sec. 3, Ch. 253, L. 1955; amd. Sec. 3, Ch. 234, L. 1957; amd. Sec. 3, Ch. 162, L. 1961; amd. Sec. 3, Ch. 149, L. 1965; amd. Sec. 3, Ch. 207, L. 1967.

#### Amendments

The 1965 amendment increased the maximum weekly compensation set forth in the various clauses from \$29 to \$35, from \$32 to \$38, from \$36 to \$42, from \$40 to \$46, from \$45 to \$51, and from \$50 to \$56.

The 1967 amendment increased the maximum weekly compensation set forth in the various clauses from \$35 to \$37 per week; from \$38 to \$40 per week; from \$42 to \$45 per week; from \$46 to \$50 per week; from \$51 to \$55 per week; and from \$56 to \$60 per week.

#### Computation of Average Weekly Wage

This section does not incorporate the six-day week component under section

92-422 in determining pre- or post-injury earnings for partial disability, and in this manner is different from sections 92-701 and 92-702, which deal with total disability. *Mahlum v. Broeder*, 147 M 386, 412 P 2d 572.

Pre- or post-injury compensation for partial disability under this section is determined by dividing a man's earnings over a reasonable period of time by the total number of days he worked, excluding all overtime and then multiplying the average daily wage by the number of days actually worked each week. *Mahlum v. Broeder*, 147 M 386, 412 P 2d 572.

#### Earning Capacity—Loss of Earnings

Under this section, coupled with section 92-709, a claimant may have an award of temporary total disability payments during period he is entirely disabled, an award of temporary partial disability payments while his injury is still healing and he is partially able to earn wages, and an additional award for loss of prospective future earnings as the result of permanent partial disability. *Jones v. Claridge*, 145 M 326, 400 P 2d 888.

**92-704. (2915) Compensation for injury causing death.** For beneficiaries residing within the United States: Where decedent leaves one (1) beneficiary, fifty per centum (50 %) of the wages received at the time of the injury, subject to a maximum compensation of thirty-seven dollars (\$37.00) per week; where decedent leaves two (2) beneficiaries, fifty-five per centum (55%) of the wages received at the time of the injury, subject to a maximum compensation of forty dollars (\$40.00) per week; where decedent leaves three (3) beneficiaries, sixty per centum (60%) of the wages received at the time of the injury, subject to a maximum compensation of forty-five dollars (\$45.00) per week; where decedent leaves four (4) beneficiaries, sixty-two and one-half per centum (62½%) of the wages received at the time of the injury subject to a maximum compensation of fifty dollars (\$50.00) per week; where decedent leaves five (5) beneficiaries, sixty-five per centum (65%) of the wages received at the time of the injury, subject to a maximum compensation of fifty-five dollars (\$55.00) per week; where decedent leaves six (6) or more beneficiaries, sixty-six and two-thirds per centum (66⅔%) of the wages received at the time of the injury, subject to a maximum compensation of sixty dollars (\$60.00) per week; and subject in all such cases to a minimum compensation of thirty-four and 50/100 dollars (\$34.50) per week.

For beneficiaries residing outside of the United States: Where decedent leaves one (1) beneficiary, forty per centum (40 %) of the compensation which would be payable to such beneficiary, if residing within the United States; where decedent leaves two (2) beneficiaries, forty-five per centum (45 %) of the compensation which would be payable to such beneficiaries, if residing within the United States; where decedent leaves three (3) beneficiaries, forty-seven and one-half per centum (47½ %) of the compensation which would be payable to such beneficiaries, if residing within the United States; where decedent leaves four (4) or more beneficiaries, fifty per centum (50 %) of the compensation which would be payable to such beneficiaries, if residing within the United States.

If decedent leaves no beneficiaries, then compensation shall be payable as follows: To his major dependents, if any, residing in the United States at the date of the happening of the injury; where decedent leaves one (1) major dependent, fifty per centum (50 %) of the wages received at the time of the injury, subject to a maximum compensation of thirty-seven dollars (\$37.00) per week; where decedent leaves two (2) major dependents, fifty-five per centum (55%) of the wages received at the time of the injury, subject to a maximum compensation of forty-one dollars (\$41.00) per week.

If the decedent leaves no major dependents, compensation shall be payable to his minor dependents, if any, if residing within the United States at the time of the happening of the injury, as follows: Where decedent leaves one (1) minor dependent, thirty per centum (30 %) of the wages received at the time of the injury, subject to a maximum compensation of thirty-eight dollars (\$38.00) per week; where decedent leaves two (2) minor dependents, thirty-five per centum (35%) of the wages received at the time of the injury, subject to a maximum compensation of forty dollars (\$40.00) per week; where decedent leaves three (3) or



more minor dependents, forty per centum (40%) of the wages received at the time of the injury, subject to a maximum compensation of fifty dollars (\$50.00) per week.

If the decedent leaves no major or minor dependents a lump sum in the amount of three thousand and no/100 dollars (\$3,000.00) shall be payable to his surviving parent or parents.

All such payments of compensation provided for in this section shall be subject to a maximum compensation of sixty dollars (\$60.00) per week for a period not exceeding six hundred (600) weeks and subject to change when the number of beneficiaries or dependents increases by birth, or decreases, and provided, further, that compensation payable to major or minor dependents shall not exceed the amount of the dependency.

**History:** En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 7, Ch. 100, L. 1919; re-en. Sec. 2915, R. C. M. 1921; amd. Sec. 12, Ch. 121, L. 1925; amd. Sec. 14, Ch. 177, L. 1929; amd. Sec. 4, Ch. 230, L. 1947; amd. Sec. 4, Ch. 7, L. 1949; amd. Sec. 4, Ch. 48, L. 1951; amd. Sec. 4, Ch. 38, L. 1953; amd. Sec. 4, Ch. 253, L. 1955; amd. Sec. 4, Ch. 234, L. 1957; amd. Sec. 4, Ch. 162, L. 1961; amd. Sec. 4, Ch. 149, L. 1965; amd. Sec. 1, Ch. 192, L. 1967; amd. Sec. 4, Ch. 207, L. 1967.

#### Compiler's Notes

This section was amended twice in 1967, once by Ch. 192 and once by Ch. 207. Neither amendatory act referred to or incorporated the changes made by the other. Since the two amendments do not appear to conflict, the compiler has made a composite section embodying the amendments made by both 1967 acts.

#### Amendments

The 1965 amendment increased the maximum weekly compensation set forth in the various clauses in the first paragraph from \$29 to \$35, from \$32 to \$38, from \$36 to \$42, from \$40 to \$46, from \$45 to \$51, and from \$50 to \$56; increased the minimum weekly compensation at the end of the first paragraph from \$25.50 to \$31.50; increased the maximum weekly compensation set forth in clauses of the third paragraph from \$29 to \$35 and from \$32 to \$38; increased the maximum weekly compensation set forth in various clauses in the fourth paragraph from \$29 to \$35, from \$32 to \$38, and from \$40 to \$46; and

increased the maximum weekly compensation set forth in the final paragraph from \$50 to \$56.

Chapter 192, Laws of 1967, inserted "per centum" after "sixty-two and one-half" in the first paragraph, and increased the number of weeks of compensation to be paid for injury causing death from 500 to 600 weeks in the sixth paragraph.

Chapter 207, Laws of 1967, increased the maximum weekly compensation set forth in the various clauses in the first paragraph from \$35 to \$37 per week; from \$38 to \$40 per week; from \$40 to \$45 per week; from \$46 to \$50 per week; from \$51 to \$55 per week; from \$56 to \$60 per week; and increased minimum compensation in all cases from \$31.50 to \$34.50 per week; increased the maximum weekly compensation set forth in clauses of the third paragraph from \$35 to \$37 per week and from \$38 to \$41 per week; increased the maximum weekly compensation set forth in the various clauses of the fourth paragraph from \$35 to \$38 and from \$38 to \$40 and from \$46 to \$50; and increased the maximum compensation in the last paragraph from \$56 to \$60.

#### Foreign Beneficiary

Nondependent surviving mother, whose son was killed in mine accident, but who lived in and was a lifelong resident of Ireland, was entitled to award of \$3,000 as against contention that surviving parent is entitled to payment only if residing within United States at time of injury. *Dunphy v. Anaconda Co.*, 151 M 76, 438 P 2d 660.

**92-706. (2917) Medical and hospital services and such other treatment as approved by the board to be furnished.** In addition to the compensation provided by this act and as an additional benefit separate and apart from compensation, the following shall be furnished:

During the first thirty-six (36) months after the happening of the injury, the employer or insurer or the board, as the case may be, shall furnish reasonable services by a physician or surgeon, reasonable hos-

pital services and medicines when needed, and such other treatment approved by the board, not exceeding in amount the sum of five thousand dollars (\$5,000.00) provided however, that in cases of total disability where apportionment of such sum does not meet all hospitalization expenses, the board may allow an additional amount for additional hospital and medical expenses as in special cases it may deem proper. The employer or insurer or the board shall not be required to furnish such services if the employee refuses to allow them to be furnished or if the employee is under hospital contract as provided in section 92-610.

When such employee is under a hospital contract as above and when hospital and medical facilities or both are inadequate to the needs of an injured employee in a particular case such injured employee may, any time, be placed where adequate hospital facilities are obtainable, and the cost thereof in whole or in part shall be a legal charge against the one so contracting to furnish hospital facilities, and the amount of such charge and the necessity therefor shall be determined by the board.

And be it further provided, that where an injury arising out of and received in the course of employment necessarily results in the loss by amputation of an arm, hand, leg or foot, or the enucleation of an eye, or the loss of any of the natural teeth, the industrial accident board may, in its discretion, order that an artificial member be furnished to supply the loss of any such member or members so lost. The board may also order the replacement or repair of any prosthetic appliance damaged in an industrial accident. Such artificial member shall be furnished at the expense of the employer, operating under plan one, or the insurer, operating under plan two, or the industrial accident fund where the employer is operating under plan three. The replacement of an artificial member so furnished shall be required every five (5) years, if necessary, unless the board shall determine a replacement is needed within a shorter period.

**History:** En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 3, Ch. 196, L. 1921; re-en. Sec. 2917, R. C. M. 1921; amd. Sec. 14, Ch. 121, L. 1925; amd. Sec. 15, Ch. 177, L. 1929; amd. Sec. 2, Ch. 139, L. 1931; amd. Sec. 1, Ch. 229, L. 1943; amd. Sec. 2, Ch. 213, L. 1945; amd. Sec. 1, Ch. 41, L. 1949; amd. Sec. 7, Ch. 38, L. 1953; amd. Sec. 5, Ch. 253, L. 1955; amd. Sec. 6, Ch. 234, L. 1957; amd. Sec. 1, Ch. 81, L. 1965; amd. Sec. 1, Ch. 67, L. 1969.

#### **Amendments**

The 1965 amendment inserted the second sentence in the final paragraph.

The 1969 amendment increased the amount of hospital and medical services to be furnished from \$2,500 to \$5,000 in the first sentence of the second paragraph.

**92-707. (2918) Compensation from what date paid.** When an injured employee has no wife, child, father, mother, brother or sister residing within the United States who would be entitled to compensation in case of his death, no compensation shall be allowed or paid during the first week of any injury, except as may be required by the provisions of the preceding section, but if disability continues one (1) week, compensation shall be paid from the date of injury. Where the injured employee has a beneficiary or a major or minor dependent residing within the United States who would be entitled to compensation in case of his death, no compensation shall be paid for the first week of any injury,

but if disability continues one (1) week, compensation shall be paid from the date of injury, provided, that separate benefits of medical and hospital services shall be furnished from date of injury.

**History:** En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 4, Ch. 196, L. 1921; re-en. Sec. 2918, R. C. M. 1921; amd. Sec. 3, Ch. 177, L. 1929; amd. Sec. 3, Ch. 213, L. 1945; amd. Sec. 5, Ch. 7, L. 1949; amd. Sec. 1, Ch. 144, L. 1969.

#### Amendments

The 1969 amendment substituted "one (1) week" for "six weeks" in the first sentence, and "one (1) week" for "three weeks" in the second sentence.

**92-709. (2920) Compensation in case of specified injuries.** In case of the following specified injuries, the compensation in lieu of any other compensation provided by this act, shall be as follows: Where the injured employee has no wife, child, father, mother, brother, or sister residing within the United States who would be entitled to compensation in case of his death, fifty per centum (50 %) of the wages received at the time of the injury, subject to a maximum compensation of thirty-seven dollars (\$37.00) per week; where the injured employee has a wife, or child, or father or mother, or brother or sister residing within the United States who would be entitled to compensation in case of his death, fifty-five per centum (55%) of the wages received at the time of the injury, subject to a maximum compensation of forty dollars (\$40.00) per week; where the injured employee has a wife and one (1) child, or two (2) children, or a father and mother, or two (2) or more brothers and/or sisters residing within the United States who would be entitled to compensation in case of his death, sixty per centum (60%) of the wages received at the time of the injury, subject to a maximum compensation of forty-five dollars (\$45.00) per week; where the injured employee has a wife and two (2) children or three (3) children residing within the United States who would be entitled to compensation in case of his death, sixty-two and one-half per centum (62½%) of the wages received at the time of injury, subject to a maximum compensation of fifty dollars (\$50.00) per week; where the injured employee has a wife and three (3) children, or four (4) children residing within the United States who would be entitled to compensation in case of his death, sixty-five per centum (65%) of the wages received at the time of the injury, subject to a maximum compensation of fifty-five dollars (\$55.00) per week; where the injured employee has a wife and four (4) or more children, or five (5) or more children residing within the United States who would be entitled to compensation in case of his death, sixty-six and two-thirds per centum (66⅔%) of the wages received at the time of the injury, subject to a maximum compensation of sixty dollars (\$60.00) per week, subject to change when the number of beneficiaries or dependents increases by birth, or decreases, and subject in all cases to a minimum compensation of thirty-four and 50/100 dollars (\$34.50) per week, and shall be paid for the following periods:

For loss of:

One arm at or near shoulder .....	280 weeks
One arm at the elbow .....	240 weeks
One arm between wrist and elbow .....	220 weeks
One hand .....	200 weeks



One thumb and the metacarpal bone thereof .....	75 weeks
One thumb at the proximal joint .....	37 weeks
One thumb at the second distal joint .....	25 weeks
One first finger and the metacarpal bone thereof .....	40 weeks
One first finger at the proximal joint .....	30 weeks
One first finger at the second joint .....	22 weeks
One first finger at the distal joint .....	15 weeks
One second finger and the metacarpal bone thereof .....	37 weeks
One second finger at the proximal joint .....	20 weeks
One second finger at the second joint .....	15 weeks
One second finger at the distal joint .....	8 weeks
One third finger and the metacarpal bone thereof .....	25 weeks
One third finger at the proximal joint .....	15 weeks
One third finger at the second joint .....	10 weeks
One third finger at the distal joint .....	5 weeks
One fourth finger and the metacarpal bone thereof .....	15 weeks
One fourth finger at the proximal joint .....	11 weeks
One fourth finger at the second joint .....	8 weeks
One fourth finger at the distal joint .....	6 weeks
One leg at or near the hip joint as to preclude the use of an artificial limb .....	300 weeks
One leg at or above the knee where stump remains sufficient to permit the use of an artificial limb .....	200 weeks
One leg between knee and ankle .....	190 weeks
One foot at the ankle .....	180 weeks
One great toe with the metatarsal bone thereof .....	37 weeks
One great toe at the proximal joint .....	18 weeks
One great toe at the second joint .....	12 weeks
One toe other than the great toe with the metatarsal bone thereof .....	16 weeks
One toe other than the great toe at the proximal joint .....	8 weeks
One toe other than the great toe at second or distal joint .....	5 weeks
One eye by enucleation .....	165 weeks
Total blindness of one eye .....	140 weeks
Total loss of hearing, one ear .....	40 weeks
Total loss of hearing, both ears .....	200 weeks

Loss of vision: Where central visual acuity does not exceed 20/200 in the better eye with correcting lenses or the widest diameter of the visual field subtends an angle no greater than 20 degrees, the same as for loss of the eye.

Total loss of use: Indemnity benefits for permanent total loss of use of a member shall be the same as for loss of the member.

Partial loss or partial loss of use: Indemnity benefits for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

In any case in which there shall be a loss, or loss of use, of more than one member as set forth in this section, not amounting to permanent total disability, the award of indemnity benefits shall be for the loss, or loss of use thereof, which awards shall run consecutively, provided, however,

that the total award or compensation in no case shall exceed five hundred (500) weeks.

**Disfigurement:** The board may award proper and equitable indemnity benefits for serious face, head, or neck disfigurement, not to exceed twenty-five hundred dollars (\$2,500.00) in addition to any other indemnity benefits payable under this section.

The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two (2) thereof, in one (1) accident, in the absence of conclusive proof to the contrary shall constitute total disability, permanent in character. Provided, however, that the percentage of permanent disability caused by any single accident or injury shall be so computed as to cover the permanent disability caused by that particular injury without reference to any previous physical ailment or defect or to any injury previously suffered or any permanent disability caused thereby; provided, that no payment under this section shall be in lieu of the separate benefit of medical and hospital services.

**History:** En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 8, Ch. 100, L. 1919; amd. Sec. 5, Ch. 196, L. 1921; re-en. Sec. 2920, R. C. M. 1921; amd. Sec. 16, Ch. 121, L. 1925; amd. Sec. 16, Ch. 177, L. 1929; amd. Sec. 5, Ch. 213, L. 1945; amd. Sec. 5, Ch. 230, L. 1947; amd. Sec. 6, Ch. 7, L. 1949; amd. Sec. 5, Ch. 48, L. 1951; amd. Sec. 5, Ch. 38, L. 1953; amd. Sec. 6, Ch. 253, L. 1955; amd. Sec. 7, Ch. 234, L. 1957; amd. Sec. 5, Ch. 162, L. 1961; amd. Sec. 5, Ch. 149, L. 1965; amd. Sec. 5, Ch. 207, L. 1967.

#### Amendments

The 1965 amendment increased the maximum weekly compensation set forth in the various clauses in the preliminary paragraph from \$29 to \$35, from \$32 to \$38, from \$36 to \$42, from \$40 to \$46, from \$45 to \$51, and from \$50 to \$56; and increased the minimum weekly compensation set forth at the end of the preliminary paragraph from \$25.50 to \$31.50.

The 1967 amendment increased the maximum weekly compensation set forth in the various clauses in the preliminary paragraph from \$35 to \$37 per week; from \$38 to \$40 per week; from \$42 to \$45 per week; from \$46 to \$50 per week; from \$51 to \$55 per week; from \$56 to \$60 per week; and increased the minimum weekly compensation set forth at the

end of the preliminary paragraph from \$31.50 to \$34.50.

#### Additional Compensation

Under this section, coupled with section 92-703, a claimant may have an award of temporary total disability payments during period he is entirely disabled, an award of temporary partial disability payments while his injury is still healing and he is partially able to earn wages, and an additional award for loss of prospective future earnings as the result of permanent partial disability. *Jones v. Claridge*, 145 M 326, 400 P 2d 888.

#### Construction

The words "indemnity benefits" coupled with a "proportionate loss" anticipate estimated loss of future earning capacity irrespective of loss of wages and economic deprivation suffered by claimant and his dependents during the healing period. *Jones v. Claridge*, 145 M 326, 400 P 2d 888.

#### Date of Accrual

Indemnity benefits accrue from the date the permanent nature of the disability becomes established. *Jones v. Claridge*, 145 M 326, 400 P 2d 888.

### CHAPTER 8—MISCELLANEOUS REGULATIONS—POWERS OF BOARD—REHEARINGS AND APPEALS

Section 92-827. Record of proceedings to be kept and testimony to be taken down—attorney's fees—transcripts on appeal—indigent claimants.

92-834. How appeal taken—notice—record—trial.

92-807. (2933) Notice of claims for injuries other than death.

#### References

*La Forest v. Safeway Stores, Inc.*, 147 M 431, 414 P 2d 200.

**92-821. (2947) Jurisdiction of board to hear disputes and controversies.****References**

State ex rel. Glacier General Assurance

Co. v. District Court, 143 M 569, 393 P 2d 54.

**92-825. (2951) When a nominal disability indemnity may be awarded.****Degree of Permanent Physical Impairment Unknown**

Where the board found that a compensable impairment existed, but the degree of permanent physical impairment was un-

known, it was proper to award nominal disability indemnity under this section. Benoit v. Murphy Corp., 143 M 463, 391 P 2d 350.

**92-827. (2953) Record of proceedings to be kept and testimony to be taken down—attorney's fees—transcripts on appeal—indigent claimants.** A full and complete record shall be kept of all proceedings and hearings had before the board, or any member thereof, of any formal hearing had, and all testimony produced before the board or any member thereof shall be taken down by a stenographic reporter appointed by the board, and the parties shall be entitled to be heard in person or by attorney.

Whenever the claimant or plaintiff is represented by an attorney either before the board or the courts, the industrial accident board may, in its discretion or upon the application of the claimant or plaintiff, fix the amount of the attorney fee of the attorney representing the claimant or plaintiff, and the fee fixed by the board shall be paid by claimant or plaintiff.

In cases of an action to review any order or decision of the board, a transcript of such testimony, together with all exhibits, and of the pleadings, records, and proceedings in the cause shall constitute the record of the board. Provided further, that the board must furnish a copy of such testimony, written exhibits, pleadings, records and proceedings to the claimant without cost.

After judgment on appeal to the district court, an indigent claimant, deeming himself aggrieved, may file in said court an affidavit that he does not have money, property or credit sufficient to pay for the cost of a transcript on appeal to the supreme court, and the clerk of court serve a copy by registered mail, return receipt requested, on the industrial accident board; the affidavit shall be prima facie evidence of the truth of the facts stated therein; in the event the board contest the allegations, the court shall fix a date for the hearing thereof, not less than five nor more than ten days from date of filing, and shall make its determination of the controversy, and if it be found and adjudged that the claimant does not have sufficient money, property or credit to pay for such transcript, the order shall direct the industrial accident board to furnish the same at its expense to be paid from the industrial accident administrative earmarked revenue account.

All proceedings on such appeal, including preparation, presentation and settlement of the bill of exceptions, shall be continued pending determination of the controversy.

If the board does not contest the allegations of the claimant's affidavit within ten days from receipt, it shall be deemed in default and the court shall make its order in favor of claimant on expiration of such period.



**History:** En. Sec. 20, Ch. 96, L. 1915; re-en. Sec. 2953, R. C. M. 1921; amd. Sec. 4, Ch. 139, L. 1931; amd. Sec. 3, Ch. 162, L. 1937; amd. Sec. 1, Ch. 170, L. 1959; amd. Sec. 1, Ch. 111, L. 1965.

#### **Amendment**

The 1965 amendment added the fourth, fifth and sixth paragraphs.

#### **Repealing Clause**

Section 2 of Ch. 111, Laws 1965 repealed all acts and parts of acts in conflict therewith.

### **92-829. (2955) Application for rehearing.**

#### **Court Required to Make Findings of Fact and Conclusions of Law**

While there is no rule of law requiring the district court to adopt the proposed findings and conclusions of either litigant on appeal in a workmen's compensation case, and the court may request that the litigants submit such findings, or litigants may submit them without a request by the

court, it is clear that the legislature intended that the court make findings of fact and conclusions of law in all cases on appeal. *Stokes v. Delaney & Sons, Inc.*, 143 M 516, 391 P 2d 698.

#### **References**

*Simons v. C. G. Bennett Lumber Co.*, 146 M 129, 404 P 2d 505.

### **92-830. (2956) Board may at any time diminish or increase an award.**

#### **References**

*State ex rel. Glacier General Assurance*

*Co. v. District Court*, 143 M 569, 393 P 2d 54.

### **92-833. (2959) Appeal to district court.**

#### **Jurisdiction of District Court**

District court had no jurisdiction to hear claimant's appeal from the decision of the industrial accident board when the court's seat was in neither the county of the em-

ployer's residence nor the county of the place of the accident. *State ex rel. Glacier General Assurance Co. v. District Court*, 143 M 569, 393 P 2d 54.

**92-834. (2960) How appeal taken—notice—record—trial.** Said appeal shall be taken by serving a written notice of said appeal upon the chairman of such industrial accident commission, or upon any other member thereof, which said service shall be made by the delivery of a copy of such notice to such chairman or member, and filing the original with the clerk of the court to which said appeal is taken. A copy of such notice must also be served upon the adversary party, if there be any, by mailing the same to said adversary party to such address of such party as said party shall have left with the board. If such party shall have left no address with the board, then no service upon such party shall be required. The order of filing and service of said notice is immaterial. Immediately upon service upon said board of said notice, the said board shall certify to said district court the entire record and proceedings, including all testimony and evidence taken by said board, with the clerk of said district court. Immediately upon the return of such certified record, the district court shall fix a day for the hearing of said cause, and shall cause notice to be served upon the board and upon the appellant, and also upon the adversary party, if there be any. The court may, upon the hearing, for good cause shown, permit additional evidence to be introduced, but, in the absence of such permission from the court, the cause shall be heard on the record of the board, as certified to the court by it. The trial of the matter shall be de novo, and upon such trial the court shall determine whether or not the board regularly pursued its authority, and whether or not the findings of the board ought to be sustained, and whether or not such findings are reasonable under all the circumstances of the case.

**History:** En. Sec. 22, Ch. 96, L. 1915; re-en. Sec. 2960, R. C. M. 1921; amd. Sec. 7, Ch. 149, L. 1965.

**Amendment**

The 1965 amendment made no apparent change.

**Repealing Clause**

Section 8 of Ch. 149, Laws 1965 repealed all acts and parts of acts in conflict therewith.

**Effective Date**

Section 9 of Ch. 149, Laws 1965 read "This act shall be in full force and effect from and after the 1st day of July, 1965."

**Court Required to Make Findings of Fact and Conclusions of Law**

While there is no rule of law requiring the district court to adopt the proposed findings and conclusions of either litigant on appeal in a workmen's compensation case, and the court may request that the litigants submit such findings, or litigants may submit them without a request by the court, it is clear that the legislature intended that the court make findings of fact and conclusions of law in all cases on appeal. *Stokes v. Delaney & Sons, Inc.*, 143 M 516, 391 P 2d 698.

**References**

*Simons v. C. G. Bennett Lumber Co.*, 146 M 129, 404 P 2d 505.

**92-835. (2961) Appearances—setting aside conclusions, orders, etc.**

**References**

*Stokes v. Delaney & Sons, Inc.*, 143 M 516, 391 P 2d 698.

**92-838. (2964) Court to give liberal construction to act.**

**Failure to List Children in Claim**

Where claimant failed to list all of his children in his claim for compensation it did not constitute a waiver of the claim. *Stokes v. Delaney & Sons, Inc.*, 143 M 516, 391 P 2d 698.

**References**

*State ex rel. Glacier General Assurance Co. v. District Court*, 143 M 569, 393 P 2d 54.

CHAPTER 9—COMPENSATION PLAN NO. 1

Section 92-902. Proof of solvency of employer electing plan No. 1 to be filed.

**92-902. (2971) Proof of solvency of employer electing plan No. 1 to be filed.** Every such employer now or hereafter engaged in the state of Montana, in the industries, trades, works, occupations, or employments herein mentioned, and who shall have elected to be bound by such compensation plan No. 1, shall file such proof of his solvency within the time and in such form as may be prescribed by the rules or orders of the board.

The board shall levy an assessment in the amount of not to exceed two hundredths of one per cent of the annual payroll of such employer in Montana, for the preceding fiscal year, which assessment shall be paid to the board by said employer at the time of filing of proof of solvency.

No assessment shall be in an amount less than two hundred dollars (\$200).

If such employer had no payroll in Montana for the entire preceding fiscal year, the assessment shall be based on the estimated payroll for the year in which election is made.

The treasurer of the board shall pay the amounts so collected into the state treasury.

**History:** En. Sec. 30, Ch. 96, L. 1915; re-en. Sec. 2971, R. C. M. 1921; amd. Sec. 5, Ch. 139, L. 1931; amd. Sec. 3, Ch. 176, L. 1957; amd. Sec. 169, Ch. 147, L. 1963; amd. Sec. 1, Ch. 183, L. 1965; amd. Sec. 1, Ch. 170, L. 1969.

#### Amendments

The 1965 amendment increased the minimum assessment specified in the third paragraph from \$10 to \$75.

The 1969 amendment increased the minimum assessment specified in the third paragraph from \$75 to \$200.

#### Repealing Clause

Section 2 of Ch. 183, Laws 1965 repealed all acts and parts of acts in conflict therewith.

### CHAPTER 10—COMPENSATION PLAN NO. 2

#### 92-1002. (2979) Duty of employer electing plan No. 2, etc.

##### References

Meyer v. Noble Drilling, Inc., 259 F Supp 110, 115.

#### 92-1004. (2981) Agreement to be contained in policies of insurance, etc.

##### Cross-References

Policy to provide for freedom of choice of professional practitioner, sec. 40-4108.

### CHAPTER 11—COMPENSATION PLAN NO. 3

- Section 92-1101. What necessary in electing plan No. 3—percentage of payroll to be paid under plan.
- 92-1103. Manner of electing—contract or policy of insurance—payment of premium.
- 92-1104. Classifications by board.
- 92-1105. Intent and purpose of plan No. 3.
- 92-1105.1. Advanced rate for dangerous places of employment.
- 92-1108. In case of default, rates to be advanced twenty-five per cent (25%).

#### 92-1101. (2990) What necessary in electing plan No. 3—percentage of payroll to be paid under plan.

### COMPENSATION PLAN NUMBER THREE

Every employer subject to the provisions of compensation plan No. 3 shall at the times and in the manner prescribed by the industrial accident board, pay to the industrial accident board a premium based on a percentage of his payroll as determined by the industrial accident board which shall be a member of a rating organization in accordance with the provisions of this act.

**History:** En. Sec. 40, Ch. 96, L. 1915; re-en. Sec. 2990, R. C. M. 1921; amd. Sec. 1, Ch. 123, L. 1957; amd. Sec. 175, Ch. 147, L. 1963; amd. Sec. 1, Ch. 233, L. 1969; amd. Sec. 20, Ch. 329, L. 1969.

appear to conflict, the compiler has made a composite section incorporating both amendments.

#### Compiler's Notes

This section was amended twice in 1969, once by Ch. 233 and once by Ch. 329. Neither amendatory act mentioned nor included the changes made by the other. Since the two amendments do not

#### Amendments

Chapter 233, Laws of 1969, substituted "at the times and in the manner prescribed by the industrial accident board" for "in the manner herein specified."

Chapter 329, Laws of 1969, inserted "which shall be a member of a rating organization."



**92-1103. (2991) Manner of electing—contract or policy of insurance—payment of premium.** The industrial accident board shall prescribe the procedure by which employers may elect to be bound by compensation plan No. 3, the effective time of such election and the manner in which such election is terminated for reasons other than default in payment of premiums. Every employer electing to be bound by compensation plan No. 3 shall receive from the industrial accident board a contract or policy of insurance in a form approved by the board. The premium thereon shall be paid by the employer, to the industrial accident board at such times as the board shall prescribe and shall be paid over by the board to the state treasurer to the credit of the industrial insurance account in the agency fund.

**History:** En. Sec. 40, Ch. 96, L. 1915; amd. Sec. 6, Ch. 196, L. 1921; re-en. Sec. 2991, R. C. M. 1921; amd. Sec. 2, Ch. 123, L. 1957; amd. Sec. 178, Ch. 147, L. 1963; amd. Sec. 2, Ch. 233, L. 1969.

#### **Amendments**

The 1969 amendment inserted the present first sentence.

#### **Repealing Clause**

Section 3 of Ch. 233, Laws 1969 read "Sections 92-1106 and 92-1107, R. C. M. 1947, are repealed."

#### **Cross-References**

Policy to provide for freedom of choice of professional practitioner, sec. 40-4108.

**92-1104. (2992) Classifications by board.** The industrial accident board is hereby given full power and authority to determine premium rates and classifications as in its judgment and experience, and as member of a rating organization as is otherwise provided for in this code, may be necessary or expedient, provided that no change in the classification or rates prescribed shall be effective until thirty (30) days after the date of the order making such change.

**History:** En. Sec. 40, Ch. 96, L. 1915; re-en. Sec. 2992, R. C. M. 1921; amd. Sec. 3, Ch. 123, L. 1957; amd. Sec. 21, Ch. 329, L. 1969.

a member of a rating organization as is otherwise provided for in this code."

#### **Cross-References**

Industrial accident board to be member of rating organization, sec. 40-5616.

#### **Amendments**

The 1969 amendment inserted "and as

**92-1105. (2993) Intent and purpose of plan No. 3.** It is the intent and purpose of compensation plan No. 3 that each industry, trade, occupation or employment coming under the provisions of said plan shall be liable to pay for injuries happening to employees coming under the provisions of the Workmen's Compensation Act.

All premiums, penalties, recoveries by subrogation, interest earned upon money belonging to the fund, and securities acquired by or through use of money shall be deposited in the industrial insurance account in the agency fund.

The industrial insurance program shall be neither more nor less than self-supporting. Employments affected by the provisions hereof shall be divided by the board as a member of a rating organization into classes, whose rates may be readjusted at such times as the board as a member of such rating organization may determine. Separate accounts shall be kept of the amounts collected and expended in each class for determining

rates but for payment of compensation and dividends the industrial insurance account shall be one and indivisible. The board as a member of such rating organization shall determine the hazards of the different classes of occupations or industries and fix the premiums therefor at the lowest rate consistent with maintenance of a solvent industrial insurance fund, and the creation of surplus and reserves and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of each risk, and shall take advantage of the experience and information afforded to it as a member of such rating organization.

The board in fixing rates shall provide for the expenses of administering the industrial insurance account allowed by law, the disbursements on account of injuries and deaths of employees in each class, an adequate catastrophe reserve, reserves adequate to meet anticipated and unexpected losses, and such other reserves and surplus as may be determined by the board as a member of such rating organization.

**History:** En. Sec. 40, Ch. 96, L. 1915; re-en. Sec. 2993, R. C. M. 1921; amd. Sec. 4, Ch. 123, L. 1957; amd. Sec. 176, Ch. 147, L. 1963; amd. Sec. 22, Ch. 329, L. 1969.

ed "and shall take advantage \* \* \* rating organization" to the fourth sentence; and, in the fourth paragraph, added "as a member of such rating organization."

#### Amendments

The 1969 amendment, in the second sentence of the third paragraph, inserted "as a member of a rating organization" after "board"; inserted "as a member of such rating organization" after "board" in the second and fourth sentences, and add-

#### Separability Clause

Section 23 of Ch. 329, Laws 1969 read "The provisions of this act shall be severable; and if any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void, the remainder of this act shall continue in full force and effect."

**92-1105.1. Advanced rate for dangerous places of employment.** If by reason of poor or careless management, or otherwise, any place of employment be unduly dangerous in comparison with other like places of employment, and the employer operating the same shall not have complied with the safety provisions of the Montana Safety Act, and such employer shall be under compensation plan number 3, the board, in addition to any other penalty provided, shall advance the rate upon such place of employment fifty (50) per cent, and such advanced rate shall continue and be in force until such place of employment shall have ceased to be unduly dangerous in comparison with other like places of employment and such employer shall have obtained a certificate of the board.

**History:** En. 92.1105.1 by Sec. 28, Ch. 341, L. 1969.

**92-1106, 92-1107. (2994, 2995) Repealed.**

#### Repeal

Sections 92-1106 and 92-1107 (Sec. 40, Ch. 96, L. 1915; Sec. 179, Ch. 147, L.

1963), relating to payments under compensation plan No. 3, were repealed by Sec. 3, Ch. 233, Laws 1969.

**92-1108. (2996) In case of default, rates to be advanced twenty-five per cent (25%).** Any employer who is in default in the observance of

any order of the board, issued pursuant to the provisions of sections 92-1101 to 92-1105, inclusive, shall, in addition to any other penalty provided by this act, be charged an advance of twenty-five per centum (25%) over the established rate, and such advanced rate shall continue and be in force until such employer shall have ceased to be in such default.

**History:** En. Sec. 40, Ch. 96, L. 1915;  
re-en. Sec. 2996, R. C. M. 1921; amd. Sec.  
4, Ch. 233, L. 1969.

#### **Amendments**

The 1969 amendment substituted section "92-1105" for "92-1107."

### **CHAPTER 12—SAFETY PROVISIONS**

(Repealed—Sections 6 to 8, Chapter 176, Laws of 1957; Section 30, Chapter 341, Laws of 1969)

#### **92-1201 to 92-1210. (3012 to 3021) Repealed.**

##### **Repeal**

Sections 92-1201 to 92-1210 (Secs. 50, 51, Ch. 96, L. 1915), relating to safety

provisions, were repealed by Sec. 30, Ch. 341, Laws 1969.

#### **92-1214 to 92-1222. (3025 to 3033) Repealed.**

##### **Repeal**

Sections 92-1214 to 92-1222 (Secs. 53, 54, Ch. 96, L. 1915), relating to safety

provisions, were repealed by Sec. 30, Ch. 341, Laws 1969.

### **CHAPTER 13—OCCUPATIONAL DISEASE ACT**

Section 92-1304. Occupational disease.

92-1311. Payment of compensation—exceptions and limitations.

92-1313. Notice of disability or death.

**92-1304. Occupational disease.** The following diseases only shall be termed occupational diseases.

1. Silicosis, asbestosis.

2 to 6. \* \* \* [Same as parent volume.]

**History:** En. Sec. 4, Ch. 155, L. 1959;  
amd. Sec. 1, Ch. 95, L. 1965.

#### **Repealing Clause**

Section 2 of Ch. 95, Laws 1965 repealed all acts and parts of acts in conflict therewith.

#### **Amendment**

The 1965 amendment added "asbestosis" to item 1.

**92-1311. Payment of compensation—exceptions and limitations.** A. Compensation shall be paid to every employee who becomes disabled by reason of occupational disease arising out of his employment, subject to the following conditions; and when claims are presented and notices given in accordance with the limitations of sections 92-1312 and 92-1313.

1. \* \* \* [Same as parent volume.]

2. No compensation shall be paid for a disease other than silicosis or due to ionizing radiation unless total disability results within one hundred twenty (120) days from the last day upon which the employee actually worked for the employer against whom compensation is claimed; provided that the board upon good cause shown may waive this limitation in the interest of justice, but in any case said period may not be extended



to more than one year from the date of last employment by the said employer.

3 to 5. \* \* \* [Same as parent volume.]

B. The compensation shall be paid to the beneficiary and dependents of every employee covered by this act in cases where death results from an occupational disease arising out of his employment subject to the following conditions.

1 to 3. \* \* \* [Same as parent volume.]

4. No compensation shall be paid for death from any occupational disease other than silicosis or due to ionizing radiation unless death results within one (1) year from the last day upon which the employee actually worked for the employer against whom compensation is claimed, except in those cases where death results during a period of continuous total disability from an occupational disease other than silicosis or ionizing radiation for which compensation has been paid or awarded, or for which a claim, compensable but for such death, is on file with the board. In such cases compensation shall be paid if death results within three (3) years from the last day upon which the employee actually worked for the employer against whom compensation is claimed.

5. \* \* \* [Same as parent volume.]

C. \* \* \* [Same as parent volume.]

History: En. Sec. 11, Ch. 155, L. 1959;  
amd. Sec. 1, Ch. 92, L. 1965.

#### Amendment

The 1965 amendment inserted "or due to ionizing radiation" following "silicosis" in paragraphs A 2 and B 4.

**92-1313. Notice of disability or death.** The provisions of section 92-807 shall not apply to cases of disability or death from occupational diseases as in this act defined.

Notice of disability or death in respect to which compensation is payable under this act, except disability or death resulting from silicosis, shall be given to the employer, the insurer, or the board, as the case may be, within thirty (30) days after the employee, his beneficiaries, or his dependents knew or should have known the nature of the impairment or cause of death and its relationship to the employment, but in no event, except in the case of disability or death due to ionizing radiation, shall notice be filed more than one year after the last day upon which the employee actually worked for the employer against whom compensation is claimed.

In cases of disability resulting from silicosis which are compensable under this act, notice of such disability shall be given to the employer, the insurer, or the board, as the case may be, within thirty (30) days after the employee knew or should have known of the nature of the impairment and its relationship to employment, but in no event shall such notice be filed more than four (4) years after the last date upon which the employee actually worked for the employer against whom compensation is claimed.

In cases of a death from silicosis which is compensable under this act, notice of such death shall be given to the employer, the insurer,

or the board, within thirty (30) days after the employee's beneficiaries or his dependents knew or should have known of the cause of death and its relationship to the employment, but in no event shall such notice be filed more than one (1) year after such death.

Such notice shall be valid only if filed in writing on forms to be furnished by the board, and shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the disability or death, and shall be signed by the employee or by some other person on his behalf; or in case of death by any person claiming to be entitled to compensation for such death or by some person on his behalf.

Except if death occurs during the period of total disability described in section 92-1311, B.3., in which case the period of notice may be extended to the term of seven (7) years from the last day of said employment.

**History:** En. Sec. 13, Ch. 155, L. 1959;      **Amendment**  
amd. Sec. 2, Ch. 92, L. 1965.

The 1965 amendment inserted "except in the case of disability or death due to ionizing radiation" in the second paragraph.









# REVISED CODES OF MONTANA

## VOLUME 7

### 1969 Cumulative Pocket Supplement

*Containing*

AMENDMENTS TO ACTS AND NEW LAWS ENACTED BY THE  
LEGISLATIVE ASSEMBLY SINCE PUBLICATION OF  
REPLACEMENT VOLUME 7 OF THE  
1947 REVISED CODES

AND

ANNOTATIONS SUPPLEMENTING REPLACEMENT VOLUME 7  
THROUGH VOLUME 447, PACIFIC  
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## NEW LAWS IN VOLUME 7

For index see pocket supplement to Replacement Volume 9

### ENACTED IN 1965

Attachment released if no proceedings taken in action, 93-4331.1.  
Exemptions from execution, waiver in unsecured note unenforceable, 93-5813.1.  
Judicial sales, validation, 93-5846.  
Montana Rules of Appellate Civil Procedure, Rules 1 to 43.  
Recording of judgment as notice despite defect in proceedings, 93-5710.1.

### ENACTED IN 1967

Actions relating to unincorporated associations, M. R. Civ. P., Rule 23.2.  
Derivative actions by shareholder, M. R. Civ. P., Rule 23.1.  
Directed verdict, motion for, M. R. Civ. P., Rules 50(c) and (d).  
Foreign law, determination of, M. R. Civ. P., Rule 44.1.  
Interpreter, court appointment of, M. R. Civ. P., Rule 43(f).  
Judges' retirement system, 93-1107 to 93-1132.  
Justices' courts, pleadings, 93-6802.1, 93-6802.2.  
Recording of judgment before 1967 as notice, 93-5710.2.  
Validation of judicial sales before 1967, 93-5846.

### ENACTED IN 1968

Removal to federal district court, transmittal of file, Rule 77(e).

### ENACTED IN 1969

Drawing additional jurors, 93-1512.  
Uniform Reciprocal Enforcement of Support Act, revised, 93-2601-41 to 93-2601-82.  
Validation of defective judgments or decrees affecting realty, 93-5710.3.  
Validation of judicial sales before 1969, 93-5847.

## AMENDMENTS IN VOLUME 7

Amended pleadings, relation back, M. R. Civ. P., Rule 15(c).  
Attachment, undertaking, 93-4304.  
Change of venue, M. R. Civ. P., Rule 12(b).  
Class action, M. R. Civ. P., Rule 23 generally.  
Counterclaim and cross-claim, M. R. Civ. P., Rule 13(h).  
Court reporters, 93-1906.  
Default judgment, M. R. Civ. P., Rule 55(b).  
Defenses and objections,  
    Affirmative defenses, M. R. Civ. P., Rule 86(a).  
    Consolidation, M. R. Civ. P., Rule 12(g).  
    Denials, M. R. Civ. P., Rule 8(c).  
    Pleading, M. R. Civ. P., Rule 12(b).  
    Preliminary hearings, M. R. Civ. P., Rule 12(d).  
    Waiver, M. R. Civ. P., Rule 12(h).  
Depositions, M. R. Civ. P., Rules 28(b) and (e).  
Depositions pending action, objections to admissibility, M. R. Civ. P., Rule 26(e).  
Directed verdict, motion for, M. R. Civ. P., Rules 50(a) and (b).  
Dismissal of action,  
    For failure to serve summons, M. R. Civ. P., Rule 41(e).  
    Involuntary dismissal, effect of, M. R. Civ. P., Rule 41(b).  
Disqualification of judge, 93-901.  
District court, judges' salaries, 93-303.  
Eminent domain, 93-9913.

## AMENDMENTS IN VOLUME 7 (Continued)

Findings by court, amendment of, M. R. Civ. P., Rule 52(b).  
Interrogatories to parties, M. R. Civ. P., Rule 33.  
Intervention, M. R. Civ. P., Rules 24(a) and (c).  
Joinder of claims, M. R. Civ. P., Rule 18(a).  
Joinder of persons needed for just adjudication, M. R. Civ. P., Rules 19(a), (b), (c) and (d).  
Judges' retirement system,  
    Administrative expenses, 93-1110.  
    Final salary, 93-1107.  
Jurisdiction of persons in courts, M. R. Civ. P., Rules 4 A, 4 B.  
Jurors, drawing, 93-1503.  
Juror's qualifications, 93-1301.  
Jury boxes, 93-1404.  
Justices' courts, 93-6711, 93-7712.  
New trials, M. R. Civ., P., Rules 59(d) and (e).  
Offer of judgment, M. R. Civ. P., Rule 68.  
Official record, proof of, M. R. Civ. P., Rules 44(a), (b) and (c).  
Oral depositions, M. R. Civ. P., Rule 30(f).  
Permissive joinder, M. R. Civ. P., Rule 20(a).  
Physical and mental examinations, M. R. Civ. P., Rule 35(b)(2).  
Pleadings, service of, M. R. Civ. P., Rule 5(a).  
Real party in interest, M. R. Civ. P., Rule 17(a).  
Receivers, appointment, 93-4401.  
Records as evidence, reproductions of originals, 93-801-5.  
Relief from judgment or order, M. R. Civ. P., Rule 60(b).  
Rules of Appellate Civil Procedure,  
    Costs on appeal, M. R. App. Civ. P., Rule 33(a).  
    Notice of appeal, time for filing, M. R. App. Civ. P., Rule 5.  
    Petitions for rehearing, M. R. App. Civ. P., Rule 34.  
    Scope, M. R. App. Civ. P., Rule 1(b).  
Rules of Civil Procedure,  
    Amendment procedure, M. R. Civ. P., Rule 86(a).  
    Statutes superseded, M. R. Civ. P., Rule 86(b), Tables B and C.  
Service of process, M. R. Civ. P., Rule 4 D.  
Summary judgment proceedings, M. R. Civ. P., Rule 56(c).  
Summons, form and issuance, M. R. Civ. P., Rule 4 C.



# MONTANA REVISED CODES

## TITLE 93—CIVIL PROCEDURE

- Chapter 3. District courts, 93-303.
9. Disqualification of judicial officers, 93-901.
11. Miscellaneous provisions respecting courts and judicial officers, 93-1107 to 93-1132.
13. Jurors—qualifications and exemptions, 93-1301.
14. Jurors—selection and return, 93-1404.
15. Jurors—drawing and summoning for courts of record, 93-1503, 93-1512.
19. Court reporters, 93-1906.
43. Attachment, 93-4304, 93-4331.1.
44. Receivers, 93-4401.
57. Judgment—manner of giving and entry—judgment roll and docket—lien of, 93-5708, 93-5710.1 to 93-5710.3.
58. The execution, 93-5813.1, 93-5846.
67. Justices' courts—manner of commencing actions in, 93-6711.
68. Justices' courts—pleadings in, 93-6802.1, 93-6802.2.
77. Justices' courts—general provisions, 93-7712.
80. Supreme court—appeals to, 93-8001, 93-8002, 93-8013.
99. Eminent domain, 93-9905, 93-9913.
801. Evidence—Uniform Business Records as Evidence Act—Uniform Photographic Copies of Business and Public Records as Evidence Act, 93-801-5.
2601. Uniform Reciprocal Enforcement of Support Act, 93-2601-41 to 93-2601-82.
2701. Montana Rules of Civil Procedure, Rules 4, 5(a), 6(b), 8(b), (c), 12(b), (d), (g), (h), 13(h), 15(c), 17(a), 18(a), 19(a) to (d), 20(a), 23(a) to (f), 23.1, 23.2, 24(a), (c), 26(e), 28(b), (e), 30(f), 33, 35(b), 41(b), (e), 43(f), 44(a) to (c), 44.1, 46, 47(b), 50(a) to (d), 52, 55(b) (2), 56(c), 59(a) to (f), 60(b), (c), 68, 72, 77(e), 86(a), (b), Tables B, C.
3001. Montana Rules of Appellate Civil Procedure, Rules 1 to 43, Appendix of Forms, Tables A to C.

## CHAPTER 2—SUPREME COURT

### 93-216. (8805) Powers and duties of supreme court on appeals.

#### Equity Case

In an equity case it is proper for the appellate court to pry into the factual issues of the case and the decision must hinge on factual observations unless the case is returned to the lower court for further proceedings. *Jenson v. Olson*, 144 M 224, 395 P 2d 465, 468.

The supreme court in reviewing an equity case will review the law therein and also will review the evidence to that extent necessary to ascertain whether the findings of fact by the trial court are substantially supported and sufficient to support the conclusions of law derived therefrom. *Bender v. Bender*, 144 M 470, 397 P 2d 957.

Supreme court in equity case not only

has function of reviewing law involved but also reviews evidence to extent of determining whether findings of fact by trial court are supported by substantial evidence. *White v. Nollmeyer*, 151 M 387, 443 P 2d 873.

#### Nuisance Cases

Supreme court will not hesitate to set aside lower court finding that nuisance exists where there is no substantial evidence on which to base finding. *Kasala v. Kalispell Pee Wee Baseball League*, 151 M 109, 439 P 2d 65.

#### Remand to District Court

Trial court abused discretion in dismissing action for failure of plaintiff to

prosecute case returned by supreme court to lower court for new trial where trial court failed to set trial for next jury term as per order of supreme court under statute providing that supreme court may direct new trial. *Jangula v. United States Rubber Co.*, 149 M 241, 425 P 2d 319.

#### Scope of Review

Function of supreme court on review is

to determine whether there is substantial evidence to support findings of fact and conclusions of law. *Peery v. Higgins*, — M —, 447 P 2d 481.

#### References

*Kyser v. Hiebert*, 142 M 466, 385 P 2d 90; *State ex rel. Keast v. Krieg*, 147 M 164, 410 P 2d 710.

### CHAPTER 3—DISTRICT COURTS

Section 93-303. Salaries of district judges.

**93-303. (8814) Salaries of district judges.** The annual salary of each district judge shall be nineteen thousand dollars (\$19,000).

**History:** En. Sec. 1, Ch. 176, L. 1919; re-en. Sec. 8814, R. C. M. 1921; amd. Sec. 1, Ch. 114, L. 1947; amd. Sec. 1, Ch. 84, L. 1951; amd. Sec. 1, Ch. 247, L. 1955; amd. Sec. 1, Ch. 198, L. 1959; amd. Sec. 1, Ch. 187, L. 1961; amd. Sec. 2, Ch. 212, L. 1963; amd. Sec. 2, Ch. 308, L. 1967; amd. Sec. 1, Ch. 322, L. 1969.

#### Amendments

The 1967 amendment increased from \$14,000 to \$15,000 the annual salary for district judges.

The 1969 amendment increased the annual salary from \$15,000 to \$19,000.

#### Repealing Clause

Section 3 of Ch. 308, Laws 1967 repealed all acts and parts of acts in conflict therewith.

**93-320. (8831) Process.**

#### References

*Beavers v. Rankin*, 142 M 570, 385 P 2d 640.

### CHAPTER 4—JUSTICES' AND POLICE COURTS

**93-407. (8839) Repealed.**

#### Repeal

This section (Sec. 1, p. 99, L. 1901; Sec. 1, Ch. 35, L. 1921), relating to the oath and bond of the justice of the peace, was

repealed by Sec. 10, Ch. 68, Laws 1967. For new provisions relating to bonds of county officers and employees, see sec. 6-203 et seq.

**93-410. (8842) Criminal jurisdiction.**

#### Driving While under Influence of Intoxicating Liquor

Since the offense of driving a vehicle on a highway while under the influence of intoxicating liquor in violation of sec-

tion 32-2142 is a misdemeanor, it falls within the jurisdiction of a justice of the peace under this section. *Wilson v. Brodie*, 148 M 235, 419 P 2d 306, 308.

### CHAPTER 9—DISQUALIFICATION OF JUDICIAL OFFICERS

Section 93-901. Cases in which judge may be disqualified—calling in another judge.

**93-901. (8868) Cases in which judge may be disqualified—calling in another judge.** Any justice, judge, or justice of the peace must not sit or act as such in any action or proceeding:

1. To which he is a party, or in which he is interested;

2. When he is related to either party by consanguinity or affinity within the sixth degree, computed according to the rules of law;

3. When he has been attorney or counsel for either party in the action or proceeding, or when he rendered or made the judgment, order, or decision appealed from;

4. When either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge. Such affidavit may be made by any party to an action, motion, or proceeding, personally, or by his attorney or agent, and shall be filed with the clerk of the district court in which the same may be pending.

In any judicial district having only one judge the affidavit of disqualification with reference to any action or proceeding to be tried before a jury must be filed at least one day before the day appointed or fixed by the court for setting the trial calendar; provided, however, this limitation shall not apply unless notice of such setting date shall be given to all parties by the clerk of the district court at least fifteen (15) days prior thereto. In all other cases the affidavit must be filed at least fifteen (15) days before the day appointed or fixed for the hearing or trial of any such action, motion, or proceeding (provided such party shall have had notice of the hearing of such action, motion, or proceeding for at least the period of fifteen (15) days and in case he shall not have had notice for such length of time, he shall file such affidavit immediately upon receiving such notice). Upon the filing of the affidavit, the judge as to whom said disqualification is averred shall be without authority to act further in the action, motion, or proceeding, but the provisions of this section do not apply to the arrangement of the calendar, the regulation of the order of business, the power of transferring the action or proceeding to some other court nor to the power of calling in another district judge to sit and act in such action or proceeding, providing that no judge shall so arrange the calendar as to defeat the purposes of this section. No more than two judges can be disqualified in said action or proceeding, at the instance of the plaintiff, and no more than two at the instance of the defendant, in said action or proceeding, and this limitation shall apply however many parties or persons in interest may be plaintiffs or defendants in such action or proceeding. If there be more than one judge in any judicial district in which said affidavit is made and filed, upon the first disqualification of a judge in the cause, another judge, residing in the judicial district wherein the affidavit is made and filed, must be called in to preside in such action, motion or proceeding; upon the second or any subsequent disqualification of a judge in the cause, a district judge of another judicial district of the state must be called in to preside in such action, motion, or proceeding, or the action, motion, or proceeding transferred to a district judge of another judicial district of the state; when another judge has assumed jurisdiction of an action, motion, or proceeding, the clerk of the district court in which the same was pending, shall at once notify the parties or their attorneys of record in the same, either personally or by registered mail, of the name of the judge called in, or to whom such action, motion, or proceeding was transferred. Such second or subsequent



affidavit of disqualification shall be filed with the clerk of the district court in which such action, motion or proceeding may be pending within three days after the party or his attorney of record, filing such affidavit, has received notice as to the judge assuming jurisdiction of such action, motion, or proceeding.

**History:** Ap. p. Sec. 453, p. 134, Ban-nack Stat.; re-en. Sec. 610, p. 159, Cod. Stat. 1871; re-en. Sec. 530, p. 179, L. 1877; re-en. Sec. 530, 1st Div. Rev. Stat. 1879; re-en. Sec. 547, 1st Div. Comp. Stat. 1887; amd. Sec. 180, C. Civ. Proc. 1895; amd. Ch. 3, 2nd Ex. L. 1903; re-en. Sec. 6315, Rev. C. 1907; amd. Sec. 1, Ch. 114, L. 1909; re-en. Sec. 8868, R. C. M. 1921; amd. Sec. 1, Ch. 93, L. 1927; amd. Sec. 1, Ch. 218, L. 1961; amd. Sec. 1, Ch. 82, L. 1963; amd. Sec. 1, Ch. 234, L. 1965. Cal. C. Civ. Proc. Sec. 170.

#### Amendment

The 1965 amendment deleted "by reason of the bias or prejudice of such judge" at the end of the first sentence of subdivision 4; divided subdivision 4 into two paragraphs; and made a minor change in punctuation.

#### Repealing Clause

Section 2 of Ch. 234, Laws 1965 repealed all acts and parts of acts in conflict therewith.

#### Effective Date

Section 3, of Ch. 234, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved March 8, 1965.

#### Constitutionality

The 1965 amendment of this section, deleting the words "by reason of the bias and prejudice of such judge," does not impair the constitutionality of this section, since the affidavit will still be required to state that the party has reason to believe and does believe he cannot have a fair and impartial hearing or trial before the district judge. State ex rel. Peery v. District Court, 145 M 287, 400 P 2d 648.

This section does not violate the separation of powers provision of section 1, article IV of the Montana constitution in that it does not impinge upon the existence or supremacy of the judicial system nor alter its jurisdiction or duties, but is a reasonable manner of providing a fair trial for all litigants. State ex rel. Peery v. District Court, 145 M 287, 400 P 2d 648.

#### Compelling Disqualification

Where district court judge attempted to

comply with affidavit of disqualification, but was unsuccessful in calling in a district court judge from another judicial district, and was also unsuccessful in attempting to comply with order to show cause, mandamus proceedings against him were dropped but not against a second district court judge who believed he had original jurisdiction and challenged the constitutionality of this section. State ex rel. Peery v. District Court, 145 M 287, 400 P 2d 648.

#### Custody Award

District court judge was without jurisdiction to award custody where affidavits of disqualification were filed prior to court's final disposition of various motions even though motion for new trial was pending. State ex rel. Ross v. District Court, 150 M 233, 433 P 2d 778.

#### Mandamus

Mandamus is the appropriate remedy to compel a disqualified judge to perform a mandatory duty resting upon him to call in another judge or transfer the cause to another department or court. State ex rel. Peery v. District Court, 145 M 287, 400 P 2d 648.

#### New Trial

This section should not be construed to permit disqualification of a judge pending motion for a new trial because of the provisions of Rule 59(d), M. R. Civ. P. State ex rel. Peery v. District Court, 145 M 287, 400 P 2d 648.

#### Remanded Cause

District judge should have honored affidavit of disqualification filed more than four months before day fixed for hearing where mandate of supreme court in remanding cause left it to the district court to make a determination as to the amount due the plaintiffs in the event that sum was not settled between the parties themselves. State ex rel. Gage v. District Court, 148 M 284, 419 P 2d 746, 747.

#### References

State ex rel. Wilson v. District Court, 143 M 543, 393 P 2d 39; State ex rel. McNeal v. District Court, 144 M 550, 399 P 2d 997; State ex rel. Kinman v. District Court, 146 M 74, 404 P 2d 517.

CHAPTER 11—MISCELLANEOUS PROVISIONS RESPECTING COURTS  
AND JUDICIAL OFFICERS

- Section 93-1107. Judges' retirement system—definitions.  
 93-1108. Montana judges' retirement system.  
 93-1109. Montana judges' retirement board.  
 93-1110. Administrative expenses.  
 93-1111. Payments into the Montana judges' retirement fund—investment.  
 93-1112. Rules and regulations—actuarial data.  
 93-1113. Membership.  
 93-1114. Service allowance.  
 93-1115. Payments by contributors.  
 93-1116. Contributions by the state of Montana.  
 93-1117. Vesting of proportional retirement.  
 93-1118. Retirement allowance.  
 93-1119. Disability retirement allowance.  
 93-1120. Involuntary retirement allowance.  
 93-1121. Penalty retirement allowance.  
 93-1122. Refunds in case of resignation or discharge.  
 93-1123. Payments upon death.  
 93-1124. Payments in case of death from natural cause.  
 93-1125. Monthly payments of retirement allowances.  
 93-1126. Exemption from taxes and execution.  
 93-1127. Nomination of beneficiary.  
 93-1128. Service in the armed forces of the United States.  
 93-1129. Fraud—correction of errors.  
 93-1130. Call of retired judge for duty.  
 93-1131. Optional retirement allowance.  
 93-1132. Transfer of dormant accounts to pension accumulation fund.

## 93-1101. (8877) Subsequent applications for orders refused, etc.

## References

Weinheimer v. Scott, 143 M 243, 388  
 P 2d 790.

## 93-1102. (8878) Violations of preceding section.

## Frivolous Appeal

Where attorney specified as error in his appellate brief in a second action, the same point raised in his complaint in a previous action involving the same parties,

the appeal was frivolous and damages were assessed in favor of the respondents. Weinheimer v. Scott, 143 M 243, 388 P 2d 790.

**93-1107. Judges' retirement system—definitions.** The following words and phrases as used in this act, unless a different meaning is plainly implied by the context, shall have the following meanings:

"Accumulated deductions"—the total of the amounts deducted from the salary of a contributor and paid into the fund, and standing to his credit in the fund, together with the regular interest thereon.

"Beneficiary"—shall be such person or persons having an insurable interest in his life as he shall nominate by written designation, duly acknowledged and filed with the board.

"Retired judge"—any person in receipt of a retirement allowance under this act.

"Board"—the Montana judges' retirement board.

"Penalty retirement age"—seventy (70) years of age.

"Contributor"—any person who has accumulated deductions in the fund standing to his credit.

"Final salary"—the annual salary for the office retired from as of the date of retirement.

"Actuarial equivalent"—the accumulated contributions and the present value of the member's state service based on length of service and member's attained age used to provide a life or temporary life income to the legally designated person, based on such person's attained age and sex at the time the option becomes available.

"Fund"—the Montana judges' retirement fund.

"Involuntary retirement"—a retirement not for cause and before retirement age.

"Member's annuity"—payments for life derived from contributions made by the contributor.

"Retirement allowance"—the state annuity plus the member's annuity.

"State annuity"—payments for life derived from contributions made by the state of Montana.

**History:** En. Sec. 1, Ch. 289, L. 1967; amd. Sec. 1, Ch. 218, L. 1969.

#### Compiler's Notes

Chapter 218, Laws 1969 was passed by the constitutional majority of both houses of the 41st legislative assembly over the veto of the governor.

#### Title of Act

An act relating to the judicial department of the state of Montana; providing for the retirement of district judges and justices of the supreme court, subject to thereafter being called into service for the performance of certain judicial duties under the direction of the supreme court and providing an allowance of actual expenses for such service; defining the terms used in this act; establishing a Montana judges' retirement system; creating a Montana judges' retirement board; providing for payment of the expense of administering this act, and for payments into the Montana judges' retirement fund; providing for the establishment and enforcement of rules and regulations; requiring membership in public employees' retirement system and for payments thereto by each judge not heretofore a member thereof; providing a service allowance based on length of service; requiring payments into the Montana

judges' retirement fund by deductions from members' salaries; providing for contributions by the state of Montana, and for payment into the Montana judges' retirement fund of one-quarter of fees collected by clerks of district court and by the clerk of the supreme court; specifying length of service and age requirements necessary for retirement; providing the method of computing retirement allowance; providing for a disability retirement allowance and an involuntary retirement allowance; specifying penalty retirement age and providing for a retirement allowance forfeiture; providing for payments upon death; providing for monthly payments of retirement allowances, for exemption from taxes and execution, for nomination of beneficiary, and for options available to judges entering military service; providing certain optional methods of payment of retirement allowance; providing for transfer of accounts dormant for ten (10) years; and providing a savings clause declaring the provisions of this act to be severable.

#### Amendments

The 1969 amendment rewrote the definition of "Final salary" which was formerly defined as "the annual current salary for the office retired from."

**93-1108. Montana judges' retirement system.** A retirement system is hereby established for the judges of the district court and justices of the supreme court of the state of Montana.

**History:** En. Sec. 2, Ch. 289, L. 1967.

**93-1109. Montana judges' retirement board.** There is hereby created a Montana judges' retirement board, hereinafter referred to as the "board." The board shall consist of five (5) members who shall be the same persons as those who compose the board of administration of the public employees' retirement system.

**History:** En. Sec. 3, Ch. 289, L. 1967.



**93-1110. Administrative expenses.** (1) The expense of the administration of this act, exclusive of the payment of retirement allowances and other benefits, shall be paid from the Montana judges' retirement account.

(2) Before July 15, 1970 and before July 15 of each year thereafter, the board shall compute the administrative costs for the immediately preceding fiscal year and transfer that amount from the Montana judges' retirement account to the public employees' retirement system account in the earmarked revenue fund.

**History:** En. Sec. 4, Ch. 289, L. 1967;  
amd. Sec. 1, Ch. 23, L. 1969.

#### **Amendments**

The 1969 amendment designated the former section as subsection (1), and substituted "from the Montana judges' retirement account" for "by the state of Montana, by appropriation out of the general fund, made on the basis of budgets submitted by the board" at the end and added subsection (2).

#### **Compiler's Notes**

Chapter 58, Laws 1969 transferred not in excess of \$3,000 from the Montana judges' retirement account to the public employees' retirement board for reimbursement of the general fund for cost of administering the judges' retirement fund during the fiscal biennium ending June 30, 1969.

**93-1111. Payments into the Montana judges' retirement fund—investment.** All appropriations made by the state of Montana, all contributions by members of the Montana judges, in the amount hereinafter specified, and all interest on and increase of the investments and moneys under this account shall be paid to the secretary of the public employees' retirement system board (PERS), who shall credit said payments to the Montana judges' retirement fund. Said funds may be co-mingled with funds of the PERS, but shall be earmarked as judges' retirement fund.

**History:** En. Sec. 5, Ch. 289, L. 1967.

**93-1112. Rules and regulations—actuarial data.** The board may establish such rules and regulations as it deems necessary and is charged within the limitations of this act for its proper administration, operation, and enforcement, and shall be the authority under this act for its proper administration, operation, and enforcement, and shall be the authority under this act as to the conditions under which persons may be admitted to and continue to receive benefits under the retirement system. It shall keep such data as shall be necessary for actuarial valuation purposes. It shall cause to be made periodic actuarial investigations into the mortality and service experience of the contributors to and the beneficiaries of the fund, and shall adopt for the retirement system one or more mortality tables.

**History:** En. Sec. 6, Ch. 289, L. 1967.

**93-1113. Membership.** (a) Any judge or justice, who has, previous to the adoption of this act, been a member of the PERS, may elect to remain under that system; such election to be made in writing to the PERS board within three (3) months after the effective date of this act.

(b) Every judge or justice who was in service in either a district court or a supreme court of the state of Montana, prior to July 1, 1967, shall have the option and he may elect to make back payments to the date when he first entered the service of the judiciary. Such back payments may be spread over a period of five (5) years by having the regular payroll deduction of the contributor increased in an amount equal to the total of his back payments divided by sixty (60), which deduction increase shall be credited to such back payments owing, and shall be continued until the full amount of such back payments shall have been completed. Any such deduction increase may be anticipated in part or in full by the contributor at any time and must be anticipated in full at the time of retirement before a retirement allowance is granted, and if not so anticipated and paid in full then a member's retirement allowance shall be calculated for the total years and months on which contributions have been made in accordance with section 12 [93-1118] of this act. Every contributor who shall elect to make such back payments shall receive full credit under this act for all contributions made into the fund and for all service credits to which he might thereby be entitled.

**History:** En. Sec. 7, Ch. 289, L. 1967.

**93-1114. Service allowance.** In computing the length of service of a contributor for retirement purposes, full credit shall be given to each contributor for each year of service rendered to the judiciary including service rendered prior to July 1, 1967, upon complying with the provisions of this act. As soon as practicable, the retirement board shall issue to each original member a certificate certifying the aggregate length of his service prior to July 1, 1967. Such certificate shall be final and conclusive as to his prior service unless thereafter modified by the board upon application of the contributor.

**History:** En. Sec. 8, Ch. 289, L. 1967.

**93-1115. Payments by contributors.** Every member shall be required to contribute into the fund a sum equal to six per cent (6%) of his monthly salary, which sum shall be deducted from his salary and credited to his account in the fund.

**History:** En. Sec. 9, Ch. 289, L. 1967.

**93-1116. Contributions by the state of Montana.** The state of Montana shall monthly contribute to the fund a sum equal to six per cent (6%) of the salary of each member of the Montana judiciary retirement system. In addition to the above, three-quarters ( $\frac{3}{4}$ ) of the fees collected under section 25-232, as amended, and section 25-233, as amended, shall be paid into the county treasurer on the first Monday of each month as provided in section 25-203, and the other one-quarter shall be transmitted by the clerk to the secretary of the PERS board on the first Monday of each month, and by him credited to the judicial retirement fund. The fees collected under section 82-503, as amended, shall be by the clerk of the supreme court paid by him, three-quarters ( $\frac{3}{4}$ ) into the state treasury to be credited to the general fund, and one-quarter ( $\frac{1}{4}$ ) of which shall

be paid by him to the secretary of the PERS board, which shall be credited to the credit of the judicial retirement fund. The full amount of such fund as created and accumulated is hereby set aside to be used exclusively for the purpose of paying the accrued retirement and expenses provided for herein.

**History:** En. Sec. 10, Ch. 289, L. 1967.

**93-1117. Vesting of proportional retirement.** Any member who has completed at least five (5) years or more service, and has reached the age of sixty-five (65), may retire and receive the proportional retirement allowances provided in section 12 [93-1118].

**History:** En. Sec. 11, Ch. 289, L. 1967.

**93-1118. Retirement allowance.** Upon retirement from service a member shall receive a service retirement allowance which shall consist of the state annuity plus the member's annuity. The member's annuity shall be the actuarial equivalent of his aggregate contributions at the time of retirement and the state annuity shall be in an amount which, when added to the member's annuity, will provide a total retirement allowance of three and one-third per cent ( $3\frac{1}{3}\%$ ) per year of his final salary for the first fifteen (15) years' service, and one per cent (1%) per year for each year's service thereafter.

**History:** En. Sec. 12, Ch. 289, L. 1967.

**93-1119. Disability retirement allowance.** In case of the total disability of a contributor, permanent in character, regardless of length of service of the contributor, a disability retirement allowance shall be granted the contributor in an amount calculated on the actuarial equivalent of the member's annuity and the state annuity standing to his credit at the time of his disability retirement; provided, that if such total disability is a direct result of any service to the Montana judiciary in line of duty, then such judge or justice who is totally and permanently disabled shall be retired on total retirement allowance of a minimum of one-half ( $\frac{1}{2}$ ) of his final salary or the allowance provided in section 12 [93-1118], whichever is greater. In the event of any disability not caused in the line of duty after attaining the age of sixty (60) years, the maximum monthly payment shall be the retirement allowance as provided in section 12 [93-1118].

**History:** En. Sec. 13, Ch. 289, L. 1967.

**93-1120. Involuntary retirement allowance.** Should a contributor be discontinued from service, not voluntarily, after having completed five (5) years of total service, but before reaching retirement age, he shall, upon filing of application in the manner herein provided for retirement, be paid as he may elect as follows:

(a) the full amount of accumulated deductions standing to his credit; or

(b) a member's annuity of equivalent actuarial value to his accumulated deductions standing to his credit, plus the actuarial equivalent of a state



annuity having a value equal to the present value of a state annuity then standing to his credit.

**History:** En. Sec. 14, Ch. 289, L. 1967.

**93-1121. Penalty retirement allowance.** Any judge or justice who becomes eligible for retirement hereunder, but fails to make application therefor, prior to his attaining the age of seventy (70) years, shall automatically waive all retirement benefits, and shall receive a return of only such moneys equal to the accumulated deduction contributed by him; save and except that any judge or justice, who is over the age of seventy (70) years, at the time of the effective date of this act, or who shall attain such age before the expiration of his term, shall be permitted to serve out the balance of his existing term, without forfeiting said retirement. At the termination of the said existing term, if such member has failed to make application for retirement under this act, he shall automatically waive all retirement benefits hereunder, and shall receive a return of only such moneys equal to the accumulated deduction contributed by him.

**History:** En. Sec. 15, Ch. 289, L. 1967.

**Compiler's Notes**

This act became effective July 1, 1967.

**93-1122. Refunds in case of resignation or discharge.** Where a contributor resigns of his own volition, or is discharged for cause before becoming entitled to a retirement allowance, then the deductions standing to his credit shall be paid to him.

**History:** En. Sec. 16, Ch. 289, L. 1967.

**93-1123. Payments upon death.** If the board shall find that a contributor died as a direct and proximate result of injury received in the course of his employment, a retirement allowance shall be paid to his beneficiary. Such retirement allowance shall consist of:

(a) a member's annuity which shall be the actuarial equivalent of the contributor's accumulated deductions standing to his credit; and

(b) the actuarial equivalent of a state annuity which when added to the member's annuity will provide a total annuity equal to the allowance provided for in section 12 [93-1118].

**History:** En. Sec. 17, Ch. 289, L. 1967.

**93-1124. Payments in case of death from natural cause.** (a) If the retired judge or justice dies before receiving in payments the present value of his member's annuity and the state annuity as it was at the time of his retirement, the balance shall be paid to his beneficiary.

(b) If a member dies before reaching retirement age, his beneficiary shall be entitled to the actuarial equivalent of the options as provided in section 14 [93-1120].

**History:** En. Sec. 18, Ch. 289, L. 1967.

**93-1125. Monthly payments of retirement allowances.** The retirement allowances granted under the provisions of this act shall be paid in equal monthly installments and shall not be increased, decreased, revoked or

repealed unless by act of the legislative assembly of the state of Montana. No retirement allowances can be approved by the board while the member is drawing full compensation as a judge or justice.

**History:** En. Sec. 19, Ch. 289, L. 1967.

**93-1126. Exemption from taxes and execution.** Any money received or to be paid as a member's annuity, state annuity or return of deductions or the right of any of these, shall be exempt from any state or municipal tax and from levy, sale, garnishment, attachment or any other process whatsoever and shall be unassignable.

**History:** En. Sec. 20, Ch. 289, L. 1967.

**93-1127. Nomination of beneficiary.** Every contributor shall have the authority to name his beneficiary by written designation duly acknowledged and filed with the board.

**History:** En. Sec. 21, Ch. 289, L. 1967.

**93-1128. Service in the armed forces of the United States.** Any member of the Montana judiciary now in or hereafter inducted into the armed forces of the United States, shall have the option:

(a) to continue his payments into the fund; or

(b) allow the board to make his payments for him during such military service, in which event he shall repay the fund the full amount of such payments upon his return to the Montana judiciary, and such repayments must be made within two (2) years after his return to the judiciary provided that a member's service in the armed forces of the United States shall be credited to and made a part of the member's service allowance.

**History:** En. Sec. 22, Ch. 289, L. 1967.

**93-1129. Fraud—correction of errors.** (a) No person shall knowingly make any false statement, or shall falsify or permit to be falsified any record or records of the retirement system herein established in any attempt to defraud such system.

(b) Should any such change in records fraudulently made or any mistake in records inadvertently made result in any contributor or beneficiary receiving more or less than he would have been entitled to had the records been correct, then, on the discovery of such error, the board shall correct such error and shall adjust the payments which shall be made to the contributor or annuitant in such manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid.

Any person violating any of the provisions of subsection (a) of this section shall be guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine not exceeding one thousand dollars (\$1,000) or suffer imprisonment not exceeding one (1) year, or both, in the discretion of the court.

**History:** En. Sec. 23, Ch. 289, L. 1967.

**93-1130. Call of retired judge for duty.** Every judge or justice receiving retirement pay under the provisions of this act, shall, if physically

and mentally able, be subject to call by the supreme court or the chief justice thereof to aid and assist the supreme court or any district court under such directions as the supreme court may give, including the examination of the facts and cases before the court, the examination of authorities cited and the preparation of opinions for and on behalf of the court, which opinions, when and if and to the extent approved by the court, may by the court be ordered to constitute the opinion of such court and such court and such retired judge or justice may, subject to any rule which the supreme court may adopt, perform any and all duties preliminary to the final disposition of cases in so far as not inconsistent with the constitution of the state. Such retired judge or justice when called to service as herein provided shall be reimbursed for his actual expenses, if any, in responding to such call.

**History:** En. Sec. 24, Ch. 289, L. 1967.

**93-1131. Optional retirement allowance.** Until the first payment on account of any retirement allowance is made and subject to the conditions that, if he die after retirement and within thirty (30) days from the date upon which his election or changed election is received at the office of the retirement board, then said election is void and of no effect, and the death shall be considered as that of a member before retirement. A member or a beneficiary may elect, or revoke or change a previous election prior to the approval of the previous election to receive the actuarial equivalent of his retirement allowance as of the date of retirement, in a lesser retirement, allowance, payable throughout life with one of the following options:

Option 1. Upon his death, his lesser retirement allowance shall be continued throughout the life of and paid to such person, having an insurable interest in his life, as he nominates by written designation duly executed and filed with the board at the time of his retirement.

Option 2. Upon his death, one-half ( $\frac{1}{2}$ ) of his lesser retirement allowance shall be continued throughout the life of and paid to such person, having an insurable interest in his life, as he nominates by written designation duly executed and filed with the board at the time of his retirement.

Option 3. Such other benefit or benefits shall be paid, either to the beneficiary or to such other person or persons as he nominates, as, together with such lesser retirement allowance, are the actuarial equivalent of his retirement allowance, and shall be approved by the board.

**History:** En. Sec. 25, Ch. 289, L. 1967.

**93-1132. Transfer of dormant accounts to pension accumulation fund.** The board may in its discretion transfer the savings account of a member to the pension accumulation fund if the account has been dormant for a period of ten (10) years, provided that no right of the member shall be jeopardized by such transfer and the savings account shall be transferred to the member's name upon subsequent re-entry to membership.

**History:** En. Sec. 27, Ch. 289, L. 1967.

#### **Separability Clause**

Section 26 of Ch. 289, Laws 1967 read

"The provisions of this act are severable, and, if any of its provisions shall be held to be unconstitutional, the decision of the court shall not affect or impair any of



the remaining provisions. It is hereby declared to be the legislative intent that this act would have been adopted had such

unconstitutional provisions not been included herein."

## CHAPTER 12—JURIES—DIFFERENT KINDS DEFINED

### 93-1206. (8888) Juries in justices' courts.

#### Cross-References

Formation of criminal trial jury in justice or police court, sec. 95-2005.

Trial of criminal cases in justice and police courts, sec. 95-2004.

## CHAPTER 13—JURORS—QUALIFICATIONS AND EXEMPTIONS

### Section 93-1301. Who competent to act as juror.

93-1301. (8890) Who competent to act as juror. A person is competent to act as a juror if:

1. A citizen of the United States of the age of twenty-one years, who shall have been a resident of the state one year, and of the county ninety days before being selected and returned.

2 to 4. \* \* \* [Same as parent volume.]

**History:** Earlier statutes were Sec. 8, p. 506, Cod. Stat. 1871; amd. Sec. 1, p. 70, L. 1873; re-en. Sec. 780, 5th Div. Rev. Stat. 1879; amd. Sec. 1, p. 57, L. 1881; re-en. Sec. 1304, 5th Div. Comp. Stat. 1887; re-en. Sec. 230, C. Civ. Proc. 1895; re-en. Sec. 6337, Rev. C. 1907; re-en. Sec. 8890, R. C. M. 1921; amd. Sec. 6, Ch. 203, L. 1939; amd. Sec. 1, Ch. 116, L. 1965. Cal. C. Civ. Proc. Sec. 198.

#### Amendment

The 1965 amendment deleted "and not more than seventy" after "age of twenty-one" in paragraph 1.

#### Repealing Clause

Section 2 of Ch. 116, Laws 1965 repealed all acts and parts of acts in conflict therewith.

## CHAPTER 14—JURORS—SELECTION AND RETURN

### Section 93-1404. Duty of clerk—jury boxes.

93-1404. (8899) Duty of clerk—jury boxes. The clerk shall prepare and keep a jury box and contents as follows: The number of each juror shall be written, typed or stamped on paper or other suitable material, identical in all respects, and placed in a box of ample size to permit said numbers to be thoroughly mixed, and which said box shall be kept for that purpose and shall be known as, and plainly marked, "jury box No. 1." The numbers may be used as often as necessary; provided, however, none shall be used which is in any manner whatsoever defaced or disfigured, or so marked that it may be recognized or distinguished from the others in said jury box No. 1 except by the number thereon. There shall be so enclosed in said box one number, and only one number, corresponding to the number before the name of each juror on the jury list.

**History:** En. Sec. 243, C. Civ. Proc. 1895; re-en. Sec. 6345, Rev. C. 1907; amd. Sec. 1, Ch. 35, L. 1919; re-en. Sec. 8899, R. C. M. 1921; amd. Sec. 2, Ch. 168, L. 1957; amd. Sec. 1, Ch. 110, L. 1969. Cal. C. Civ. Proc. Sec. 209.

#### Amendment

The 1969 amendment deleted "and enclosed in separate black capsules" after "suitable material"; substituted references to "numbers" for references to "capsules"

wherever appearing; and, in the last sentence, substituted "number before the name of each juror" for "corresponding to the name of each juror."

### DECISIONS UNDER FORMER LAW

#### Color of Capsules

Identical opaque capsules, though not black as formerly required by statute, were not such deviation as to constitute material departure from provisions of statute since the price of black capsules was approximately five times that of other avail-

able capsules, and hence an additional burden on taxpayer, and since no unfairness in selection of jurors would result from using another opaque colored capsule. In re Jury Box Capsules, — M —, 447 P 2d 687.

## CHAPTER 15—JURORS—DRAWING AND SUMMONING FOR COURTS OF RECORD

Section 93-1503. Drawing—how conducted.

93-1512. Drawing additional jurors when original number insufficient—order designating number needed—selection from portion of county only—notification of jurors.

**93-1503. (8904) Drawing — how conducted.** 1. The clerk must place said box on a rod so that the same may readily revolve and said box must be revolved a sufficient number of times so as to ensure that the numbered slips in said box shall become thoroughly mixed, and thereafter the judge must draw from said box one (1) at a time, as many of the numbered slips as are ordered by the court.

2 and 3. \* \* \* [Same as parent volume.]

4. No person shall be asked to serve on more than one term during any year unless all the numbers in jury box No. 1 have been drawn and there are no other qualified jurors available.

**History:** En. Sec. 262, C. Civ. Proc. 1895; re-en. Sec. 6350, Rev. C. 1907; amd. Sec. 2, Ch. 35, L. 1919; re-en. Sec. 8904, R. C. M. 1921; amd. Sec. 1, Ch. 148, L. 1933; amd. Sec. 2, Ch. 151, L. 1937; amd. Sec. 2, Ch. 3, L. 1939; amd. Sec. 4, Ch. 168, L. 1957; amd. Sec. 2, Ch. 110, L. 1969. Cal. C. Civ. Proc. Sec. 219.

#### Amendments

The 1969 amendment, in subsection (1), twice substituted "numbered slips" for "capsules," the latter referring to separate black capsules containing each juror's number; substituted "the" for "such" before the last reference to "numbered slips"; and added subsection (4).

**93-1504 to 93-1506. (8905 to 8907) Repealed.**

#### Repeal

Sections 93-1504 to 93-1506 (Secs. 263 to 265, C. Civ. Proc. 1895; Secs. 3 to 5, Ch. 35, L. 1919; Sec. 2, Ch. 148, L. 1933;

Secs. 5 to 7, Ch. 168, L. 1957), relating to the drawing of jurors from jury boxes Nos. 2 and 3, were repealed by Sec. 4, Ch. 110, Laws 1969.

**93-1510, 93-1511. (8911, 8912) Repealed.**

#### Repeal

Sections 93-1510 and 93-1511 (Secs. 281, 282, C. Civ. Proc. 1895; Secs. 8, 9,

Ch. 168, L. 1957), relating to the drawing and summoning of jurors, were repealed by Sec. 4, Ch. 110, Laws 1969.

**93-1512. Drawing additional jurors when original number insufficient—order designating number needed—selection from portion of county only—notification of jurors.** Whenever it appears to a district judge that additional jurors will be needed for any term or trial the judge shall draw as many numbers from jury box No. 1 as are necessary to secure the required number of additional jurors. Before drawing the numbers the judge shall by appropriate order designate the number of

jurors needed, and, when the judge believes that securing the additional jurors from all of the county would cause unnecessary delay or expense then he may order the jurors selected from only a designated portion of the county, which portion shall never be less than the corporate limits of the county seat. If, in the selection of the additional jurors, a number is drawn and the jury list shows the person represented by the number to be a resident of an area outside the area designated by the court order then that number shall be returned to the jury box and a new number drawn. When the required number of names have been selected the judge may order the prospective jurors notified by telephone by the clerk of the court or he may order them summoned by the sheriff either by certified mail or by personal service.

**History:** En. Sec. 3, Ch. 110, L. 1969.

#### **Title of Act**

An act amending sections 93-1404 and 93-1503, R. C. M. 1947, to provide for a change in the method of drawing jurors and to eliminate the jury boxes numbered two and three and to provide for a change in the method of notifying jurors; repeal-

ing sections 93-1504, 93-1505, 93-1506, 93-1510 and 93-1511, R. C. M. 1947.

#### **Repealing Clause**

Section 4 of Ch. 110, Laws 1969 read "Sections 93-1504, 93-1505, 93-1506, 93-1510, and 93-1511, R. C. M. 1947, are repealed."

## **CHAPTER 19—COURT REPORTERS**

Section 93-1906. Salary and expenses of reporter—apportionment.

### **93-1903. (8930) Matters written out and filed.**

#### **Compiler's Notes**

Section 93-5505, referred to in this sec-

tion in the parent volume, was superseded by M. R. App. Civ. P., Rules 9, 10, and 25.

**93-1906. (8933) Salary and expenses of reporter — apportionment.** Every reporter appointed under the provisions of this chapter receives an annual salary of nine thousand two hundred dollars (\$9,200) and no other compensation except as provided in section 93-1904, provided, however, that all transcripts and bills of exceptions required by the county shall be furnished without cost, payable in monthly installments out of the general funds of the counties comprising the district for which he is appointed, according and in proportion to the number of civil and criminal actions entered and commenced in the district courts of such counties respectively in the preceding year; and it shall be the duty of the judge of such district, on the first day of January of each year, or as soon thereafter as may be, to apportion the amount of such salary to be paid by each county in his district on the basis aforesaid. The reporter is allowed, in addition to the salary and fees above provided, in judicial districts comprising more than one (1) county, his actual and necessary expenses of transportation and living when he goes on official business to a county of his judicial district other than the county in which he resides, from the time he leaves his place of residence until he returns thereto, said expenses to be apportioned and payable in the same way as the salary.

**History:** En. Sec. 375, C. Civ. Proc. 1895; re-en. Sec. 6378, Rev. C. 1907; amd. Sec. 1, Ch. 80, L. 1909; re-en. Sec. 8933,

R. C. M. 1921; amd. Sec. 1, Ch. 36, L. 1927; amd. Sec. 1, Ch. 73, L. 1945; amd. Sec. 1, Ch. 49, L. 1951; amd. Sec. 1, Ch.



125, L. 1953; amd. Sec. 1, Ch. 76, L. 1955; amd. Sec. 6, Ch. 22, L. 1961; amd. Sec. 1, Ch. 114, L. 1965; amd. Sec. 1, Ch. 221, L. 1967; amd. Sec. 1, Ch. 192, L. 1969. Cal. C. Civ. Proc. Secs. 271 and 274.

#### **Amendments**

The 1965 amendment increased the sal-

ary set forth near the beginning of the section from \$6,600 to \$7,800.

The 1967 amendment increased the annual salaries of court reporters from \$7,800 to \$8,800.

The 1969 amendment increased annual salaries of court reporters from \$8,800 to \$9,200.

## **CHAPTER 20—ATTORNEYS—QUALIFICATIONS—ADMISSION—LICENSE AND DISBARMENT**

### **93-2026. (8961) Disbarment of attorneys—causes—jurisdiction.**

#### **Misappropriation**

The conduct of an attorney in opening a checking account in the name of an estate of which he had been appointed

executor and making withdrawals for his personal use constituted deceit and malpractice involving moral turpitude. In re O'Donnell, 143 M 51, 387 P 2d 303.

## **CHAPTER 21—ATTORNEYS—DUTIES—LIABILITIES AND COMPENSATION**

### **93-2102. (8975) Change of attorney.**

#### **Death of Client**

Attorney was authorized to represent deceased client for whom there was filed a praecipe signed by counsel indicating withdrawal of previous counsel and re-

questing entry of name of new attorney for deceased even though signed and filed by counsel after death of client. State ex rel. Ross v. District Court, Fourth Judicial Dist., 150 M 233, 433 P 2d 778.

### **93-2106. (8979) Punishment for willful delay.**

#### **Actual Damages**

Under this section, only actual damages may be trebled, not the statutory interest due. Daniels v. Paddock, 145 M 207, 399 P 2d 740.

#### **Fiduciary Duty**

Where attorney paid off client's mort-

gage with stipulation to receive client's inheritance when it came due, failure to give money to client under transaction, which was a breach of attorney's fiduciary duty, subjected attorney to treble damages. Daniels v. Paddock, 145 M 207, 399 P 2d 740.

### **93-2120. (8993) Lien for compensation.**

#### **Unemployment Compensation Cases**

This section being in conflict with sections 87-142 and 87-143, relating to unemployment compensation claims, the latter sections, being more specific, should control over this section, which is more general, especially where, in light of the services rendered, the attorney's fees could be considered "necessaries" under section 87-143. McAlear v. Unemploy-

ment Compensation Commission, 145 M 458, 405 P 2d 219.

#### **Waiver of Lien**

Failure of attorney to deduct expenses incurred in obtaining award in case and his expressed intention that he would collect expenses from future settlements constituted waiver of his lien for expenses. Gross v. Holzworth, 151 M 179, 440 P 2d 765.

## **CHAPTER 25—LIMITATION OF ACTIONS FOR RECOVERY OF REAL PROPERTY**

### **93-2504. (9015) Seizin within five years, etc.**

#### **Public Highway**

Public highway was established by prescription on evidence that members of public had used road openly for more than fifty years without ever having obtained permission from owners, that previous

owner had considered road a public highway, that road had been maintained by county for some 24 years and that public had never been denied use of road. Kostbade v. Metier, 150 M 139, 432 P 2d 382.

**93-2507. (9018) Possession—when presumed, etc.****Public Highway**

Where county adversely paved and maintained a highway over the land of a private party for a period of more than ten years, such county acquired an easement by prescription over the land even

though the private owner was assessed for and paid taxes on the property during the running of the statutory period. *Brannon v. Lewis and Clark County*, 143 M 200, 387 P 2d 706.

**93-2508. (9019) Occupation under written instrument or judgment, etc.****References**

*Rhodes v. Weigand*, 145 M 542, 402 P 2d 588.

**93-2511. (9022) What constitutes adverse possession, etc.****Conflicting Evidence**

Finding of district court that adverse possession was not established was affirmed, in light of record disclosing conflicting testimony on question of existence

and upkeep of fences and conflicting testimony on question whether and who ran livestock on property during the prescriptive period. *Johnson v. Silver Bow County*, 151 M 283, 443 P 2d 6.

**93-2513. (9024) Occupancy and payment of taxes necessary, etc.****Burden of Proof**

The burden of proving all the essential elements of adverse possession is upon the party alleging it and he must prove that no taxes were levied or assessed against the land or that he has paid all taxes which were levied thereon. *Townsend v. Koukol*, 148 M 1, 416 P 2d 532, 536.

*Brannon v. Lewis and Clark County*, 143 M 200, 387 P 2d 706.

**Essential Elements**

To constitute adverse possession, the possession must be actual, feasible, exclusive, hostile and continuous for the full period of years and the party asserting adverse possession must have paid all the taxes levied and assessed upon the property during the statutory period. *Townsend v. Koukol*, 148 M 1, 146 P 2d 532, 535, 536.

**Easement**

Where the county maintained and paved a highway over the land of a private party for a period of more than ten years, such county acquired an easement by prescription over the land and it was not necessary that the county pay taxes on the property during the statutory period.

**References**

*Rhodes v. Weigand*, 145 M 542, 402 P 2d 588.

**CHAPTER 26—LIMITATION OF OTHER ACTIONS****93-2603. (9029) Within eight years.****Nonparticipating Oil Royalty**

Where wife agreed to property settlement granting her a percentage of royalties should oil ever be found on land, such right did not vest until oil production

began and her action for royalties was not barred by the fact that it had been more than eight years since execution of the settlement. *Close v. Ruegsegger's Estate*, 143 M 32, 386 P 2d 739.

**93-2604. (9030) Within five years.****Damage to Building from Broken Water Pipes**

This section did not apply to action by owners of apartment building against realtors for water damages to building from bursting of water pipes due to alleged negligence of realtors in caring for the building. The claim was barred by statute of limitations relating to injury to

or waste or trespass on property, section 93-2607. *Quitmeyer v. Theroux*, 144 M 302, 395 P 2d 965, 969, 970. (Dissenting opinion, 144 M 302, 395 P 2d 965, 971.)

**References**

*Hager v. Tandy*, 146 M 531, 410 P 2d 447.

**93-2605. (9031) Within three years.****Malpractice**

Where sponge had been left in patient's body in operation performed ten years previously, patient's cause of action for malpractice did not accrue until patient learned that such foreign object was in

his body. *Johnson v. St. Patrick's Hospital*, 148 M 469, 417 P 2d 469, 473.

**References**

*Rhodes v. Weigand*, 145 M 542, 402 P 2d 588.

**93-2607. (9033) Two-year limitation.****Claim and Delivery**

In an action for claim and delivery, where possession by the defendant is rightful, the statute of limitations begins to run when the defendant refuses upon demand to return the property. *Interstate Mfg. Co. v. Interstate Products Co.*, 146 M 449, 408 P 2d 478.

**Damage by Fire**

Two-year statute of limitations under this section barred suit brought by the United States under section 82-1237 for damage to property caused by alleged negligence of defendants in setting forest fire. *United States v. Eytcheson*, 237 F Supp 371.

**Damage to Building from Broken Water Pipes**

Claim of owners of an apartment building against realtors for water damage to building from bursting of water pipes due to alleged negligence of realtors in caring for the building was barred by this section. Statute of limitations concerning implied contracts, section 93-2604, was inapplicable. *Quitmeyer v. Theroux*, 144 M 302, 395 P 2d 965, 969, 970. (Dissenting opinion, 144 M 302, 395 P 2d 965, 971.)

**Fraud and Mistake**

An action by administrator of estate of deceased against surviving partners to recover assets which had been transferred by deceased during his last illness was timely filed on July 25, 1960 where fraud was not discovered until December 1, 1958. *Marshall v. Minschmidt*, 148 M 263, 419 P 2d 486, 491.

Action to rescind contract for sale of real estate was barred when not brought within two years after discovery of fraud by all parties concerned. *Rock v. Birdwell*, 149 M 449, 429 P 2d 634.

Quiet title action based on husband's fraud of wife's community property and instituted within two years of discovery of facts constituting fraud was timely even though brought as counterclaim. *Rozan v. Rosen*, 150 M 121, 431 P 2d 870.

**Injury to Personal Property**

An action by an adoptive father and natural grandfather under section 93-2809 is an action for an injury to a pecuniary interest of the parent, therefore one for an injury to a property right which must be commenced within two years from the date the claim arose under subdivision 2 of this section. *LaTray v. Mannix Electric Co.*, 148 M 303, 419 P 2d 744, 745.

**Negligent Misrepresentation**

Action for negligent misrepresentation is action for fraud within meaning of statute and is subject to two-year statute of limitations which begins to run when plaintiff acquires knowledge of facts constituting negligent misrepresentation. *Falls Sand & Gravel Co. v. Western Concrete, Inc.*, 270 F Supp 495.

**Statutory Liability**

The cause of action based on a railroad's statutory duty to maintain a cement drop, siphon and wooden flume on its right of way did not accrue on the taking of the right of way nor on the abandonment of the right of way and notice to water rights owners that it would no longer maintain the works, but rather would accrue only after injury occurred from the railroad's failure to maintain the works. *Harrer v. Northern Pacific Ry. Co.*, 147 M 130, 410 P 2d 713.

**References**

*Rhodes v. Weigand*, 145 M 542, 402 P 2d 588; *Hager v. Tandy*, 146 M 531, 410 P 2d 447.

**93-2613. (9041) Actions for relief not hereinbefore provided for.****References**

*Rhodes v. Weigand*, 145 M 542, 402 P 2d 588.



CHAPTER 27—TIME OF COMMENCEMENT OF ACTIONS—  
GENERAL PROVISIONS CONCERNING

## 93-2708. (9054) Provision where judgment has been reversed.

**Dismissal of Counterclaim**

Quiet title action based on husband's fraud of wife's community property instituted as counterclaim and timely brought under statute of limitations but dismissed

on husband's motion may be properly instituted as principal action within one year after involuntary dismissal. *Rozan v. Rosen*, 150 M 121, 431 P 2d 870.

## CHAPTER 28—PARTIES TO CIVIL ACTIONS

## 93-2809. (9075) Parent or guardian may sue for injury, etc.

**Limitation of Actions**

An action by an adoptive father and natural grandfather under this section is an action for an injury to a pecuniary interest of the parent, therefore one for an injury to a property right which must be commenced within two years from the date the claim arose under section 93-2607(2). *LaTray v. Mannix Electric Co.*, 148 M 303, 419 P 2d 744, 745.

**Mother Bringing Action**

Decedent's mother was real party in interest in wrongful death action where decedent left no surviving wife nor children and his father was dead. *Cowan v. Pacific Gamble Robinson Co.*, 232 F Supp 403, 405.

## 93-2810. (9067) When representative may sue for death, etc.

**References**

*Stiles v. Gove*, 345 F 2d 991, 992.

## 93-2823. (9085) Tenants in common, etc., may sever in bringing, etc.

**Assignor Bringing Action**

Assignee of one-half interest of an overriding royalty agreement with plaintiff-assignor and defendant could not be joined as a party plaintiff in a suit to

compel defendant to pay the other half interest to plaintiff whether assignor was a trustee for the assignee or they were tenants in common. *Lowe & Lynn v. Flank Oil Co.*, 144 M 499, 398 P 2d 608.

## 93-2824. (9086) Action—when not to abate by death, marriage, etc.

**Personal Injuries Action**

Suit for personal injuries filed by decedent prior to his death survived in favor of administratrix of his estate. *Pickett v. Kyger*, 151 M 87, 439 P 2d 57.

**Wrongful Death Action**

Decedent's mother was real party in interest in wrongful death action where decedent left no surviving wife nor children and his father was dead. *Cowan v. Pacific Gamble Robinson Co.*, 232 F Supp 403, 405.

## CHAPTER 29—PLACE OF TRIAL OF CIVIL ACTIONS

## 93-2901. (9093) Certain actions to be tried where the subject, etc.

**References**

*Beavers v. Rankin*, 142 M 570, 385 P 2d 640; *Tassie v. Continental Oil Co.*,

228 F Supp 807, 808; *Hidden Hollow Ranch v. Collins*, 146 M 321, 406 P 2d 365.

## 93-2902. (9094) Other actions—where the cause, etc.

**References**

*Hidden Hollow Ranch v. Collins*, 146 M 321, 406 P 2d 365.

**93-2903. (9595) Place of trial of actions against counties.****Action by County against Nonresident**

This section does not require a change of venue where a county brings action against a nonresident in the district court

of that county. *Carter County v. Cambrian Corp.*, 143 M 193, 387 P 2d 904.

**References**

*Tassie v. Continental Oil Co.*, 228 F Supp 807, 808.

**93-2904. (9096) Other actions, according to the residence, etc.****Burden of Proof**

In contract action, once defendant showed that his place of residence was other than where suit was brought, the burden of proof was on the plaintiff to meet the motion for change of venue. *Rapp v. Graham*, 145 M 371, 401 P 2d 579.

**Change of Venue**

Although express terms of construction loan agreement between borrowers residing in Lewis and Clark County and lender in Cascade County did not designate place of performance of the contract, district court of Lewis and Clark County properly denied motion of lender for change of venue of action for breach of the contract, where borrowers' affidavit in opposition to the motion showed that the contract was to be performed in Lewis and Clark County, the loan agreement, note and mortgage being executed in Lewis and Clark County for home to be built in that county and inspection, supervision and completion of the home were to take place in Lewis and Clark County where all bills were to be paid. *Brown v. First Federal Savings & Loan Assn. of Great Falls*, 144 M 149, 394 P 2d 1017, 1019.

Denial of defendant's motion for change of venue to place where he resided was improper, since, where plaintiff-relator did not plead the commission agreement itself, nor include it as an exhibit, there was no way of considering the venue matter except on the residence of the defendant. *Rapp v. Graham*, 145 M 371, 401 P 2d 579.

The provisions of this section are permissive only and where five separate actions were brought in four widely separated counties against the same defendant involving the same accident, court did not abuse its discretion in granting change of venue under section 93-2906, subdivision 3, to the place where the tort occurred, for the convenience of the witnesses. *Putro v. Mannix Electric, Inc.*, 147 M 314, 412 P 2d 410.

Under statute providing that on proper motion court must change place of trial when convenience of witnesses and ends of justice would be promoted and under further statute requiring action to be tried in county in which defendants reside at commencement of action, defendants were

entitled to have action moved to county upon which all agreed, which was residence of one defendant, which was place insurance contract was entered into, which was where tort occurred and which was most convenient for defendants and their witnesses. *Truck Ins. Exchange v. National Farmers Union Property & Cas. Co.*, 149 M 357, 427 P 2d 50.

**Construction**

Statutory provisions creating exceptions to the general rule recognizing a defendant's privilege to be sued in his own county will not be given a strained or doubtful construction. *Rapp v. Graham*, 145 M 371, 401 P 2d 579.

**Performance of Contract**

In an action for breach of an oral agreement to lease farm land, venue was in the county where the estate of one of the defendants was being probated, in which the other defendants resided, in which the land was located, and in which service was made and the creditor's claim filed. *Erickson v. Toy*, 142 M 121, 385 P 2d 268.

If contract is to be performed in a county other than the county of defendant's residence, then the plaintiff has his choice of the two counties in which to sue. He may sue in the county where defendant resides or in the county where the contract is to be performed. The provisions of this section are permissive. *Brown v. First Federal Savings & Loan Assn. of Great Falls*, 144 M 149, 394 P 2d 1017, 1019.

In order for plaintiff to maintain action on contract in a county where defendant does not reside, the place of performance must be evident either by express terms of contract, or by necessary implication that a county other than that of defendant's residence is intended to be the county of performance. *Brown v. First Federal Savings & Loan Assn. of Great Falls*, 144 M 149, 394 P 2d 1017, 1019.

To maintain suit in county other than that of defendant's residence, plaintiff must show clearly the facts relied on to bring the case within one of the exceptions to the rule. The contract must state clearly that it is to be performed in county other than that of defendant's residence so that no other fair construction

can be placed upon it. *Rapp v. Graham*, 145 M 371, 401 P 2d 579.

In bringing suit where contract is to be performed, rather than place of defendant's residence, a mere direction by the seller as to the place of payment is not sufficient to maintain venue within exception to this section, nor can a promise to remit to cover the purchase price be sued upon by the seller in the county of the point to which the remittance is to be made. *Rapp v. Graham*, 145 M 371, 401 P 2d 579.

In suit against seller for breach of express warranty against diseased cattle, buyer properly exercised option in initiating suit in county where cattle were delivered as county where contract was to be performed. *Neely v. Steinbach*, 149 M 119, 423 P 2d 584.

Contract clause expressly requiring defendant to perform by making payments in county other than defendant's county of residence came within performance exception in statute thereby entitling plaintiff to institute action on contract in county in which payments were to be made. *McGregor v. Svare*, 151 M 520, 445 P 2d 571.

### Tort Actions

Attorney's advice to a client that a personal injury action had to be filed in the county where the cause arose was not improper or unethical. *Petition of Wason*, 143 M 323, 389 P 2d 406.

Although either the county of residence of defendant or county where tort was committed was proper county in which to bring action for personal injury arising from accident, where none of the defendants were residents of Montana, the action was triable in any county designated by plaintiff in his complaint. *Tassie v. Continental Oil Co.*, 228 F Supp 807, 809.

Defendant is not entitled to a change of venue in personal injury action where plaintiff filed the action in the proper county. *Tassie v. Continental Oil Co.*, 228 F Supp 807, 809.

Where personal injury action arising from accident occurring in Fallon County, Montana, was commenced in Silver Bow County, Montana, by nonresident plaintiff, and nonresident defendants in removing action to federal district court designated Billings Division, but stated no statutory grounds for change of venue and did not show good cause for assignment to Billings Division, plaintiff was entitled to change of venue to Butte Division in which Silver Bow County was located. *Tassie v. Continental Oil Co.*, 228 F Supp 807, 810.

### References

*Hidden Hollow Ranch v. Collins*, 146 M 321, 406 P 2d 365; *Yeager v. Foster*, 146 M 330, 406 P 2d 370.

## 93-2906. (9098) Place of trial may be changed in certain cases.

### Change of Venue

Under statute providing that on proper motion the court must change place of trial when convenience of witnesses and ends of justice would be promoted and under further statute requiring action to be tried in county in which defendants reside at commencement of action, defendants were entitled to have action moved to county upon which all agreed, which was residence of one defendant, which was place insurance contract was entered into, which was where tort occurred and which was most convenient for defendants and their witnesses. *Truck Ins. Exchange v. National Farmers Union Property & Cas. Co.*, 149 M 357, 427 P 2d 50.

### Convenience of Witnesses

Where affidavit showed that five separate actions had been brought against defendant in four widely separated counties involving the same occurrence, trial court properly granted change of venue for the convenience of the witnesses to the county where accident occurred although affidavit omitted names of witnesses and nature of their testimony.

*Putro v. Mannix Electric, Inc.*, 147 M 314, 412 P 2d 410.

### County Taxpayers as Jurors

Where county brought an action for damages done to bridge struck by defendant's truck, it was not an abuse of discretion for the district court to deny a motion for a change of venue even though the jury was made up, necessarily, of taxpayers of that county, each of whom had a pecuniary interest of \$31. *Carter County v. Cambrian Corp.*, 143 M 193, 387 P 2d 904.

### Multiple Causes of Action

Where the defendant is entitled to a change of venue on one cause of action in a complaint containing more than one cause of action, the motion for change must be granted even though the other cause or causes would be triable where the plaintiff commenced the action. *Beavers v. Rankin*, 142 M 570, 385 P 2d 640.

### Time for Motion

Court's discretion in granting change of venue under subdivision 3 of this section cannot be exercised until after a



defendant has answered, so that where action was brought under section 93-2904 in county where co-defendant lived, denial of first motion before defendant had answered applied only to the residency requirement of the co-defendant and did not bar determination of second motion made under this section after defendant

had answered. *Putro v. Mannix Electric, Inc.*, 147 M 314, 412 P 2d 410.

#### References

*Tassie v. Continental Oil Co.*, 228 F Supp 807, 810; *State ex rel. Peery v. District Court*, 145 M 287, 400 P 2d 648; *Yeager v. Foster*, 146 M 330, 406 P 2d 370.

### CHAPTER 30—MANNER OF COMMENCING CIVIL ACTIONS—SERVICE OF SUMMONS

#### 93-3002. (9106) Superseded—Supreme Court Order 10750.

##### Supersession

This section (Sec. 23, p. 47, *Bannack Stat.*; Sec. 23, p. 139, L. 1867; Sec. 67, p. 54, L. 1877), relating to endorsement

of the complaint and issue of summons, is superseded by M. R. Civ. P., Rule 41(e) as amended by Sup. Ct. Ord. 10750.

#### 93-3008. (9112) Superseded—Supreme Court Order 10750.

##### Supersession

This section (Sec. 1, Ch. 37, L. 1917; Sec. 1, Ch. 135, L. 1949; Sec. 1, Ch. 122, L. 1951), relating to service of process

on corporations through the secretary of state, is superseded by M. R. Civ. P., Rule 4 D, as amended by Sup. Ct. Ord. 10750.

#### 93-3011, 93-3012. (9115, 9116) Superseded—Supreme Court Order 10750.

##### Supersession

These sections (Secs. 4, 5, Ch. 37, L. 1917), relating to service of process on corporations through the secretary of

state, are superseded by M. R. Civ. P., Rule 4 D, as amended by Sup. Ct. Ord. 10750.

#### 93-3020. (9124) Return of summons.

##### References

*Sewell v. Beatrice Foods Co.*, 145 M 337, 400 P 2d 892.

### CHAPTER 37—VERIFICATION OF PLEADINGS

#### 93-3702. (9163) Verification of pleadings.

##### References

*Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 747.

### CHAPTER 42—INJUNCTION

#### 93-4203. (9242) Injunction—when not allowed.

##### Discretionary Appointment

Taxpayer was not entitled to an injunction in action questioning the qualifications of supervisor appointed by board of railway commissioners in the proper exercise of their discretion. *Steel v. Board of Railroad Comms.*, 144 M 432, 397 P 2d 101.

##### Enforcement of Public Statute

County commissioners and assessor cannot be enjoined from relying on reclassification officer's real property evaluations to determine tax assessment rolls. *State ex rel. Keast v. Krieg*, 145 M 521, 402 P 2d 405.

#### 93-4205. (9244) Injunction order, etc.

##### Injunction Granted after Hearing

Portion of statute pertaining to affidavits does not apply to injunction issued on basis of hearing on order to show cause.

*State ex rel. Martin v. District Court, Twelfth Judicial Dist.*, 151 M 41, 438 P 2d 563.

**93-4206. (9245) When notice required.****References**

State ex rel. Keast v. Krieg, 145 M 521,  
402 P 2d 405.

**CHAPTER 43—ATTACHMENT****Section 93-4304. Undertaking.**

93-4331.1. Release of attachment by clerk where no proceedings taken in main action.

**93-4304. (9259) Undertaking.** Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff, with two (2) or more sufficient sureties, to be approved by the clerk, in a sum not less than double the amount claimed by the plaintiff, if such amount be one thousand dollars (\$1,000) or under, or, in case the amount so claimed by plaintiff shall exceed one thousand dollars (\$1,000), then in a sum equal to such amount, but in no case shall an undertaking be required exceeding in amount the sum of twenty thousand dollars (\$20,000). The condition of such undertaking shall be to the effect that if the defendant recovered judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the issuing out of the attachment, not exceeding the sum specified in the undertaking. At any time within thirty (30) days after the service of summons, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two (2) days nor more than ten (10) days, must justify before a judge of the district court, or before the clerk thereof, and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the clerk or judge shall issue an order vacating the writ of attachment.

**History:** Ap. p. Sec. 93, p. 61, Bannack Stat.; amd. Sec. 122, p. 156, L. 1867; amd. Sec. 12, p. 65, L. 1869; amd. Sec. 7, p. 75, L. 1870; amd. Sec. 138, p. 54, Cod. Stat. 1871; amd. Sec. 20, p. 56, L. 1874; amd. Sec. 180, p. 82, L. 1877; re-en. Sec. 180, 1st Div. Rev. Stat. 1879; amd. Sec. 6, p. 9, L. 1881; re-en. Sec. 182, 1st Div. Comp. Stat. 1887; en. Sec. 892, C. Civ. Proc. 1895; re-en. Sec. 6659, Rev. C.

1907; re-en. Sec. 9259, R. C. M. 1921; amd. Sec. 1, Ch. 15, L. 1951; amd. Sec. 1, Ch. 303, L. 1967. Cal. C. Civ. Proc. Sec. 539.

**Amendments**

The 1967 amendment increased the maximum amount of an undertaking from \$10,000 to \$20,000.

**93-4314. (9267) Garnishment—when garnishee liable to plaintiff.****References**

Great Falls Transfer & Storage Co. v.

Pan American Petroleum Corp., 353 F 2d 348.

**93-4331.1. Release of attachment by clerk where no proceedings taken in main action.** If a writ of attachment has been levied on real property as provided in section 93-4307, R. C. M. 1947, and no proceedings have been taken in the action in which the attachment was issued for a period of five years, the clerk of court shall upon application of the defendant

or the record owner of such real property issue a release of the attachment and a copy of such release shall be filed with the county clerk where the writ of attachment and notice thereof is filed and the county clerk shall file and index such release as any other releases of attachment.

**History:** En. Sec. 1, Ch. 97, L. 1965.

**Title of Act**

An act providing that a lien of attach-

ment on real property may be released by the clerk of court where no action has been taken to foreclose such lien for a period of five years.

**93-4335. (9288) Different attachments—when liens accrue.**

**Conflicting Attachments**

Since, for purposes of garnishment, a debt has no fixed situs but may be reached in any jurisdiction where the person found owing it can be located, Wyoming court was bound to give full faith and credit to Montana court in de-

termining which garnishor had prior claim where writs of attachment had been issued by different parties on the same garnishee in both states. *Great Falls Transfer & Storage Co. v. Pan American Petroleum Corp.*, 353 F 2d 348.

**93-4342. (9295) Repealed.**

**Repeal**

This section (Sec. 9295, R. C. M. 1921), relating to attachment of stocks of foreign

corporations, was repealed by Sec. 143, Ch. 300, Laws 1967.

**CHAPTER 44—RECEIVERS**

Section 93-4401. Appointment of receiver.

**93-4401. (9301) Appointment of receiver.** A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

1. to 4. \* \* \* [Same as parent volume.]

5. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

**History:** Ap. p. Sec. 116, p. 67, *Bannack Stat.*; re-en. Sec. 143, p. 160, L. 1867; re-en. Sec. 179, p. 62, *Cod. Stat.* 1871; en. Sec. 221, p. 93, L. 1877; re-en. Sec. 221, 1st Div. Rev. Stat. 1879; re-en. Sec. 229, 1st Div. Comp. Stat. 1887; re-en. Sec. 950, C. Civ. Proc. 1895; re-en. Sec. 6698, Rev. C. 1907; re-en. Sec. 9301, R. C. M. 1921; amd. Sec. 142, Ch. 300, L. 1967. *Cal. C. Civ. Proc. Sec. 564.*

**Amendments**

The 1967 amendment deleted subdivision 5 and redesignated former subdivision 6 as subdivision 5.

**Debt as Basis for Appointment**

Where bank held stock as security on loans made by farming corporation, but it appeared that stockholders were, in good faith, planning to meet their obligation and the corporation was solvent,

appointment of receiver at instance of bank merely to protect the price of the stock was erroneous. *State ex rel. Larry C. Iverson, Inc. v. District Court*, 146 M 362, 406 P 2d 828.

**Extraordinary Remedy**

Appointment of a receiver being a "drastic" remedy, which deprives the lawful owner of property the right to manage and control his own interests, the power to appoint a receiver should be exercised sparingly only upon a strong showing, and not as of course. If the desired outcome may be achieved in any other way, then this course should be followed. *State ex rel. Larry C. Iverson, Inc. v. District Court*, 146 M 362, 406 P 2d 828.

**References**

*Thisted v. Tower Management Corp.*, 147 M 1, 409 P 2d 813.

**93-4406. (9306) Powers of receivers.**

**References**

*Thisted v. Tower Management Corp.*, 147 M 1, 409 P 2d 813.



CHAPTER 49—ISSUES—MODE OF TRIAL AND POSTPONEMENT—  
PROCEDURE TO PROCURE JURY TRIAL

## 93-4910. (9332) Motion to postpone a trial, etc.

**Criminal Cases**

Court did not commit prejudicial error when it overruled criminal defendant's objection to county attorney's motion for continuance even though motion was not

supported by required affidavit where motion was made just prior to end of trial court's day and trial resumed promptly on next morning. *State v. Crockett*, 148 M 402, 421 P 2d 722.

## CHAPTER 50—TRIAL BY JURY—FORMATION OF JURY—CHALLENGES

## 93-5011. (9344) Challenges for cause.

**Taxpayers of Plaintiff County**

Where county brought an action for damages to bridge, it was not an abuse of discretion for the district court to deny a motion for a change of venue even though

the jury was necessarily made up of taxpayers of that county each of whom had a pecuniary interest averaging \$31. *Carter County v. Cambrian Corp.*, 143 M 193, 387 P 2d 904.

## CHAPTER 51—TRIAL—CONDUCT OF THE TRIAL

## 93-5101. (9349) Order of trial.

**References**

*Boehler v. Sanders*, 146 M 158, 404 P 2d 885.

## 93-5102. (9350) View by jury of the premises.

**Discretion of Trial Court**

A viewing is within the discretion of the trial court, even where there has been a change in the condition of the scene of the accident or the thing which contributed to the accident. *Clark v. Worrall*, 146 M 374, 406 P 2d 822.

cause of the accident, it was not an abuse of discretion to allow the jury to view the premises on which the accident occurred after the alterations had been made. *Clark v. Worrall*, 146 M 374, 406 P 2d 822.

**References**

*Wolfe v. Northern Pacific R. Co.*, 147 M 29, 409 P 2d 528.

**Time of Viewing**

Where alterations to defendant's bowling alley had little relationship to the

## 93-5104. (9352) Jury may take with them certain papers.

**Subsequent Request by Jury**

Trial court did not err in permitting state's exhibits, consisting of photographs of scene of accident, to be taken to jury

room when asked for by jury about one hour after it began deliberation. *State v. Medicine Bull*, — M —, 445 P 2d 916.

## 93-5105. (9353) Deliberation of jury—how conducted.

**Misconduct of Jury**

When the jury retires to the jury room it should be concerned only with the evidence and the law; the verdict, thus, is a result of a fair expression of opinion by all the jurors. *Schmoyer v. Bourdeau*, 148 M 340, 420 P 2d 316, 317.

Trial court did not err in denying plaintiff's motion for a new trial, on the ground of misconduct of jury during its

deliberations, supported by affidavits of four jurors indicating that the irregularity was not on a material matter in dispute, where plaintiff was probably not prejudiced by juror's misconduct in improperly referring to prior litigation in which plaintiff had been involved, the poll of the jury showing an eight to four verdict for the plaintiff. *Schmoyer v. Bourdeau*, 148 M 340, 420 P 2d 316, 317.

**93-5106. (9354) May come into court for further instructions.****Construction**

Although this section provides that the jury may request that they be brought into court, this is not mandatory and the

jury may send an inquiry out to the court. *State ex rel. State Highway Commission v. Wheeler*, 148 M 246, 419 P 2d 492, 498.

**93-5110. (9358) Verdict—how declared—form of—polling the jury.****Poll of Jury**

Court abused discretion in granting new trial based solely on ground that it had erred in refusing to grant request for poll of jury; error, if any, was harmless in light of evidence affirmatively showing that verdict was rendered in open court in presence of all counsel, that, in response

to question by judge, foreman of jury advised him they had agreed upon verdict and that, following reading of verdict, judge inquired if it was true verdict of at least eight of them and jury answered in affirmative. *Martello v. Darlow*, 151 M 232, 441 P 2d 175.

**CHAPTER 52—THE VERDICT—GENERAL AND SPECIAL—DIRECTED WHEN****93-5205. (9364) Directed verdict—when.****Evidence Supporting Directed Verdict**

Denial of motion for directed verdict by lessor of destroyed building being sued by lessee claiming that premises were repairable was cause for reversal where, viewing evidence most favorable to plaintiff lessee and considering as proven everything which evidence tended to prove, reasonable man could come to no other conclusion but that building was destroyed. *Solich v. Hale*, 150 M 358, 435 P 2d 883.

In negligence suit, defendant was entitled to directed verdict where there was total absence of any evidence tending to establish proximate causal connection between breach of duty and plaintiff's injuries and damages. *Pickett v. Kyger*, 151 M 87, 439 P 2d 57.

**Inferences from Evidence**

In passing on a motion for a directed verdict the court will consider the evidence in the light most favorable to the party against whom the motion is directed and will draw every reasonable inference from such evidence. *Parini v. Lanch*, 148 M 188, 418 P 2d 861, 863.

**Insufficient Evidence**

A directed verdict may be granted when the evidence is so insufficient in fact as to be insufficient in law. *Parini v. Lanch*, 148 M 188, 418 P 2d 861, 863.

**Motion by Both Parties**

Owner of building destroyed by gas explosion was entitled to directed verdict against general contractor who was clearly liable on evidence, but not against gas company who should have been granted its motion for directed verdict on record unequivocally demonstrating that gas com-

pany took every reasonable precaution to protect customers as required by law. *Bridges v. Moritz*, 149 M 273, 425 P 2d 721.

**Negligence**

Directed verdict on liability of defendant for injuries sustained by plaintiff, when defendant's car struck mare which was being led by rope attached to saddle on gelding upon which plaintiff was riding, was proper where negligence of defendant was shown by evidence that defendant had been drinking; that he was driving the car at 30-35 mph while passengers were hunting gophers beside the road; that defendant was not aware of the mare which he struck until the collision was inevitable; and that he failed to stop after realizing that he had struck horse in violation of section 32-1202. *Parini v. Lanch*, 148 M 188, 418 P 2d 861, 864.

**Questions of Fact**

A jury question is presented only when reasonable men might differ as to the conclusions of fact to be drawn from the evidence, viewed in the light most favorable to the party against whom the motion is made. *Parini v. Lanch*, 148 M 188, 418 P 2d 861, 863.

**Review of Order Directing Verdict**

In reviewing an order directing a verdict for the defendant, the supreme court would consider only the evidence of the plaintiff, excluding a bare scintilla but including every fair inference which might be drawn from the facts proved, as well as any evidence introduced by defendant which tended to support the plaintiff's case, and if the evidence viewed in the

most favorable light tended to establish the case made by plaintiff's pleadings, the order would be reversed. *McIntosh v. Linder-Kind Lumber Co.*, 144 M 1, 393 P 2d 782.

#### References

*Holland v. Konda*, 142 M 536, 385 P 2d 272; *Tolson v. Tolson*, 145 M 87, 399 P 2d 754.

### CHAPTER 53—TRIAL BY THE COURT

#### 93-5302. (9366) Superseded—Supreme Court Order 10750-9.

##### Supersession

Section 93-5302 (Sec. 1111, C. Civ. Proc. 1895), requiring decision on findings upon question of fact to be in writing and filed

within twenty days after submission, was superseded by M. R. Civ. P., Rule 52(a), as amended by Sup. Ct. Ord. 10750-9.

#### 93-5305 to 93-5307. (9369 to 9371) 10750-9.

##### Supersession

Sections 93-5305 to 93-5307 (Secs. 1114 to 1116, C. Civ. Proc. 1895), relating to exceptions for defective findings and to

#### Superseded—Supreme Court Order

effect of want of findings, were superseded by M. R. Civ. P., Rule 52(b), as amended by Sup. Ct. Ord. 10750-9.

### CHAPTER 55—EXCEPTIONS—SETTLEMENT AND ALLOWANCE OF BILL

#### 93-5501. (9386) Superseded—M. R. App. Civ. P.

##### Supersession

This section (Ap. p. Sec. 164, p. 75, *Bannack Stat.*), defining an exception and providing the time when the exception

must be taken, is listed as superseded in Table A of M. R. App. Civ. P. See M. R. Civ. P., Rule 46.

#### 93-5503. (9388) Superseded—M. R. App. Civ. P.

##### Supersession

This section (Ap. p. Sec. 166, p. 76, *Bannack Stat.*; Sec. 1, Ch. 92, L. 1905; Sec. 2, Ch. 225, L. 1921), relating to ex-

ceptions and objections, is listed as superseded in Table A of M. R. App. Civ. P. See M. R. Civ. P., Rule 46.

#### 93-5504 to 93-5509. (9389 to 9394) Superseded—M. R. App. Civ. P., Rules 9, 10 and 25.

##### Supersession

These sections (Secs. 1154 to 1158, C. Civ. Proc. 1895; Sec. 1, Ch. 35, L. 1907; Secs. 3, 4, Ch. 225, L. 1921; Sec. 1, Ch.

19, L. 1941; Sec. 1, Ch. 85, L. 1955), relating to the settlement and allowance of bill of exceptions, are superseded by M. R. App. Civ. P., Rules 9, 10 and 25.

### CHAPTER 56—NEW TRIALS—GROUNDS AND MOTIONS FOR—RECORD ON APPEAL FROM FINAL JUDGMENT

#### 93-5601. (9395) New trial defined.

##### Parties Restored to Original Position

The granting of a motion for a new trial restores the parties to the positions they occupied before the trial and the action is commenced anew with the par-

ties limited to their original pleadings but unbound by previous evidence and testimony except as held by existing rules of evidence. *Waite v. Waite*, 143 M 248, 389 P 2d 181.

#### 93-5602. (9396) New trial in equity cases.

##### Irregularity in Proceedings

In an action for specific performance where plaintiff who had no knowledge of law or procedure acted as his own counsel and, though he received some assistance from the trial judge, many errors in

the proceedings were shown in the record, it was within the discretion of the judge to grant defendant's motion for a new trial. *Waite v. Waite*, 143 M 248, 389 P 2d 181.



**93-5603. (9397) When a new trial may be granted.****Abuse of Discretion**

Aggrieved party has burden of proving that district court manifestly abused its discretion by granting new trial; prima facie case of manifest abuse of discretion may be made by discrediting grounds specified for granting new trial or showing that existing error did not materially affect substantial rights of moving party. *Tigh v. College Park Realty Co.*, 149 M 358, 427 P 2d 57.

**Appellate Review**

In condemnation proceeding, where state appraised land at \$18,000, condemnnee appraised it at \$95,000 and jury awarded condemnnee \$21,000, granting of new trial because award was inadequate was not such an abuse of trial judge's discretion as to warrant reversal in spite of fact that there was no rebuttal of state's only expert witness. *State Highway Commission v. Greenfield*, 145 M 164, 399 P 2d 989.

**Inadequate Damages**

The trial court had no power in a condemnation case to condition its denial of a new trial on acceptance by the highway commission of a higher award. *State Highway Commission v. Schmidt*, 143 M 505, 391 P 2d 692.

Court abused its discretion in granting new trial upon grounds of insufficiency of evidence to justify verdict in that "verdict awarded by the jury to the plaintiff is wholly inadequate" where there was conflict in evidence and where it was question for jury whether injuries suffered by passenger were caused by grossly negligent operation of car or whether passenger assumed risk of going into car driven by man who had several drinks. *Heen v. Tiddy*, 151 M 265, 442 P 2d 434.

**Instructions to Jury**

Long form quotient verdict instruction from Jury Instruction Guide is not "a resort to the determination of chance" within meaning of statute in absence of showing that jurors agreed in advance that quotient thus obtained should constitute amount of verdict and adhered to that agreement. *Thomas v. Whiteside*, 148 M 394, 421 P 2d 449.

**Jury Misconduct**

In a condemnation proceeding, affidavits from jurors showing that a newspaper cartoon having to do with condemnation cases in general had been viewed by some members of the jury during the trial could not be used to support the motion for a new trial in the absence of a showing that the verdict was reached in a manner other than by a fair expression of opinion by the jurors. *State Highway Commission v. Manry*, 143 M 382, 390 P 2d 97.

New trial was properly granted where foreman of jury made his own investigation at the scene of the accident after hearing testimony and informed the other members of jury, during their deliberation, of the results of his investigation. The foreman was guilty of misconduct upon which verdict could be impeached by affidavits of jurors. *Goff v. Kinzie*, 148 M 61, 417 P 2d 105, 107.

Trial court did not err in denying plaintiff's motion for a new trial, on the ground of misconduct of the jury during its deliberations, supported by affidavits of four jurors indicating that the irregularity was not on a material matter in dispute, where plaintiff was probably not prejudiced by juror's misconduct in improperly referring to prior litigation in which plaintiff had been involved, the poll of the jury showing an eight to four verdict for the plaintiff. *Schmoyer v. Bourdeau*, 148 M 340, 420 P 2d 316, 317.

**Polling Jury**

Court abused discretion in granting new trial based solely on ground that it had erred in refusing request for poll of jury; error, if any, was harmless in light of evidence affirmatively showing that verdict was rendered in open court in presence of all counsel, that in response to question by judge, foreman of jury advised him they had agreed upon verdict and that following reading of verdict, signed by foreman, judge inquired of jury if it was true verdict of at least eight of them and jury answered in affirmative. *Martello v. Darlow*, 151 M 232, 441 P 2d 175.

**References**

*Waite v. Waite*, 143 M 248, 389 P 2d 181.

**93-5606. (9400) Superseded—Supreme Court Order 10750-9.****Supersession**

Section 93-5606 (Sec. 172, p. 77, Bannack Stat.; Sec. 3, Ch. 41, L. 1907; Sec. 8, Ch. 225, L. 1921), relating to hearing on new

trial motion, was superseded by M. R. Civ. P., Rule 59(d), as amended by Sup. Ct. Ord. 10750-9.

**93-5607, 93-5608. (9401, 9402) Superseded—M. R. App. Civ. P., Rules 7, 9, 10 and 25.**

**Supersession**

These sections (Ap. p. Sec. 289, p. 115, L. 1877; Ap. p. Secs. 1175, 1176, C. Civ. Proc. 1895; Sec. 4, Ch. 41, L. 1907; Sec. 9, Ch. 225, L. 1921), relating to a stay

of proceedings on notice of motion for a new trial and contents of record on appeal, are superseded by M. R. App. Civ. P., Rules 7, 9, 10 and 25.

**CHAPTER 57—JUDGMENT—MANNER OF GIVING AND ENTRY—  
JUDGMENT ROLL AND DOCKET—LIEN OF**

**Section 93-5708. Judgment lien—when it begins and when it expires.**

**93-5710.1. Judgment or decree recorded before 1965 as notice of contents—certified copies as evidence.**

**93-5710.2. Judgment or decree recorded before 1967 as notice of contents—certified copies as evidence.**

**93-5710.3. Validation of defective judgments or decrees affecting realty—1969 act.**

**93-5702. (9404) Superseded—M. R. App. Civ. P., Rule 29.**

**Supersession**

This section (Sec. 174, p. 77, Bannack Stat.), providing for bringing of a case before the court for argument where the

case has been reserved for argument, is superseded by M. R. App. Civ. P., Rule 29.

**93-5707. (9409) Superseded—M. R. App. Civ. P., Rules 9, 10 and 25.**

**Supersession**

This section (Ap. p. Sec. 203, p. 174, L. 1867; Sec. 1, Ch. 36, L. 1921; Sec. 1, Ch. 146, L. 1925), relating to the contents

and filing of judgment roll, is superseded by M. R. App. Civ. P., Rules 9, 10 and 25.

**93-5708. (9410) Judgment lien—when it begins and when it expires.** Immediately after the entry of the judgment in the judgment book, the clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon all real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterward acquire, until the lien ceases. The lien continues for six years, unless the judgment be previously satisfied.

**History:** Ap. p. Sec. 180, p. 78, Bannack Stat.; en. Sec. 204, p. 174, L. 1867; re-en. Sec. 244, p. 77, Cod. Stat. 1871; amd. Sec. 1, p. 40, L. 1876; re-en. Sec. 295, p. 116, L. 1877; re-en. Sec. 295, 1st Div. Rev. Stat. 1879; re-en. Sec. 307, 1st Div. Comp. Stat. 1887; re-en. Sec. 1197, C. Civ. Proc. 1895; re-en. Sec. 6807, Rev. C. 1907; re-en. Sec. 9410, R. C. M. 1921; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 671.

**Advisory Committee's Note**

Subdivision (b) of Rule 41, M. R. App. Civ. P., eliminates the reference in section 93-5708 to judgment rolls, which are nowhere provided for in Montana Rules of Appellate Civil Procedure.

**Amendments**

The 1965 amendment substituted "the entry of the judgment in the judgment book" for "after filing the judgment roll" near the beginning of the section.

**93-5710.1. Judgment or decree recorded before 1965 as notice of contents—certified copies as evidence.** Any judgment or decree of any court of this state affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, previous to the date this act takes effect, copied into the proper book, kept in the office

of the clerk of the district court, and certified copy of which judgment or decree was, previous to the date this act takes effect, recorded in the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired, and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree, or of the record thereof, may be read in evidence, with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

**History:** En. Sec. 1, Ch. 124, L. 1965.

**Title of Act**

An act to validate records of court proceedings containing defects, omissions, informalities or irregularities in obtaining a judgment or decree affecting real property, in which time for appeal has expired; providing that duly certified copies of such judgment or decree may

be read in evidence with the same effect as judgments or decrees duly and regularly obtained, recorded and entered; and providing for a repealing clause.

**Repealing Clause**

Section 2 of Ch. 124, Laws 1965 repealed all acts and parts of acts in conflict therewith.

**93-5710.2. Judgment or decree recorded before 1967 as notice of contents—certified copies as evidence.** Any judgment or decree of any court of this state affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, prior to January 1, 1967, copied into the proper book, kept in the office of the clerk of the district court, and certified copy of which judgment or decree was, previous to the date this act takes effect, recorded in the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired, and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree, or of the record thereof, may be read in evidence, with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

**History:** En. Sec. 1, Ch. 184, L. 1967.

**Title of Act**

An act to validate records of court proceedings prior to January 1, 1967, containing defects, omissions, informalities or irregularities in obtaining a judgment

or decree affecting real property, in which time for appeal has expired; providing that duly certified copies of such judgment or decree may be read in evidence with the same effect as judgments or decrees duly and regularly obtained, recorded and entered.

**93-5710.3. Validation of defective judgments or decrees affecting realty—1969 act.** Any judgment or decree of any court of this state



affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, prior to January 1, 1969, copied into the proper book, kept in the office of the clerk of the district court, and certified copy of which judgment or decree was, previous to the date this act takes effect, recorded in the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired, and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree, or of the record thereof, may be read in evidence, with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

**History:** En. Sec. 1, Ch. 73, L. 1969.

**Compiler's Notes**

This act became effective July 1, 1969.

**Title of Act**

An act to validate records of court proceedings prior to January 1, 1969, containing defects, omissions, informalities or ir-

regularities in obtaining a judgment or decree affecting real property, in which time for appeal has expired; providing that duly certified copies of such judgment or decree may be read in evidence with the same effect as judgments or decrees duly and regularly obtained, recorded and entered.

## CHAPTER 58—THE EXECUTION

**Section 93-5813.1. Waiver of exemptions prohibited in unsecured note.**  
93-5846. Validation of judicial sales before 1969.

**93-5813.1. Waiver of exemptions prohibited in unsecured note.** Any waiver of statutory exemption from execution in an unsecured promissory note shall be unenforceable.

**History:** En. Sec. 1, Ch. 172, L. 1965.

**Title of Act**

An act to prohibit waiver of statutory exemptions.

**93-5824. (9432) Notice of sale—how given—copy of notice.**

**Sale of Real Property**

District court ordering the restraining of a sale of real property on execution can determine if additional notice is required after the injunction is lifted if

the initial notice requirements of this section have been met. *Williams v. Superior Homes, Inc.*, 148 M 38, 417 P 2d 92, 95.

**93-5841. (9449) Possession of lands prior to foreclosure, etc.**

**Vendee of Mortgagee**

Purchasers who took premises subject to pre-existing mortgage, and who had not assumed payment of mortgage, even though occupying premises as their home at time of foreclosure, were not "execu-

tion debtors" within meaning of statute and were not entitled to possession of premises during one-year period of redemption. *First Nat. Bank of Circle v. Hastetter*, 149 M 142, 423 P 2d 306.

**93-5846. Validation of judicial sales before 1969.** All judicial sales of real property prior to January 1, 1969, provided no action is now pending to set such sale aside, where made in this state on proceedings to satisfy valid judgments or decrees of any court and the moneys bidden thereon paid to the officer making such sale, shall be valid and sufficient in law to sustain a sheriff's deed based on such sale, and when no such deed deed has been executed, shall entitle such purchaser to such deed; and such deed, if now or when executed, shall be sufficient to convey all the title of judgment debtor at the time of such sale in the premises so sold to the purchaser at said sale, and all defects or irregularities in the issuance of execution, or the manner of making or conducting the sale, or in the recitals or references in such deed, shall be disregarded and such sale shall not be invalidated by reason of any such defect or irregularity.

**History:** En. Sec. 1, Ch. 76, L. 1969.

#### Title of Act

#### Compiler's Notes

Except for the date in the second line of text, the above section is identical with Sec. 1, Ch. 57, Laws of 1965 and Sec. 1, Ch. 180, Laws of 1967, previously compiled at this section. The compiler has therefore substituted the above section for the 1967 section.

An act relating to validation of judicial sales prior to January 1, 1969, of real property and curing defects or irregularities in the issuance of execution, manner of making or conducting the sale, or in the recitals or references in sheriffs' deeds.

### CHAPTER 60—FORECLOSURE OF MORTGAGES—ACTIONS FOR— SALES UNDER POWERS

#### 93-6001. (9467) Proceedings in foreclosure suits.

##### Deficiency Judgment

The purpose of this section is to require the mortgagee to bring one foreclosure action to enforce "any right" protected by the mortgage. If the price bid in at foreclosure is insufficient to reimburse the mortgagee, a deficiency judgment may be entered against the mortgagor for the balance due and may be enforced by a lien upon the real property of the mortgagor only. *Stallings v. Erwin*, 148 M 227, 419 P 2d 480, 482.

certificates, mortgagee foreclosed the mortgage, the foreclosure sale cut off any lien asserted by mortgagee for taxes paid although the mortgage permitted mortgagee to pay taxes and collect the same upon foreclosure. *Stallings v. Erwin*, 148 M 227, 419 P 2d 480, 483.

A mortgagee who pays taxes on the mortgaged property prior to foreclosure does not acquire a distinct and separate lien on the property which survives the foreclosure sale. *Stallings v. Erwin*, 148 M 227, 419 P 2d 480, 483.

##### Tax Lien

Where, subsequent to purchase of tax

### CHAPTER 61—NUISANCE, WASTE AND TRESPASS ON REAL PROPERTY—ACTIONS FOR

#### 93-6101. (9474) Nuisance defined and actions for.

##### Baseball Park

"Pee wee" baseball league conducted on empty lot in residential district was not nuisance under statute, notwithstanding evidence that: field was brightly illuminated, crowds were noisy, traffic was heavy, field was dusty, some children used foul language, balls were hit into neighboring yards damaging lawns and flowers

and games were played after 10 p.m.; nuisance, if any, was private and arose out of particular manner of operation of legitimate enterprise lower court should merely have entered decree calculated to eliminate injurious features. *Kasala v. Kalispell Pee Wee Baseball League*, 151 M 109, 439 P 2d 65.

CHAPTER 62—QUIETING TITLE TO PROPERTY, REAL AND PERSONAL  
AND OTHER ACTIONS CONCERNING REAL ESTATE**93-6212. (9488.1) Provisions to apply if no known claimants, etc.****Compiler's Notes**

Sections 93-6206 to 93-6208, contained in the reference to sections 93-6203 to 93-

6211 in this section in the parent volume, were repealed by Sec. 2, Ch. 189, Laws 1963.

**93-6216. (9492) An order may be made to allow a party to survey, etc.****References**

State ex rel. State Highway Commis-

sion v. District Court, 147 M 348, 412 P 2d 832.

**93-6218. (9494) Petition for order—procedure.****References**

State ex rel. State Highway Commis-

sion v. District Court, 147 M 348, 412 P 2d 832.

## CHAPTER 63—PARTITION OF REAL ESTATE—ACTIONS FOR

**93-6311. (9526) Title of parties may be tried.****Compiler's Notes**

Sections 93-3101 to 93-3103, 93-3201 to 93-3203, 93-3301 to 93-3306, 93-3401, 93-3402, 93-3404, 93-3405, 93-3408, 93-3410 to 93-3412, 93-3415, 93-3501 to 93-3506, 93-3601 to 93-3604, 93-3701, 93-3801 to 93-3803, 93-

3806 to 93-3808, 93-3811 to 93-3813, 93-3815 to 93-3820, 93-3901 to 93-3905, 93-3907, and 93-3909, contained in the reference to sections 93-3101 to 93-3910 in this section in the parent volume, were repealed by Sec. 84, Ch. 13, Laws 1961.

## CHAPTER 64—QUO WARRANTO

**93-6405. (9580) When private person may commence action.****Unqualified Appointee**

Taxpayer was not entitled to an injunction in action questioning the qualifications of supervisor appointed by board

of railway commissioners in proper exercise of their discretion. Steel v. Board of Railroad Commrs., 144 M 432, 397 P 2d 101.

CHAPTER 67—JUSTICES' COURTS—MANNER OF  
COMMENCING ACTIONS IN

Section 93-6711. Service of summons.

**93-6711. (9636) Service of summons.** The summons may be served by a sheriff or constable of any of the counties of this state; provided, that when a summons issued by a justice of the peace is to be served out of the county in which it was issued, the summons shall have attached to it a certificate under seal by the county clerk of the county in which it was issued, to the effect that the person issuing the same was an acting justice of the peace at the date of the summons; or the summons may be served by any male person resident in the state, over the age of eighteen (18) years, not a party to the suit, and must be served and returned as provided in Montana Rules of Civil Procedure, Rule 4D (2), (3), (4), (8), and (9); or it may be served by publication, provided in Montana Rules of Civil Procedure, Rule 4D (5) and (8), so far as they relate to publication of summons, are made applicable to justices' courts; the word "justice" being substituted for the word "clerk" whenever the latter word occurs.

**History:** En. Sec. 1510, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 61, L. 1903; re-en. Sec. 7003, Rev. C. 1907; re-en. Sec. 9636,

R. C. M. 1921; amd. Sec. 1, Ch. 110, L. 1967. Cal. C. Civ. Proc. Sec. 850.



**Amendments**

The 1967 amendment substituted "Montana Rules of Civil Procedure, Rule 4D (2), (3), (4), (8), and (9)" for "sections 93-3006 and 93-3007" after "as provided

in"; and substituted "provided in Montana Rules of Civil Procedure, Rule 4D (5) and (8)" for "and sections 93-3013, 93-3014 and 93-3015" after "by publication."

**CHAPTER 68—JUSTICES' COURTS—PLEADINGS IN**

Section 93-6802.1. Permissible pleadings enumerated.  
93-6802.2. Demurrers and pleas abolished.

**93-6802. (9639) Pleadings in justices' courts.****Compiler's Notes**

This section appears to have been

superseded by secs. 93-6802.1 and 93-6802.2.

**93-6802.1. Permissible pleadings enumerated.** In justice court there shall be a complaint and answer; and there shall be a reply to a counter-claim denominated as such; and an answer to a cross-claim; a third-party complaint, if a person who is not an original party is brought into the action; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

**History:** En. Sec. 1, Ch. 168, L. 1967.

**Title of Act**

An act designating the pleadings to be allowed in justice court and designating the form thereof.

**93-6802.2. Demurrers and pleas abolished.** Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.

**History:** En. Sec. 2, Ch. 168, L. 1967.

**Repealing Clause**

Section 3 of Ch. 168, Laws 1967 repealed all acts and parts of acts in conflict therewith.

**CHAPTER 77—JUSTICES' COURTS—GENERAL PROVISIONS**

Section 93-7712. Depositions—how taken.

**93-7712. (9722) Depositions—how taken.** Depositions to be used in justices' courts shall be taken as provided in Rules 26 and 28 to 32, inclusive of the Montana Rules of Civil Procedure.

**History:** En. Sec. 1691, C. Civ. Proc. 1895; re-en. Sec. 7089, Rev. C. 1907; re-en. Sec. 9722, R. C. M. 1921; amd. Sec. 1, Ch. 167, L. 1967.

"shall" for "may" after "justices' courts"; and substituted "Rules 26 and 28 to 32, inclusive of the Montana Rules of Civil Procedure" for "sections 93-1801-1 to 93-1801-6."

**Amendments**

The 1967 amendment substituted

**CHAPTER 80—SUPREME COURT—APPEALS TO**

Section 93-8001. How judgments and orders may be reviewed.  
93-8002. Party aggrieved may appeal—names of parties.  
93-8013. Deposit in lieu of undertaking.

**93-8001. (9729) How judgments and orders may be reviewed.** A judgment or order in a civil action, except when expressly made final by this code, may be reviewed as prescribed in sections 93-7901 to 93-7908, and by the Rules of Appellate Civil Procedure, and not otherwise.

**History:** En. Sec. 248, p. 94, Bannack Stat.; re-en. Sec. 317, p. 199, L. 1867; re-en. Sec. 366, p. 107, Cod. Stat. 1871; re-en. Sec. 405, p. 149, L. 1877; re-en. Sec. 405, 1st Div. Rev. Stat. 1879; re-en. Sec. 418, 1st Div. Comp. Stat. 1887; re-en. Sec. 1720, C. Civ. Proc. 1895; re-en. Sec. 7096, Rev. C. 1907; re-en. Sec. 9729, R. C. M. 1921; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 936.

#### Advisory Committee's Note

Subdivisions (c), (d), (e) of Rule 41,

M. R. App. Civ. P. amend this section, and sections 93-8002 and 93-8013 which contain references to appeals from justices' courts to district courts, so as to preserve the existing procedure applicable to such appeals.

#### Amendments

The 1965 amendment substituted "by the Rules of Appellate Civil Procedure" for "93-8001 to 93-8023" after "93-7908 and" and made a minor change in punctuation.

**93-8002. (9730) Party aggrieved may appeal—names of parties.** A party aggrieved may appeal in the cases prescribed in sections 93-7901 to 93-7908 and the Rules of Appellate Civil Procedure.

**History:** En. Sec. 248, p. 94, Bannack Stat.; amd. Sec. 319, p. 199, L. 1867; re-en. Sec. 368, p. 107, Cod. Stat. 1871; re-en. Sec. 407, p. 150, L. 1877; re-en. Sec. 407, 1st Div. Rev. Stat. 1879; re-en. Sec. 420, 1st Div. Comp. Stat. 1887; re-en. Sec. 1721, C. Civ. Proc. 1895; re-en. Sec. 7097, Rev. C. 1907; re-en. Sec. 9730, R. C. M. 1921; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 938.

#### Amendments

The 1965 amendment substituted "the Rules of Appellate Civil Procedure" for "93-8001 to 93-8023" at the end of the present section and omitted a former second sentence which read: "The party appealing is known as the appellant, and the adverse party as the respondent."

**93-8003 to 93-8006. (9731 to 9734) Superseded — M. R. App. Civ. P., Rules 1 and 4 to 6.**

#### Supersession

These sections (Ap. p. Secs. 251, 252, 262, pp. 95, 97, Bannack Stat.; Secs. 320, 331, pp. 199, 201, L. 1867; Secs. 408 to 410, 431, pp. 150, 151, 157, L. 1877; Sec. 1, pp. 146, 147, L. 1899; Secs. 10, 11, Ch. 225, L. 1921; Sec. 1, Ch. 39, L. 1925;

Sec. 1, Ch. 41, L. 1941), relating to appealable judgments and orders, the taking of an appeal and the time therefor, and the undertaking or deposit on appeal, are superseded by M. R. App. Civ. P., Rules 1 and 4 to 6.

**93-8011, 93-8012. (9739, 9740) Superseded—M. R. App. Civ. P., Rules 6 and 7.**

#### Supersession

These sections (Ap. p. Secs. 268, 269, p. 99; Sec. 337, p. 202, L. 1867; Sec. 415, p. 152, L. 1877), relating to stay of pro-

ceedings and undertaking on appeal, are superseded by M. R. App. Civ. P., Rules 6 and 7.

**93-8013. (9741) Deposit in lieu of undertaking.** In all cases where an undertaking is required on appeal by the provisions of sections 93-7901 to 93-7908, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking; and in all such cases the undertaking or deposit may be waived by the written consent of the respondent.

**History:** En. Sec. 388, p. 112, Cod. Stat. 1871; re-en. Sec. 417, p. 153, L. 1877; re-en. Sec. 417, 1st Div. Rev. Stat. 1879; re-en. Sec. 430, 1st Div. Comp. Stat. 1887; amd. Sec. 1732, C. Civ. Proc. 1895; re-en. Sec. 7108, Rev. C. 1907; re-en. Sec. 9741, R. C. M. 1921; amd. Sup. Ct. Ord. 11020,

eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 948.

#### Amendments

The 1965 amendment rewrote this section. For previous text, see parent volume.

**93-8014 to 93-8025. (9742 to 9753) Superseded—M. R. App. Civ. P.****Supersession**

These sections (Secs. 260, 271, 273, pp. 96, 99, 100, Bannack Stat.; Sec. 342, p. 204, L. 1867; Secs. 418, 426 to 428, pp. 153, 156, L. 1877; Secs. 1733 to 1735, 1737, 1739 to 1744, C. Civ. Proc. 1895; Sec. 2, Ch. 35, L. 1907; Sec. 3, Ch. 42, L. 1907; Sec. 1, Ch. 47, L. 1909; Secs. 12 to

14, Ch. 225, L. 1921; Sec. 1, Ch. 19, L. 1925; Sec. 1, Ch. 87, L. 1929), relating to appeals from district courts, are superseded by the Rules of Appellate Civil Procedure. For designation of superseding rule see M. R. App. Civ. P., Table B.

## CHAPTER 86—COSTS AND DISBURSEMENTS—COST BILL— SUIT IN FORMA PAUPERIS

**93-8602. (9787) When allowed, of course, to the plaintiff.****Attorney's Fees**

On foreclosure of mortgage, federal tax lien took priority over attorney's fees allowed under section 93-8613 since attorney's lien failed to meet "choate" test at

the time the amount of federal taxes owed on the property was fixed. First Nat. Bank of Lewistown v. Tilzey, 238 F Supp 750.

**93-8605. (9790) When the several defendants are not united, etc.****References**

State ex rel. Gage v. District Court, 148 M 284, 419 P 2d 746, 748.

**93-8606. (9791) Costs of appeal discretionary with the court, etc.****References**

Stalcup v. Montana Trailer Sales & Equipment Co., 146 M 494, 409 P 2d 542.

**93-8613. (9798) Counsel fees on foreclosure.****Priority of Claim**

On foreclosure of mortgage, federal tax lien took priority over attorney's fees allowed under this section since attorney's

lien failed to meet "choate" test at the time the amount of federal taxes owed on the property was fixed. First Nat. Bank of Lewistown v. Tilzey, 238 F Supp 750.

**93-8618. (9802) What are costs and disbursements.****Attorney Fees**

Attorney fees are not included as costs under this section, so that if such costs are not allowed under section 21-137, which requires showing by motion that wife cannot take an appeal without the allowance, she is not entitled to them on execution under section 93-8621. State ex

rel. Sowerwine v. District Court, 145 M 375, 401 P 2d 568.

**References**

Kintner v. Harr, 146 M 461, 408 P 2d 487; State ex rel. Ald, Inc. v. District Court, 147 M 221, 410 P 2d 944.

**93-8621. (9805) Costs on appeal—how claimed.****Execution Void**

In divorce proceeding, inclusion in memorandum of both allowable statutory costs under section 21-137 and attorney's fee, to which the wife was not entitled because of failure to file motion on appeal, constituted noncompliance with this sec-

tion and made the execution void. State ex rel. Sowerwine v. District Court, 145 M 375, 401 P 2d 568.

**References**

State ex rel. Ald, Inc. v. District Court, 147 M 221, 410 P 2d 944.



## CHAPTER 89—UNIFORM DECLARATORY JUDGMENTS ACT

**93-8901. (9835.1) Scope.**

NOTE.—Uniform State Law. In addition to the states listed in the note in the parent volume the following also have adopted the Uniform Declaratory Judgments Act: Oklahoma and Virginia.

**Supreme Court**

Supreme court could accept original jurisdiction in suit for declaratory judgment where statute which taxed nonresident contractors indiscriminately was declared unconstitutional, since supreme court was a court of record and under its own rules could accept original jurisdiction in emergency situations. *State ex rel. Schultz-Lindsay Constr. Co. v. State Board of Equalization*, 145 M 380, 403 P 2d 635.

**93-8906. (9835.6) Discretionary.****Discretion of Court**

In absence of showing of abuse of discretion, refusal of lower court to rule on issue for reason that decree would not terminate controversy or remove uncertainty will not be reversed. *Helena Valley Irrig. Dist. v. State Highway Commission*, 150 M 192, 433 P 2d 791.

**Dismissal of Action**

Court did not abuse its discretion in dismissing insurance company's action for

**Termination of Annexation Proceedings**

Where a majority of the resident freeholders of a first class city validly protested proposed annexation under section 11-403 (1), but city council instead of terminating the annexation proceedings took arbitrary action, mandamus was proper to compel council to terminate the process. This chapter did not furnish the protestants a plain, speedy and adequate remedy. *State ex rel. Konen v. City of Butte*, 144 M 95, 394 P 2d 753, 757.

**References**

*Harrer v. Northern Pacific Ry. Co.*, 147 M 130, 410 P 2d 713.

declaratory judgment that defendant's policy was void because obtained by fraud, since, under section 93-8911, there were possible parties not joined, defendant having been in an accident several months prior to expiration of the policy, and under this section, court could refuse to enter the judgment on the basis that it would not terminate the controversy as to all parties. *Empire Fire & Marine Ins. Co. v. Goodman*, 147 M 396, 412 P 2d 569.

**93-8909. (9835.9) Jury trial.****References**

*Mahan v. Hardland*, 147 M 78, 410 P 2d 156.

**93-8911. (9835.11) Parties.****Dismissal of Action**

Court could take into account this section in refusing to grant declaratory judgment in favor of insurance company which claimed that defendant's policy was void when accident in which he was involved occurred because there were other parties not joined and therefore the declar-

atory judgment would not terminate the controversy should other parties sue defendant. *Empire Fire & Marine Ins. Co. v. Goodman*, 147 M 396, 412 P 2d 569.

**References**

*Harrer v. Northern Pacific Ry. Co.*, 147 M 130, 410 P 2d 713.

**93-8912. (9835.12) Construction.****References**

*Harrer v. Northern Pacific Ry. Co.*, 147 M 130, 410 P 2d 713.

## CHAPTER 90—CERTIORARI (WRIT OF REVIEW)

**93-9002. (9837) When and by what courts granted.****References**

*Mailey v. Board of County Commrs.*, 142 M 505, 385 P 2d 74.

**93-9008. (9843) The review under the writ, extent of.****References**

Mailey v. Board of County Commrs.,  
142 M 505, 385 P 2d 74.

**CHAPTER 91—MANDAMUS (WRIT OF MANDATE)****93-9102. (9848) When and by what court issued.****Discretionary Actions**

Mandamus lies only to compel performance of an act, not to correct action already done, so that where state board of land commissioners exercised discretion in awarding lease of land to lowest bidder, mandamus was not the proper writ to pursue in seeking a remedy. State ex rel. Thompson v. Babcock, 147 M 46, 409 P 2d 808.

holders of a first class city validly protested proposed annexation under section 11-403 (1), but city council instead of terminating the annexation proceedings, took arbitrary action, mandamus was proper to compel council to terminate the process. The Uniform Declaratory Judgments Act (93-8901 to 93-8916) did not furnish the protestants a plain, speedy and adequate remedy. State ex rel. Konen v. City of Butte, 144 M 95, 394 P 2d 753, 757.

**Termination of Annexation Proceedings**

Where a majority of the resident free-

**93-9103. (9849) Writ—when and upon what to issue.****Appealable Matters**

Engineer seeking registration from state board had no right to a writ of mandamus where discretion of the board was subject

to review under section 66-2345. Heldenbrand v. Montana State Board of Registration for Professional Engineers and Land Surveyors, 147 M 271, 411 P 2d 744.

**93-9112. (9858) Damages, costs and peremptory mandate, etc.****References**

State ex rel. Thompson v. Babcock, 147 M 46, 409 P 2d 808.

**CHAPTER 92—PROHIBITION—WRIT OF****93-9201. (9861) Prohibition defined.****Municipal Corporation**

Lower court properly refused petition for writ of prohibition against city acting within jurisdiction since writ lies only when municipal corporation acts without or in excess of jurisdiction. State ex rel.

Pat Griffin Co. v. City of Butte, 151 M 546, 445 P 2d 739.

**References**

State ex rel. Belwin, Inc. v. Davison, 148 M 345, 420 P 2d 842, 844.

**CHAPTER 97—FORCIBLE ENTRY AND UNLAWFUL DETAINER—ACTIONS FOR****93-9703. (9889) Unlawful detainer defined.****Agricultural Tenant Holding Over**

Statute gives agricultural tenant right to hold over for no other purpose than to harvest crops and protect investment and does not mean that tenant can exercise option to purchase contained in expired lease. Miller v. Meredith, 149 M 125, 423 P 2d 595.

**Unlawful Ejectment**

In case of unlawful ejectment, plaintiff, who had farmed land for three years, paying one third of each crop as rent, was not a sharecropper but a tenant with an interest in the land for a term and it was proper for the judge to instruct the jury that if plaintiff held without notice to quit more than sixty days after expiration of his term he was deemed to be holding by permission of the defendant-landlords and not guilty of unlawful detainer. Kenfield v. Curry, 145 M 174, 399 P 2d 999.

**Landlord-tenant Relationship Required**

An action for unlawful detainer can succeed only where the relation of landlord-tenant exists. Kransky v. Hensleigh, 146 M 486, 409 P 2d 537.

## CHAPTER 98—CONTEMPTS

## 93-9801. (9908) What acts or omissions are contempts.

## References

Weinheimer v. Scott, 143 M 243, 388 P 2d 790.

## CHAPTER 99—EMINENT DOMAIN

Section 93-9905. Facts necessary to be found before condemnation.

93-9913. The date with respect to which compensation shall be assessed.

## 93-9904. (9936) Private property defined—classes enumerated.

## Underpass

Where 40.89 acres of ranch land were taken by the state highway commission as a right of way for an interstate highway, consisting of four lanes in width and fully controlled access, which split the remaining land into two divisions, leaving 432.69 acres, on which farm headquarters was located, on the north side of the highway

and 393.42 acres on the south side of the highway, trial court in its preliminary order of condemnation properly ordered the commission to construct and maintain at its own expense an underpass leading from one side of the highway to the other. State ex rel. State Highway Commission v. Wheeler, 148 M 246, 419 P 2d 492, 496.

93-9905. (9937) Facts necessary to be found before condemnation. 1 and 2. \* \* \* [Same as parent volume.]

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use. The plaintiff or defendant, or any party interested in the proceedings, can appeal to the supreme court from any finding or judgment made or rendered under this chapter, as in other cases. Such appeal does not stay any further proceedings under this chapter, except that the district court on motion or ex parte may grant a stay for such period of time and under such conditions as the court deems proper.

History: En. Sec. 583, p. 191, L. 1877; re-en. Sec. 583, 1st Div. Rev. Stat. 1879; re-en. Sec. 601, 1st Div. Comp. Stat. 1887; amd. Sec. 2214, C. Civ. Proc. 1895; re-en. Sec. 7334, Rev. C. 1907; re-en. Sec. 9937, R. C. M. 1921; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 1241.

fendant to show fraud, abuse of discretion or arbitrary action in order to defeat the commission's action, while the commission had only to establish that the taking of the property was reasonably necessary for rebuilding the highway. State Highway Commission v. Crossen-Nissen Co., 145 M 251, 400 P 2d 283.

## Advisory Committee's Note

Subdivision (f) Rule 41, M. R. App. Civ. P., amends the provision of subdivision 3 of this section to permit the district court to stay proceedings on appeals in eminent domain cases, as is permitted by Rule 7(a) of these rules in other cases. See Tables A, B, C, M. R. App. Civ. P. for reference to other amendments.

## Amendments

The 1965 amendment added the exception at the end of the section.

## Burden of Proof

Where commission condemned defendant's land to build bypass through it rather than reconstruct highway through town, it became incumbent upon the de-

## Condemnor's Discretion

Highway commission did not abuse its discretion in taking farm land by eminent domain even though it was shown that town through which old highway had passed would be financially harmed and bypass would cost more to build, since the resulting savings in travel costs to highway users, in addition to the compensation paid the petitioners, offset disadvantages claimed by them. State Highway Commission v. Crossen-Nissen Co., 145 M 251, 400 P 2d 283.

## Necessity of Use

Even when necessity has been challenged on the ground of arbitrariness or excessiveness of the taking, condemnor still has discretion to determine the loca-



tion, route and area of the land to be taken. *State Highway Commission v. Crossen-Nissen Co.*, 145 M 251, 400 P 2d 283.

The word "necessary" as used in this section does not mean that the property must be indispensable to the proposed project, but that it must be reasonably requisite and proper for the accomplish-

ment of the purpose for which it is sought under the peculiar circumstances of each case. *State Highway Commission v. Crossen-Nissen Co.*, 145 M 251, 400 P 2d 283.

#### References

*State Highway Commission v. Danielson*, 146 M 539, 409 P 2d 443.

### 93-9906. (9938) Parties may make location—may enter, etc.

#### References

*State Highway Commission v. Danielson*, 146 M 539, 409 P 2d 443.

### 93-9911. (9943) Power of court—preliminary condemnation order.

#### Underpass

Where 40.89 acres of ranch land were taken by the state highway commission as a right of way for an interstate highway, consisting of four lanes in width and fully controlled access, which split the remaining land into two divisions, leaving 432.69 acres, on which farm headquarters was located, on the north side of the

highway and 393.42 acres on the south side of the highway, trial court in its preliminary order of condemnation properly ordered the commission to construct and maintain at its own expense an underpass leading from one side of the highway to the other. *State ex rel. State Highway Commission v. Wheeler*, 148 M 246, 419 P 2d 492, 496.

### 93-9912. (9944) Appointment and meeting of commissioners.

#### Apportionment of Damages

It was not error for the jury to express its award of damages separately to lessor and lessee rather than state a single lump sum when such award was not excessive, was supported by substantial evidence, and did not reflect an increased valuation due solely to a distribution of interest. *State Highway Commission v. City Service Co.*, 142 M 559, 385 P 2d 604.

#### Expert Testimony as to Value

Testimony of expert witnesses showing that although presently used for agricultural purposes, highest and best use of land was for residential subdivision, showing comparative values of similar land in same geographical area, and showing how property could have been subdivided and how highway running through it detracted from its suitability for subdivision, was sufficient to sustain jury's verdict as against contention of state that expert witnesses based their opinions on mere speculation. *Montana State Highway Commission v. Jacobs*, 150 M 322, 435 P 2d 274.

#### Measure of Damages—Leasehold Interests

The proper value of a leasehold interest is the fair market value not the market value less future rent to be paid. *State Highway Commission v. City Service Co.*, 142 M 559, 385 P 2d 604.

#### Severance Damages

While it is proper for the trial court to

determine whether there has been an impairment of access, the question of the extent to which access has been impaired is for the jury, and it was not error for the court to refuse to give instructions to the effect that all means of access to the defendant's property had been destroyed. *State Highway Commission v. Manry*, 143 M 382, 390 P 2d 97.

To determine what is "remainder" of property taken under statute providing for damages for depreciation in value of portion of land not sought to be condemned, there are generally three tests: (1) unity of ownership, (2) contiguity, (3) unity of use; claimant who conveyed part of tract of subsequently condemned land to corporation was not entitled to compensation for depreciation in value to land he still held because claimant and corporation were two distinct owners and hence unity of ownership was absent even though claimant was majority shareholder of corporation and lands were contiguous. *Montana State Highway Commission v. Robertson & Blossom Inc.*, 151 M 205, 441 P 2d 181.

#### Verdict Form

It was not prejudicial error for the trial judge to give the jury a verdict form which was in accord with this section and which verdict was not out of proportion to the damage done the defendant. *State Highway Commission v. Manry*, 143 M 382, 390 P 2d 97.

93-9913. (9945) The date with respect to which compensation shall be assessed. For the purpose of assessing compensation the right thereto shall be deemed to have accrued at the date of the service of the summons, and its actual value as of that date shall be the measure of compensation for all property to be actually taken, and the basis of depreciation in value of property not actually taken, but injuriously affected. This shall not be construed to limit the amount of compensation payable by the state highway commission under the provisions of any legislation enacted pursuant to the Federal Highway Beautification Act of 1965. If an order be made letting the plaintiff into possession, as provided in section 93-9920, the full amount finally awarded shall draw lawful interest from the date on which the property owner surrenders possession of the property in accordance with the terms of such order to the earlier of the following dates.

(a) The date on which the right to appeal to the Montana supreme court expires, or if appeal is filed, to the date of final decision by the supreme court, or

(b) The date on which the property owner withdraws from court the full amount finally awarded.

If the property owner withdraws from court a fraction of the amount finally awarded, interest on such fraction shall cease on the date it is withdrawn but interest on the remainder of the amount finally awarded shall continue to the earlier of the aforesaid dates defined in (a) and (b) of this section. None of the amount finally awarded shall draw interest after the date on which the right to appeal to the Montana supreme court expires. No improvements put upon the property, subsequent to the date of the service of summons, shall be included in the assessment of compensation or depreciation in value, nor shall the same be used as the basis of computing such compensation or depreciation.

History: En. Sec. 591, p. 194, L. 1877; re-en. Sec. 591, 1st Div. Rev. Stat. 1879; re-en. Sec. 609, 1st Div. Comp. Stat. 1887; amd. Sec. 2222, C. Civ. Proc. 1895; re-en. Sec. 7342, Rev. C. 1907; re-en. Sec. 9945, R. C. M. 1921; amd. Sec. 1, Ch. 133, L. 1957; amd. Sec. 5, Ch. 234, L. 1961; amd. Sec. 1, Ch. 182, L. 1965; amd. Sec. 1, Ch. 187, L. 1967; amd. Sec. 12, Ch. 212, L. 1969. Cal. C. Civ. Proc. Sec. 1249.

#### Compilers' Notes

The Federal Highway Beautification Act of 1965, referred to in the first paragraph of this section, is compiled in the United States Code as Tit. 23, secs. 131, 136 and 319.

#### Amendments

The 1965 amendment divided the section into paragraphs; substituted "full amount finally awarded" for "amount awarded" before "shall draw lawful interest" in the third sentence of the first paragraph; substituted "earlier of the following dates" and clauses (a) and (b) at

the end of the first paragraph for "date of receipt of the award or any portion thereof"; and substituted the first two sentences of the final paragraph for "provided, however, that interest shall not be allowed or paid on so much thereof as shall have been paid to the landowner involved or withdrawn by such landowner from the court."

The 1967 amendment added to the first sentence of the initial paragraph, "and the reasonable cost of removal of all necessary personal property from the condemned real property within a reasonable distance in the area, not to exceed the sum of six thousand dollars (\$6,000) in the case of a business, farm or ranch relocation, and not to exceed the sum of four hundred dollars (\$400) in any other case"; inserted the second sentence; and, at the end of subparagraph (a), added "if appeal is filed to the date of final decision by the supreme court, or."

The 1969 amendment deleted the provision, inserted by the 1967 amendment, concerning removal of personality.

### Separability Clause

Section 2 of Ch. 182, Laws 1965 read "If any section, paragraph, sentence, clause or provision of this act shall for any reason be held invalid or unenforceable, the invalidity or unenforceability thereof shall not affect any of the remaining sections, paragraphs, sentences, clauses or provisions of this act."

### Repealing Clause

Section 3 of Ch. 182, Laws 1965 read "All acts, or parts thereof, inconsistent herewith are hereby repealed to the extent only of such inconsistency. This repealer shall not be construed to revive any act or part thereof, heretofore repealed."

### Effective Date

Section 4 of Ch. 182, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved March 4, 1965.

### Appeal

In eminent domain proceedings the findings of the district court will generally not be disturbed on appeal unless they are so obviously and palpably out of proportion to the injury done as to be in excess of just compensation provided for by section 14, article III of the Montana constitution. State Highway Commission v. Woodcock, 147 M 291, 411 P 2d 357.

### Assessment of Compensation

Where condemnee's house was between 50 and 60 years old and had been converted into a multiple family dwelling, court did not err in excluding evidence of reconstruction costs or comparable sales elsewhere in determining value of the property since there was no way of determining depreciation of the old house in arriving at reconstruction cost figures, nor were there sufficient comparable sales in the area. State Highway Commission v. Tubbs, 147 M 296, 411 P 2d 739.

### Commercial Use

Where state highway commission in order to show public access to highway presented two appraisal witnesses to show that there was access at a certain exit in which case there would be no loss of commercial usefulness, it was quite proper and necessary to rebut this testimony and to let the jury know the type of easement provided for the access exit. State ex rel. State Highway Commission v. Wheeler, 148 M 246, 419 P 2d 492, 498.

### Cost of Moving Personal Property

Where friends of condemnees gratuitously aided them in moving personal property from condemned realty, condemnees were not entitled to recover the costs of their friends' labor as an element of damages. State Highway Commission v. Manry, 143 M 382, 390 P 2d 97.

### Depreciation on Inventory

This section requires the state to pay for any damage to personal property removed from condemned land including any depreciation in the inventory value of such property. State Highway Commission v. City Service Co., 142 M 559, 385 P 2d 604.

### Improvements

In eminent domain proceeding trial court did not err in excluding evidence concerning improvement of sole access road to ranch property remaining after state highway commission had taken part of the property for right of way for interstate highway, where any changes in access were made after the date of service of the summons in the condemnation action. State ex rel. State Highway Commission v. Wheeler, 148 M 246, 419 P 2d 492, 497.

### Market Value

The proper value of a leasehold interest is the fair market value not the market value less future rent to be paid. State Highway Commission v. City Service Co., 142 M 559, 385 P 2d 604.

Where state not only took part of plaintiff's land, but also eliminated an old channel of water and diked up a new channel, thus creating a flood basin on plaintiff's land, evidence of actual results of taking was proper, even though land values are usually measured as of the date of summons. State Highway Commission v. Biastoch Meats, Inc., 145 M 261, 400 P 2d 274.

When there is a market for the type of property being condemned, and the property has no other intrinsic value, courts will adopt a market value in determining the actual value of the property, which is nothing more than the price resulting from fair negotiations between a willing seller and buyer. State Highway Commission v. Tubbs, 147 M 296, 411 P 2d 739.

### References

State Highway Commission v. Churchill, 146 M 52, 403 P 2d 751.

## 93-9915. (9947) Appeal from assessment of commissioners.

### Apportionment of Damages

It was not error for the jury to express

its award of damages separately to lessor and lessee rather than state a single lump



sum when such award was not excessive, was supported by substantial evidence, and did not reflect an increased valuation

due solely to a distribution of title. *State Highway Commission v. City Service Co.*, 142 M 559, 385 P 2d 604.

**93-9917. (9949) Payment of damages or deposit of bond therefor.**

**Delay in Payment of Damages**

In eminent domain proceedings where the state highway commission did not move within thirty days as required by this section, it could not excuse its failure

to pay by alleging that it had no notice of the entry of judgment when the commission itself had caused the judgment to be entered. *Robertson v. State Highway Commission*, 148 M 275, 420 P 2d 21, 24.

**93-9918. (9950) Damages—to whom paid.**

**Delay in Payment of Damages**

In eminent domain proceeding where the state highway commission did not move within thirty days as required by section 93-9917, it could not excuse its failure to pay by alleging that it had no notice of the entry of the judgment when the commission itself had caused the judgment to be entered. *Robertson v. State Highway Commission*, 148 M 275, 420 P 2d 21, 24.

**Stay of Execution**

Where state highway commission filed notice of appeal and perfected their appeal after writ of execution under this section had issued, the appeal stayed the judgment although no bond was filed as required by section 93-8011 since under Rule 62(e), no security was required from the state. *Robertson v. State Highway Commission*, 148 M 275, 420 P 2d 21, 24.

**93-9920. (9952) Putting plaintiff in possession.**

**References**

*State Highway Commission v. Schmidt*, 143 M 505, 391 P 2d 692 (concurring

opinion); *State Highway Commission v. Churchwell*, 146 M 52, 403 P 2d 751.

CHAPTER 301—EVIDENCE—DEFINITIONS—KINDS AND DEGREES OF

**93-301-11. (10498) Prima-facie evidence defined.**

**Ownership of Cattle**

Although under sections 46-606 and 67-308 prima facie the owners of the recorded brand have the same interest in the cattle bearing their brand as shown in brand record, joint ownership of the cattle may be contradicted and overcome by other evidence under this section. *Marshall v. Minlschmidt*, 148 M 263, 419 P 2d 486, 490.

In action by administrator of estate of deceased partner against surviving part-

ners to recover assets transferred by deceased during his last illness, evidence that deceased had a half interest in partnership cattle and failure of defendants to produce any of the partnership records at the trial in the lower court, sustained finding that heir of deceased had overcome the prima facie showing of one-third interest in the partnership cattle arising from the recording of the brand in name of three persons. *Marshall v. Minlschmidt*, 148 M 263, 419 P 2d 486, 491.

CHAPTER 401—EVIDENCE—GENERAL PRINCIPLES OF

**93-401-4. (10508) Witness presumed to speak the truth.**

**Accomplice as Witness**

In a first degree burglary case the credibility of the defendant's accomplice, a

convicted felon, was for the jury. *State v. Barick*, 143 M 273, 389 P 2d 170.

**93-401-7. (10511) Declarations which are a part of the transaction.**

**Time between Transaction and Declaration**

In a negligence action by passenger of car struck by truck, testimony of truck driver concerning declarations of driver of

automobile concerning speed at which he was traveling was admissible even though made some ten minutes after collision. *Blevins v. Weaver Constr. Co.*, 150 M 158, 432 P 2d 378.

**93-401-9. (10513) Declaration of decedent evidence of pedigree.****References**

Cited in *Bender v. Bender*, 144 M 470, 397 P 2d 957.

**93-401-11. (10515) When part of the transaction proved, etc.****References**

*State Highway Commission v. Churchwell*, 146 M 52, 403 P 2d 751.

**93-401-12. (10516) Contents of writing—how proved.****Laboratory Test Results**

In an action for damages for death of dairy cows and losses occasioned by poisoning, allowing cattle owner to testify concerning laboratory test results was not

prejudicial where the testimony was brought out properly later without objection. *Hopkins v. Ravalli County Electric Cooperative, Inc.*, 144 M 161, 395 P 2d 106, 109.

**93-401-13. (10517) An agreement reduced to writing deemed the whole.****References**

*State Highway Commission v. Churchwell*, 146 M 52, 403 P 2d 751; *Thisted v.*

*Country Club Tower Corp.*, 146 M 87, 405 P 2d 432.

**93-401-15. (10519) Construction of statutes and instruments, etc.****References**

In *re Jones' Estate*, 146 M 439, 408 P

2d 482; *Wolff v. Standard Life & Accident Ins. Co.*, 147 M 460, 416 P 2d 11, 17.

**93-401-17. (10521) The circumstances to be considered.****References**

*Close v. Ruegsegger's Estate*, 143 M 32, 386 P 2d 739; *Thisted v. County Club*

*Tower Corp.*, 146 M 87, 405 P 2d 432; *Ryan v. Ald, Inc.*, 146 M 299, 406 P 2d 373.

**93-401-26. (10530) Affirmative only can be proved.****Notice**

Where plaintiff alleged giving of notice which defendant denied, notice or lack thereof was put in issue and plaintiff had burden of proof. *Glacier General Assurance Co. v. State Farm Mutual Automobile Ins. Co.*, 150 M 452, 436 P 2d 533.

**References**

*Colarchik v. Watkins*, 144 M 17, 393 P 2d 786.

**93-401-27. (10531) Facts which may be proved on trial.****Admission by Living Person**

In an action by property owner against church camp for damage from fire begun by camp counselor, letter written by counselor admitting starting fire accidentally was inadmissible as declaration against interest since counselor, although unavailable to testify, was not dead within requirement of subdivision 4. *MacDonald v. Protestant Episcopal Church*, 150 M 332, 435 P 2d 369.

*Council and Montana Highway Patrol* in connection with determining speed from skidmarks, was qualified to give expert opinion evidence as to speed of defendant's automobile, even though he had retired from highway patrol some six years previously, had first heard of accident two weeks before trial, did not measure drag factor or coefficient of friction on particular road surface involved and, as mere highway patrolman, would not have been permitted to testify to investigation made year and one-half after accident. *Graham v. Rolandson*, 150 M 270, 435 P 2d 263.

**Expert Testimony**

Ex-highway patrolman, who had twenty years' experience investigating automobile accidents, including determinations of speed from skidmarks and surrounding circumstances, and was skilled in use of graphs and charts used by National Safety

**References**

Cited in *Bender v. Bender*, 144 M 470, 397 P 2d 957; *McReynolds v. McReynolds*, 147 M 476, 414 P 2d 531.

## CHAPTER 501—EVIDENCE—JUDICIAL NOTICE OF FACTS AND FOREIGN LAWS

93-501-1. (10532) **Certain facts of general notoriety assumed to be, etc.****Actual Knowledge**

The burden of proof is on the individual litigant, and the courts are not required by the doctrine of judicial notice to inform themselves of facts not within the actual knowledge of the court, nor need the courts take judicial notice of a fact or facts when the party desiring such notice does not request it. *Holtz v. Babcock*, 143 M 341, 390 P 2d 801.

**Succession to Office**

The court took notice that upon his death the governor was succeeded as provided by law. *Holtz v. Babcock*, 143 M 341, 389 P 2d 869.

**References**

*Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 749; *State v. Peters*, 146 M 188, 405 P 2d 642.

## CHAPTER 701—EVIDENCE—WITNESSES

93-701-1. (10533) **Witness defined.****References**

*State v. Barick*, 143 M 273, 389 P 2d 170.

93-701-2. (10534) **All persons capable of perceptions, etc.****Felony Conviction**

An accomplice may testify in a criminal case even though he is a convicted felon

at the time of his testimony. *State v. Barick*, 143 M 273, 389 P 2d 170.

93-701-3. (10535) **Persons who cannot be witnesses.****References**

*State v. Barick*, 143 M 273, 389 P 2d 170.

93-701-4. (10536) **Persons in certain relations cannot be examined.****Criminal Actions**

The physician-patient privilege under subsection (4) of this section is not available to a defendant in a criminal action since the provision in section 94-7209 incorporating the civil rules of evidence into the criminal law "except as otherwise provided" pertains to the language of sub-

section (4) which specifically limits the privilege to civil actions. *State v. Campbell*, 146 M 251, 405 P 2d 978.

**References**

*State v. Barick*, 143 M 273, 389 P 2d 170.

## CHAPTER 801—EVIDENCE—UNIFORM BUSINESS RECORDS AS EVIDENCE ACT—UNIFORM PHOTOGRAPHIC COPIES OF BUSINESS AND PUBLIC RECORDS AS EVIDENCE ACT

Section 93-801-5. Reproductions of originals.

93-801-1. **"Business" defined.**

NOTE.—Uniform State Law. In addition to the states listed in the note in the parent volume the following also have

adopted the Uniform Business Records as Evidence Act: Connecticut, Michigan, and Rhode Island.

93-801-5. **Reproductions of originals.** If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or com-



bination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding, whether the original is in existence or not, and an enlargement or facsimile of such reproduction is likewise admissible in evidence, if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.

**History:** En. Sec. 1, Ch. 100, L. 1953; amd. Sec. 1, Ch. 160, L. 1969.

#### Amendments

The 1969 amendment deleted a limitation in the first sentence that original may be destroyed unless "held in a custodial or fiduciary capacity."

**NOTE.**—Uniform State Law. In addition to the states listed in the note in the parent volume the following also have adopted the Uniform Photographic Copies of Business and Public Records as Evidence Act: Arkansas, Delaware, Michigan, and West Virginia.

### CHAPTER 901—EVIDENCE—UNIFORM OFFICIAL REPORTS AS EVIDENCE ACT

#### 93-901-1. Official reports admissible as evidence.

**NOTE.**—Uniform State Law. Sections 93-901-1 through 93-901-5 constitute the "Uniform Official Reports as Evidence Act" approved by the National Conference of Commissioners on Uniform State Laws in 1936 and adopted in various forms in Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Ken-

tucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Washington, Wisconsin, Wyoming, and also in the Virgin Islands.

### CHAPTER 1001—EVIDENCE—PUBLIC WRITINGS

#### 93-1001-9. (10547) Constitution and statutes.

##### References

State ex rel. Peery v. District Court, 145 M 287, 400 P 2d 648.

#### 93-1001-19. (10557) Copy of a foreign record—when evidence.

##### References

In re Hosova's Estate, 143 M 75, 387 P 2d 305.

#### 93-1001-30. (10568) Manner of proving other official documents.

##### References

Holtz v. Babcock, 143 M 341, 390 P 2d 801.

CHAPTER 1301—EVIDENCE—INDIRECT—INFERENCES  
AND PRESUMPTIONS**93-1301-2. (10601) Inference defined.****Inference Distinguished from Suspicion**

An inference is to be distinguished from mere suspicion which is "the act or an instance of suspecting: imagination or apprehension of something wrong or hurt-

ful without proof or on slight evidence" (quoting Webster's New International Dictionary, 3rd ed. 1961). *State v. Barick*, 143 M 273, 389 P 2d 170.

**93-1301-3. (10602) Presumption defined.****References**

*State v. Barick*, 143 M 273, 389 P 2d 170.

**93-1301-4. (10603) When an inference arises.****References**

*State v. Barick*, 143 M 273, 389 P 2d 170.

**93-1301-6. (10605) Specification of conclusive presumptions.****Deed from Mother to Son**

Conclusive presumption was not established in situation where court refused to impose constructive trust upon lands deeded to son by aged mother. *Bodine v. Bodine*, 149 M 29, 422 P 2d 650.

not available as a defense when the essential elements of estoppel are lacking. *Belhumeur v. Dawson*, 229 F Supp 78, 86.

**Legitimacy**

Child is presumed legitimate if mother and father were married. *Spradlin v. United States*, 262 F Supp 502.

**Estoppel by Own Acts**

The doctrine of equitable estoppel set forth in subdivision 3 of this section is

**93-1301-7. (10606) All other presumptions may be controverted.****Subdivision 4**

Deceased was presumed to have taken ordinary care of his own concerns, however plaintiff's evidence in wrongful death action showing deceased's failure to properly test empty gasoline tank before welding it which could very well have been cause of accident contradicted presumption. *Knowlton v. Sandaker*, 150 M 438, 436 P 2d 98.

scriptive use. *Kostbade v. Metier*, 150 M 139, 432 P 2d 382.

Findings and conclusions of district court are presumed correct and will not be reversed on appeal unless evidence, even though conflicting, preponderates against them. *Breen v. Industrial Accident Board*, 150 M 463, 436 P 2d 701.

Where petitioner claimed, fourteen years after his conviction, that his confession had been coerced and records of the proceedings against him were incomplete, but he had counsel to represent him on a second charge brought against him a few days later, presumption that petitioner had voluntarily waived right to counsel on the first charge, besides the fact that he had pleaded guilty to it so that confession was not used against him, reinforced presumption that the proceedings had not violated his constitutional rights. *Frost v. State of Montana*, 249 F Supp 349.

**Subdivision 15**

Statutory presumption that "official duty has been regularly performed" was not overcome where defendant offered no evidence to show that any prospective juror was improperly excused from service and where judge testified that no prospective juror was excused from service without valid statutory excuse. *State v. Corliss*, 150 M 40, 430 P 2d 632.

On basis of statutory presumption and on basis of testimony of county employee that he had been ordered to maintain road by county commissioner who was also owner of the land, court concluded that then owner of land regarded road as public highway, in determining that public highway had been established by pre-

**Subdivision 17**

Where petitioner claimed, fourteen years after his conviction, that his confession had been coerced and records of the proceedings against him were incomplete, fact that defendant had pleaded guilty to the

crime charged so that confession was not used, and record stated he had waived right to counsel reinforced presumption under this subdivision that defendant's constitutional rights to counsel and against self-incrimination had not been violated. *Frost v. State of Montana*, 249 F Supp 349.

#### Subdivision 18

Presumption was not overcome where jury found in favor of defendant on his counterclaim filed in response to plaintiff's action for negligence from which may be inferred fact that issue of defendant's negligence was before the jury and that in not finding for plaintiff jury concluded that defendant was not negligent. *Ratcliff v. Murphy*, 150 M 31, 430 P 2d 627.

#### Subdivision 24

Presumption under this section that condemnnee had received revised contract from state was strengthened by facts that condemnnee received other documents enclosed in the same envelope, the envelope was not returned to the state office and the condemnnee was well-known in the vicinity. *Crissey v. State Highway Commission*, 147 M 374, 413 P 2d 308.

Testimony that notice was signed, placed in properly addressed envelope with sufficient postage thereon and mailed by certified mail was sufficient foundation for district court to admit original document into evidence and make finding that required notice was given. *Treasure State*

*Industries, Inc. v. Leigland*, 151 M 288, 443 P 2d 22.

#### Subdivision 30

In view of statute recognizing common-law marriage, presumption that man and woman deporting themselves as husband and wife have entered into lawful contract of marriage is itself proof of marriage and is overcome as matter of law only when in light of proved facts reasonable men could no longer find in accordance with presumed fact. *Spradlin v. United States*, 262 F Supp 502.

Presumption of valid common-law marriage may be overcome if divorce records from the residences of alleged common-law husband reveal that he was not divorced from former wife or had not had former marriage annulled. *Spradlin v. United States*, 284 F Supp 763.

#### Subdivision 33

Findings and conclusions of district court are presumed correct and will not be reversed on appeal unless the evidence, even though conflicting, preponderates against them. *Breen v. Industrial Accident Board*, 150 M 463, 436 P 2d 701.

#### References

Subdivision 15: *Tooker v. State*, 147 M 207, 410 P 2d 923; *Wilson v. Brodie*, 148 M 235, 419 P 2d 306, 308.

Subdivision 16: *Wilson v. Brodie*, 148 M 235, 419 P 2d 306, 308.

Subdivision 17: *Tooker v. State*, 147 M 207, 410 P 2d 923; *Wilson v. Brodie*, 148 M 235, 419 P 2d 306, 308.

### CHAPTER 1401—EVIDENCE—INDISPENSABLE—UNWRITTEN AGREEMENTS—CONCLUSIVE—UNANSWERABLE

#### 93-1401-7. (10613) Agreement not in writing—when invalid.

##### Estoppel from Raising Statute

Promisor was estopped from raising statute of frauds as defense to action on oral agreement on basis of evidence of glaring inconsistencies in promisor's position. *Daley v. Daley*, 150 M 432, 436 P 2d 88.

##### Note or Memorandum

While the statute of frauds does not

require that the memorandum be contained in a single document, where a memorandum did not name the parties to the alleged contract but referred to them as "we" and "our" and also tended to show that further negotiations were intended by the parties, it was not sufficient to satisfy the statute. *Anderson v. KFBB Broadcasting Corp.*, 143 M 423, 391 P 2d 2.

### CHAPTER 1501—EVIDENCE—PRODUCTION OF—SUBPOENAS

#### 93-1501-1. (10616) Evidence to be produced, by whom.

##### Negligence

Where plaintiff's property was damaged by the dropping of fire retardant from air-planes and at the trial he failed to come forth with sufficient evidence to show the lack of due care under the circumstances,

the trial court properly nonsuited plaintiff upon defendant's motion. *Stocking v. Johnson Flying Service*, 143 M 61, 387 P 2d 312.

Where plaintiff alleged giving of notice which defendant denied, notice or lack



thereof was put in issue and plaintiff had burden of proof. *Glacier General Assurance Co. v. State Farm Mutual Automobile Ins. Co.*, 150 M 452, 436 P 2d 533.

### **Res Ipsa Loquitur**

*Res ipsa loquitur* does not relieve the plaintiff of the burden of proving actionable negligence, nor is it sufficient that

he show that he was injured and that the instrumentality which caused his injury was in the control of the defendant; he must also show that the accident would not have occurred in the ordinary course of events if the defendant had exercised due care. *Stocking v. Johnson Flying Service*, 143 M 61, 387 P 2d 312.

## **CHAPTER 1901—EVIDENCE—GENERAL RULES OF EXAMINATION**

### **93-1901-2. (10660) Witness not under examination may be excluded.**

#### **Ignorance of Order**

Fact that witness did not hear court's order to absent himself from courtroom and, although present during part of another witness's testimony, was allowed to testify, was not reversible error in absence of showing that defendant was prejudiced. *State v. Love*, 151 M 190, 440 P 2d 275.

#### **Officers As Witnesses**

Statute does not apply to police officers called as state's witnesses, so that court properly denied defendant's motion to exclude police officers from courtroom before their time to testify. *State v. Fitzpatrick*, 149 M 400, 427 P 2d 300.

### **93-1901-6. (10664) When witness may refresh memory from notes.**

#### **Pretrial Statement**

Trial court did not abuse its discretion in permitting state's witness to testify after he had refreshed memory by referring to a statement he had made after shooting incident, in absence of prejudice to defendant and in light of fact that witness acknowledged that he made state-

ment after incident, that he recognized statement and that signature on statement was his. *State v. Gallagher*, 151 M 501, 445 P 2d 45.

#### **References**

*State v. Jones*, 143 M 155, 387 P 2d 913.

### **93-1901-7. (10665) Cross-examination, as to what.**

#### **Prior Inconsistent Pleading**

Complaint filed in previous action by father alleging boy's leg was 75% permanently disabled, signed under oath by

father, was properly admitted on cross-examination of father who had previously testified otherwise. *Tigh v. College Park Realty Co.*, 149 M 358, 427 P 2d 57.

### **93-1901-11. (10668) How impeached.**

#### **References**

*State v. Tagge*, 143 M 289, 388 P 2d

792; *State v. Tully*, 148 M 166, 418 P 2d 549, 550.

### **93-1901-12. (10669) Impeachment by evidence of declarations.**

#### **Prior Inconsistent Pleading**

Complaint filed in previous action by father alleging that boy's leg was 75% permanently disabled, signed by father under oath, was properly admitted for purpose of impeaching father who had previously testified otherwise. *Tigh v.*

*College Park Realty Co.*, 149 M 358, 427 P 2d 57.

#### **References**

*State v. Lagge*, 143 M 289, 388 P 2d 792.

### **93-1901-14. (10671) Writing shown to witness may be inspected, etc.**

#### **Pretrial Statement of Defendant**

The trial court did not err in permitting state's witness to read entire statement of defendant wherein defendant was warned of constitutional rights since it was mate-

rial evidence that defendant's constitutional rights and waiver thereof were clearly and understandably enunciated to defendant. *State v. Lucero*, 151 M 531, 445 P 2d 731.

## CHAPTER 2001—EVIDENCE—EFFECT OF

## 93-2001-1. (10672) Jury judges of effect of evidence, etc.

**Subdivision 3**

Conviction would not be reversed for giving of instruction based on statute but including words "except in so far as it may be corroborated by other and credible evidence in the case," in absence of specific showing of prejudice. *State v. Rollins*, 149 M 481, 428 P 2d 462.

**Subdivision 4—Accomplice's Testimony**

Where the court gave a defendant's instruction quoting this section verbatim in a criminal case, it may be assumed that the instruction was considered by the jury in weighing the evidence. *State v. Barick*, 143 M 273, 389 P 2d 170.

**Subdivisions 6 and 7**

In action by administrator of estate

of deceased partner against surviving partners to recover assets transferred by the deceased during his last illness, evidence that deceased had a half interest in the partnership cattle and failure of defendants to produce any of the partnership records at the trial in the lower court, sustained finding that heir of deceased had overcome the prima facie showing of one-third interest in the partnership cattle arising from the recording of the brand in name of three persons. *Marshall v. Minlschmidt*, 148 M 263, 419 P 2d 486, 491.

**References**

*State v. Lagge*, 143 M 289, 388 P 2d 792; *State v. Romero*, 146 M 77, 404 P 2d 500.

## CHAPTER 2201—EVIDENCE—RULES IN PARTICULAR CASES

## 93-2201-1. (10680) An offer equivalent to tender.

**References**

*Schultz v. Campbell*, 147 M 439, 413 P 2d 879.

## 93-2201-3. (10682) Objections to tender must be specified.

**Waiver of Tender**

Ordinarily, a check is not a tender, but it may be as effective as a tender of currency if there is no timely objection to

the form of tender, or if the objection is waived. *Schultz v. Campbell*, 147 M 439, 413 P 2d 879.

## CHAPTER 2501—QUESTIONS OF FACT AND LAW—DECISION OF

## 93-2501-2. (10699) Questions of law addressed to the court.

**Interpretation of Lease**

Interpretation of lease of building was matter for court in dispute between lessor

and lessee. *Solich v. Hale*, 150 M 358, 435 P 2d 883.

## CHAPTER 2601—REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT (1968)

- Section 93-2601-41. Purposes.  
 93-2601-42. Definitions.  
 93-2601-43. Remedies additional to those now existing.  
 93-2601-44. Extent of duties of support.  
 93-2601-45. Interstate rendition.  
 93-2601-46. Conditions of interstate rendition.  
 93-2601-47. Choice of law.  
 93-2601-48. Remedies of state or political subdivision furnishing support.  
 93-2601-49. How duties of support enforced.  
 93-2601-50. Jurisdiction.  
 93-2601-51. Contents and filing of petition for support—venue.  
 93-2601-52. Officials to represent obligee.  
 93-2601-53. Petition for a minor.  
 93-2601-54. Duty of initiating court.

- 93-2601-55. Costs and fees.
- 93-2601-56. Jurisdiction by arrest.
- 93-2601-57. State information agency.
- 93-2601-58. Duty of the court and officials of this state as responding state.
- 93-2601-59. Further duties of court and officials in the responding state.
- 93-2601-60. Hearing and continuance.
- 93-2601-61. Immunity from criminal prosecution.
- 93-2601-62. Evidence of husband and wife.
- 93-2601-63. Rules of evidence.
- 93-2601-64. Order of support.
- 93-2601-65. Responding court to transmit copies to initiating court.
- 93-2601-66. Additional powers of responding court.
- 93-2601-67. Paternity.
- 93-2601-68. Additional duties of responding court.
- 93-2601-69. Additional duty of initiating court.
- 93-2601-70. Proceedings not to be stayed.
- 93-2601-71. Application of payments.
- 93-2601-72. Effect of participation in proceeding.
- 93-2601-73. Intrastate application.
- 93-2601-74. Appeals.
- 93-2601-75. Additional remedies.
- 93-2601-76. Registration.
- 93-2601-77. Registry of foreign support orders.
- 93-2601-78. Official to represent obligee.
- 93-2601-79. Registration procedure—notice.
- 93-2601-80. Effect of registration—enforcement procedure.
- 93-2601-81. Uniformity of interpretation.
- 93-2601-82. Short title.

**93-2601-1 to 93-2601-40. Repealed.**

**Repeal**

Sections 93-2601-1 to 93-2601-40 (Sec. 1, Ch. 208, L. 1961), known as the “Uni-

form Reciprocal Enforcement of Support Act,” were repealed by Sec. 44, Ch. 237, Laws 1969.

**93-2601-41. Purposes.** The purposes of this act are to improve and extend by reciprocal legislation the enforcement of duties of support.

**History:** En. Sec. 1, Ch. 237, L. 1969.

**Compiler's Notes**

Section 93-2601-41 to 93-2601-44 comprise Part I of this chapter, as enacted by Ch. 237, Laws 1969, entitled “General provisions.”

**Title of Act**

An act adopting the Uniform Reciprocal Enforcement of Support Act as revised by the National Conference of Commissioners on Uniform State Laws in 1968; pro-

viding additional remedies for enforcement of duties of support; providing for criminal enforcement by extradition; providing for civil enforcement where parties reside in different states or in different counties of Montana; providing for registration and enforcement of foreign support orders and support orders issued in different counties of Montana; providing for the resolution of paternity and visitation rights if contested, and for appeals; and repealing sections 93-2601-1 through 93-2601-40, R. C. M. 1947.

**93-2601-42. Definitions.** (a) “Court” means the district court of this state and when the context requires means the court of any other state as defined in a substantially similar reciprocal law.

(b) “Duty of support” means a duty of support whether imposed or imposable by law or by order, decree, or judgment of any court, whether interlocutory or final or whether incidental to an action for divorce, separation, separate maintenance, or otherwise and includes the duty to pay arrearages of support past due and unpaid.

(c) “Governor” includes any person performing the functions of governor or the executive authority of any state covered by this act.



(d) "Initiating state" means a state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced. "Initiating court" means the court in which a proceeding is commenced.

(e) "Law" includes both common and statutory law.

(f) "Obligee" means a person including a state or political subdivision to whom a duty of support is owed or a person including a state or political subdivision that has commenced a proceeding for enforcement of an alleged duty of support or for registration of a support order. It is immaterial if the person to whom a duty of support is owed is a recipient of public assistance.

(g) "Obligor" means any person owing a duty of support or against whom a proceeding for the enforcement of a duty of support or registration of a support order is commenced.

(h) "Prosecuting attorney" means the public official in the appropriate place who has the duty to enforce criminal laws relating to the failure to provide for the support of any person.

(i) "Register" means to file in the registry of foreign support orders.

(j) "Registering court" means any court of this state in which a support order of a rendering state is registered.

(k) "Rendering state" means a state in which the court has issued a support order for which registration is sought or granted in the court of another state.

(l) "Responding state" means a state in which any responsive proceeding pursuant to the proceeding in the initiating state is commenced. "Responding court" means the court in which the responsive proceeding is commenced.

(m) "State" includes a state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any foreign jurisdiction in which this or a substantially similar reciprocal law is in effect.

(n) "Support order" means any judgment, decree, or order of support in favor of an obligee whether temporary or final, or subject to modification, revocation, or remission, regardless of the kind of action or proceeding in which it is entered.

**History:** En. Sec. 2, Ch. 237, L. 1969.

**93-2601-43. Remedies additional to those now existing.** The remedies herein provided are in addition to and not in substitution for any other remedies.

**History:** En. Sec. 3, Ch. 237, L. 1969.

**93-2601-44. Extent of duties of support.** Duties of support arising under the law of this state, when applicable under section 7 [93-2601-47], bind the obligor present in this state regardless of the presence or residence of the obligee.

**History:** En. Sec. 4, Ch. 237, L. 1969.

**93-2601-45. Interstate rendition.** The governor of this state may

(1) demand of the governor of another state the surrender of a person found in that state who is charged criminally in this state with failing to provide for the support of any person; or

(2) surrender on demand by the governor of another state a person found in this state who is charged criminally in that state with failing to provide for the support of any person. Provisions for extradition of criminals not inconsistent with this act apply to the demand even if the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and has not fled therefrom. The demand, the oath, and any proceedings for extradition pursuant to this section need not state or show that the person whose surrender is demanded has fled from justice or at the time of the commission of the crime was in the demanding state.

**History:** En. Sec. 5, Ch. 237, L. 1969.

prise Part II of this chapter, as enacted by Ch. 237, Laws 1969, entitled "Criminal enforcement."

**Compiler's Notes**

Sections 93-2601-45 and 93-2601-46 com-

**93-2601-46. Conditions of interstate rendition.** (a) Before making the demand upon the governor of another state for the surrender of a person charged criminally in this state with failing to provide for the support of a person, the governor of this state may require any prosecuting attorney of this state to satisfy him that at least sixty (60) days prior thereto the obligee initiated proceedings for support under this act or that any proceeding would be of no avail.

(b) If, under a substantially similar act, the governor of another state makes a demand upon the governor of this state for the surrender of a person charged criminally in that state with failure to provide for the support of a person, the governor may require any prosecuting attorney to investigate the demand and to report to him whether proceedings for support have been initiated or would be effective. If it appears to the governor that a proceeding would be effective but has not been initiated he may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.

(c) If proceedings have been initiated and the person demanded has prevailed therein the governor may decline to honor the demand. If the obligee prevailed and the person demanded is subject to a support order, the governor may decline to honor the demand if the person demanded is complying with the support order.

**History:** En. Sec. 6, Ch. 237, L. 1969.

**93-2601-47. Choice of law.** Duties of support applicable under this act are those imposed under the laws of any state where the obligor was present for the period during which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.

**History:** En. Sec. 7, Ch. 237, L. 1969.

prise Part III of this chapter, as enacted by Ch. 237, Laws 1969, entitled "Civil enforcement."

**Compiler's Notes**

Sections 93-2601-47 to 93-2601-74 com-

**93-2601-48. Remedies of state or political subdivision furnishing support.** If a state or a political subdivision furnishes support to an individual obligee it has the same right to initiate a proceeding under this act as the individual obligee for the purpose of securing reimbursement for support furnished and of obtaining continuing support.

**History:** En. Sec. 8, Ch. 237, L. 1969.

**93-2601-49. How duties of support enforced.** All duties of support, including the duty to pay arrearages, are enforceable by a proceeding under this act including a proceeding for civil contempt. The defense that the parties are immune to suit because of their relationship as husband and wife or parent and child is not available to the obligor.

**History:** En. Sec. 9, Ch. 237, L. 1969.

**93-2601-50. Jurisdiction.** Jurisdiction of any proceeding under this act is vested in the district court.

**History:** En. Sec. 10, Ch. 237, L. 1969.

**93-2601-51. Contents and filing of petition for support—venue.** (a) The petition shall be verified and shall state the name and, so far as known to the obligee, the address and circumstances of the obligor and the persons for whom support is sought, and all other pertinent information. The obligee may include in or attach to the petition any information which may help in locating or identifying the obligor including a photograph of the obligor, a description of any distinguishing marks on his person, other names and aliases by which he has been or is known, the name of his employer, his fingerprints, and his social security number.

(b) The petition may be filed in the appropriate court of any state in which the obligee resides. The court shall not decline or refuse to accept and forward the petition on the ground that it should be filed with some other court of this or any other state where there is pending another action for divorce, separation, annulment, dissolution, habeas corpus, adoption, or custody between the same parties or where another court has already issued a support order in some other proceeding and has retained jurisdiction for its enforcement.

**History:** En. Sec. 11, Ch. 237, L. 1969.

**93-2601-52. Officials to represent obligee.** If this state is acting as an initiating state the prosecuting attorney upon the request of the court, a state department of welfare, a county commissioner, or other local welfare officer, shall represent the obligee in any proceeding under this act. If the prosecuting attorney neglects or refuses to represent the obligee the attorney general may order him to comply with the request of the court or may undertake the representation.

**History:** En. Sec. 12, Ch. 237, L. 1969.

**93-2601-53. Petition for a minor.** A petition on behalf of a minor obligee may be executed and filed by a person having legal custody of the minor without appointment as guardian ad litem.

**History:** En. Sec. 13, Ch. 237, L. 1969.



**93-2601-54. Duty of initiating court.** If the initiating court finds that the petition sets forth facts from which it may be determined that the obligor owes a duty of support and that a court of the responding state may obtain jurisdiction of the obligor or his property it shall so certify and cause three (3) copies of the petition and its certificate and one (1) copy of this act to be sent to the responding court. Certification shall be in accordance with the requirements of the initiating state. If the name and address of the responding court is unknown and the responding state has an information agency comparable to that established in the initiating state it shall cause the copies to be sent to the state information agency or other proper official of the responding state, with a request that the agency or official forward them to the proper court and that the court of the responding state acknowledge their receipt to the initiating court.

**History:** En. Sec. 14, Ch. 237, L. 1969.

**93-2601-55. Costs and fees.** An initiating court shall not require payment of either a filing fee or other costs from the obligee but may request the responding court to collect fees and costs from the obligor. A responding court shall not require payment of a filing fee or other costs from the obligee but it may direct that all fees and costs requested by the initiating court and incurred in this state when acting as a responding state, including fees for filing of pleadings, service of process, seizure of property, stenographic or duplication service, or other service supplied to the obligor, be paid in whole or in part by the obligor or by the state or political subdivision thereof. These costs or fees do not have priority over amounts due to the obligee.

**History:** En. Sec. 15, Ch. 237, L. 1969.

**93-2601-56. Jurisdiction by arrest.** If the court of this state believes that the obligor may flee it may

(1) as an initiating court, request in its certificate that the responding court obtain the body of the obligor by appropriate process; or

(2) as a responding court, obtain the body of the obligor by appropriate process. Thereupon it may release him upon his own recognizance or upon his giving a bond in an amount set by the court to assure his appearance at the hearing.

**History:** En. Sec. 16, Ch. 237, L. 1969.

**93-2601-57. State information agency.** (a) The state department of public welfare is designated as the state information agency under this act, [and] it shall

(1) compile a list of the courts and their addresses in this state having jurisdiction under this act and transmit it to the state information agency of every other state which has adopted this or a substantially similar act. Upon the adjournment of each session of the legislature the agency shall distribute copies of any amendments to the act and a statement of their effective date to all other state information agencies;

(2) maintain a register of lists of courts received from other states and transmit copies thereof promptly to every court in this state having jurisdiction under this act; and

(3) forward to the court in this state which has jurisdiction over the obligor or his property petitions, certificates and copies of the act it receives from courts or information agencies of other states.

(b) If the state information agency does not know the location of the obligor or his property in the state and no state location service is available it shall use all means at its disposal to obtain this information, including the examination of official records in the state and other sources such as telephone directories, real property records, vital statistics records, police records, requests for the name and address from employers who are able or willing to co-operate, records of motor vehicle license offices, requests made to the tax offices both state and federal where such offices are able to co-operate, and requests made to the social security administration as permitted by the Social Security Act as amended.

(c) After the deposit of three (3) copies of the petition and certificate and one (1) copy of the act of the initiating state with the clerk of the appropriate court, if the state information agency knows or believes that the prosecuting attorney is not prosecuting the case diligently it shall inform the attorney general who may undertake the representation.

**History:** En. Sec. 17, Ch. 237, L. 1969.

**Compiler's Notes**

The compiler inserted the bracketed word "and" in subsection (a).

The Social Security Act, as amended, referred to in subsection (b) of this section, is compiled in the United States Code as Tit. 42, sec. 1306.

**93-2601-58. Duty of the court and officials of this state as responding state.** (a) After the responding court receives copies of the petition, certificate and act from the initiating court the clerk of the court shall docket the case and notify the prosecuting attorney of his action.

(b) The prosecuting attorney shall prosecute the case diligently. He shall take all action necessary in accordance with the laws of this state to enable the court to obtain jurisdiction over the obligor or his property and shall request the court to set a time and place for a hearing and give notice thereof to the obligor in accordance with law.

(c) If the prosecuting attorney neglects or refuses to represent the obligee the attorney general may order him to comply with the request of the court or may undertake the representation.

**History:** En. Sec. 18, Ch. 237, L. 1969.

**93-2601-59. Further duties of court and officials in the responding state.** (a) The prosecuting attorney on his own initiative shall use all means at his disposal to locate the obligor or his property, and if because of inaccuracies in the petition or otherwise the court cannot obtain jurisdiction the prosecuting attorney shall inform the court of what he has done and request the court to continue the case pending receipt of

more accurate information or an amended petition from the initiating court.

(b) If the obligor or his property is not found in the county, and the prosecuting attorney discovers that the obligor or his property may be found in another county of this state or in another state he shall so inform the court. Thereupon the clerk of the court shall forward the documents received from the court in the initiating state to a court in the other county or to a court in the other state or to the information agency or other proper official of the other state with a request that the documents be forwarded to the proper court. All powers and duties provided by this act apply to the recipient of the documents so forwarded. If the clerk of a court of this state forwards documents to another court he shall forthwith notify the initiating court.

(c) If the prosecuting attorney has no information as to the location of the obligor or his property he shall so inform the initiating court.

**History:** En. Sec. 19, Ch. 237, L. 1969.

**93-2601-60. Hearing and continuance.** If the obligee is not present at the hearing and the obligor denies owing the duty of support alleged in the petition or offers evidence constituting a defense the court, upon request of either party, continue the hearing to permit evidence relative to the duty to be adduced by either party by deposition or by appearing in person before the court. The court may designate the judge of the initiating court as a person before whom a deposition may be taken.

**History:** En. Sec. 20, Ch. 237, L. 1969.

**93-2601-61. Immunity from criminal prosecution.** If at the hearing the obligor is called for examination as an adverse party and he declines to answer upon the ground that his testimony may tend to incriminate him, the court may require him to answer, in which event he is immune from criminal prosecution with respect to matters revealed by his testimony, except for perjury committed in this testimony.

**History:** En. Sec. 21, Ch. 237, L. 1969.

**93-2601-62. Evidence of husband and wife.** Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable to proceedings under this act. Husband and wife are competent witnesses and may be compelled to testify to any relevant matter, including marriage and parentage.

**History:** En. Sec. 22, Ch. 237, L. 1969.

**93-2601-63. Rules of evidence.** In any hearing for the civil enforcement of this act the court is governed by the rules of evidence applicable in a civil court action in the district court. If the action is based on a support order issued by another court a certified copy of the order shall be received as evidence of the duty of support, subject only to any defenses available to an obligor with respect to paternity (section 27 [93-2601-67]) or to a defendant in an action or a proceeding to enforce a foreign money judgment. The determination or enforcement of a duty



of support owed to one obligee is unaffected by any interference by another obligee with rights of custody or visitation granted by a court.

**History:** En. Sec. 23, Ch. 237, L. 1969.

**93-2601-64. Order of support.** If the responding court finds a duty of support it may order the obligor to furnish support or reimbursement therefor and subject the property of the obligor to the order. Support orders made pursuant to this act shall require that payments be made to the clerk of the court of the responding state. The court and prosecuting attorney of any county in which the obligor is present or has property have the same powers and duties to enforce the order as have those of the county in which it was first issued. If enforcement is impossible or cannot be completed in the county in which the order was issued, the prosecuting attorney shall send a certified copy of the order to the prosecuting attorney of any county in which it appears that proceedings to enforce the order would be effective. The prosecuting attorney to whom the certified copy of the order is forwarded shall proceed with enforcement and report the results of the proceedings to the court first issuing the order.

**History:** En. Sec. 24, Ch. 237, L. 1969.

**93-2601-65. Responding court to transmit copies to initiating court.** The responding court shall cause a copy of all support orders to be sent to the initiating court.

**History:** En. Sec. 25, Ch. 237, L. 1969.

**93-2601-66. Additional powers of responding court.** In addition to the foregoing powers a responding court may subject the obligor to any terms and conditions proper to assure compliance with its orders and in particular to:

(1) require the obligor to furnish a cash deposit or a bond of a character and amount to assure payment of any amount due;

(2) require the obligor to report personally and to make payments at specified intervals to the clerk; and

(3) punish under the power of contempt the obligor who violates any order of the court.

**History:** En. Sec. 26, Ch. 237, L. 1969.

**93-2601-67. Paternity.** If the obligor asserts as a defense that he is not the father of the child for whom support is sought and it appears to the court that the defense is not frivolous, and if both of the parties are present at the hearing or the proof required in the case indicates that the presence of either or both of the parties is not necessary, the court may adjudicate the paternity issue. Otherwise the court may adjourn the hearing until the paternity issue has been adjudicated.

**History:** En. Sec. 27, Ch. 237, L. 1969.

**93-2601-68. Additional duties of responding court.** A responding court has the following duties which may be carried out through the clerk of the court:

(1) to transmit to the initiating court any payment made by the obligor pursuant to any order of the court or otherwise; and

(2) to furnish to the initiating court upon request a certified statement of all payments made by the obligor.

**History:** En. Sec. 28, Ch. 237, L. 1969.

**93-2601-69. Additional duty of initiating court.** An initiating court shall receive and disburse forthwith all payments made by the obligor or sent by the responding court. This duty may be carried out through the clerk of the court.

**History:** En. Sec. 29, Ch. 237, L. 1969.

**93-2601-70. Proceedings not to be stayed.** A responding court shall not stay the proceeding or refuse a hearing under this act because of any pending or prior action or proceeding for divorce, separation, annulment, dissolution, habeas corpus, adoption, or custody in this or any other state. The court shall hold a hearing and may issue a support order pendente lite. In aid thereof it may require the obligor to give a bond for the prompt prosecution of the pending proceeding. If the other action or proceeding is concluded before the hearing in the instant proceeding and the judgment therein provides for the support demanded in the petition being heard the court must conform its support order to the amount allowed in the other action or proceeding. Thereafter the court shall not stay enforcement of its support order because of the retention of jurisdiction for enforcement purposes by the court in the other action or proceeding.

**History:** En. Sec. 30, Ch. 237, L. 1969.

**93-2601-71. Application of payments.** A support order made by a court of this state pursuant to this act does not nullify and is not nullified by a support order made by a court of this state pursuant to any other law or by a support order made by a court of any other state pursuant to a substantially similar act or any other law, regardless of priority of issuance, unless otherwise specifically provided by the court. Amounts paid for a particular period pursuant to any support order made by the court of another state shall be credited against the amounts accruing or accrued for the same period under any support order made by the court of this state.

**History:** En. Sec. 31, Ch. 237, L. 1969.

**93-2601-72. Effect of participation in proceeding.** Participation in any proceeding under this act does not confer jurisdiction upon any court over any of the parties thereto in any other proceeding.

**History:** En. Sec. 32, Ch. 237, L. 1969.

**93-2601-73. Intrastate application.** This act applies if both the obligee and the obligor are in this state but in different counties. If the court of the county in which the petition is filed finds that the petition sets forth facts from which it may be determined that the obligor

owes a duty of support and finds that a court of another county in this state may obtain jurisdiction over the obligor or his property, the clerk of the court shall send the petition and a certification of the findings to the court of the county in which the obligor or his property is found. The clerk of the court of the county receiving these documents shall notify the prosecuting attorney of their receipt. The prosecuting attorney and the court in the county to which the copies are forwarded then shall have duties corresponding to those imposed upon them when acting for this state as a responding state.

**History:** En. Sec. 33, Ch. 237, L. 1969.

**93-2601-74. Appeals.** If the attorney general is of the opinion that a support order is erroneous and presents a question of law warranting an appeal in the public interest, he may

(a) perfect an appeal to the proper appellate court if the support order was issued by a court of this state, or

(b) if the support order was issued in another state, cause the appeal to be taken in the other state. In either case expenses of appeal may be paid on his order from funds appropriated for his office.

**History:** En. Sec. 34, Ch. 237, L. 1969.

**93-2601-75. Additional remedies.** If the duty of support is based on a foreign support order, the obligee has the additional remedies provided in the following sections.

**History:** En. Sec. 35, Ch. 237, L. 1969.

**Compiler's Notes**

Sections 93-2601-75 to 93-2601-82 com-

prise Part IV of this chapter, as enacted by Ch. 237, Laws 1969, entitled "Registration of foreign support orders."

**93-2601-76. Registration.** The obligee may register the foreign support order in a court of this state in the manner, with the effect, and for the purposes herein provided.

**History:** En. Sec. 36, Ch. 237, L. 1969.

**93-2601-77. Registry of foreign support orders.** The clerk of the court shall maintain a registry of foreign support orders in which he shall file foreign support orders.

**History:** En. Sec. 37, Ch. 237, L. 1969.

**93-2601-78. Official to represent obligee.** If this state is acting either as a rendering or a registering state the prosecuting attorney upon the request of the court, a state department of welfare, a county commissioner, or other local welfare official shall represent the obligee in proceeding under this part.

If the prosecuting attorney neglects or refuses to represent the obligee, the attorney general may order him to comply with the request of the court or may undertake the representation.

**History:** En. Sec. 38, Ch. 237, L. 1969.

**93-2601-79. Registration procedure — notice.** (a) An obligee seeking to register a foreign support order in a court of this state shall



transmit to the clerk of the court (1) three (3) certified copies of the order with all modifications thereof, (2) one (1) copy of the reciprocal enforcement of support act of the state in which the order was made, and (3) a statement verified and signed by the obligee, showing the post-office address of the obligee, the last known place of residence and post-office address of the obligor, the amount of support remaining unpaid, a description and the location of any property of the obligor available upon execution, and a list of the states in which the order is registered. Upon receipt of these documents the clerk of the court, without payment of a filing fee or other cost to the obligee, shall file them in the registry of foreign support orders. The filing constitutes registration under this act.

(b) Promptly upon registration the clerk of the court shall send by certified or registered mail to the obligor at the address given a notice of the registration with a copy of the registered support order and the post-office address of the obligee. He shall also docket the case and notify the prosecuting attorney of his action. The prosecuting attorney shall proceed diligently to enforce the order.

History: En. Sec. 39, Ch. 237, L. 1969.

**93-2601-80. Effect of registration — enforcement procedure.** (a) Upon registration the registered foreign support order shall be treated in the same manner as a support order issued by a court of this state. It has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a support order of this state and may be enforced and satisfied in like manner.

(b) The obligor has twenty (20) days after the mailing of notice of the registration in which to petition the court to vacate the registration or for other relief. If he does not so petition the registered support order is confirmed.

(c) At the hearing to enforce the registered support order the obligor may present only matters that would be available to him as defenses in an action to enforce a foreign money judgment. If he shows to the court that an appeal from the order is pending or will be taken or that a stay of execution has been granted the court shall stay enforcement of the order until the appeal is concluded, the time for appeal has expired, or the order is vacated, upon satisfactory proof that the obligor has furnished security for payment of the support ordered as required by the rendering state. If he shows to the court any ground upon which enforcement of a support order of this state may be stayed the court shall stay enforcement of the order for an appropriate period if the obligor furnishes the same security for payment of the support ordered that is required for a support order of this state.

History: En. Sec. 40, Ch. 237, L. 1969.

**93-2601-81. Uniformity of interpretation.** This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 41, Ch. 237, L. 1969.

93-2601-82. **Short title.** This act may be cited as the Revised Uniform Reciprocal Enforcement of Support Act (1968).

**History:** En. Sec. 42, Ch. 237, L. 1969.

**Separability Clause**

Section 43 of Ch. 237, Laws 1969 read "If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect with-

out the invalid provision or application, and to this end the provisions of this act are severable."

**Repealing Clause**

Section 44 of Ch. 237, Laws 1969 read "Sections 93-2601-1 through 93-2601-40, R. C. M. 1947, are repealed."

## CHAPTER 2701

### MONTANA RULES OF CIVIL PROCEDURE

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#### II. COMMENCEMENT OF ACTION—SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

##### Rule

4. Persons subject to jurisdiction—Process—Service.
  - A. DEFINITION OF PERSON.
  - B. JURISDICTION OF PERSONS.
    - (1) Subject to Jurisdiction.
    - (2) Acquisition of Jurisdiction.
  - C. PROCESS.
    - (1) Summons—Issuance.
    - (2) Summons—Form.
  - D. SERVICE.
    - (1) By Whom Served.
    - (2) Personal Service Within the State.
    - (3) Personal Service Outside the State.
    - (4) Other Service.
    - (5) Service by Publication—When Permitted—Effect—Manner—Proof.
      - (a) When Permitted.
      - (b) Effect of Service by Publication.
      - (c) Filing of Pleading and Affidavit for Service by Publication; and Order for Publication.
      - (d) Number of Publications.
      - (e) Mailing Summons and Complaint.
      - (f) Time When First Publication or Service Outside State Must Be Made.
      - (g) When Service by Publication or Outside State Complete.
      - (h) Additional Information to Be Published.
    - (6)
      - (a) Service on Secretary of State.
      - (b) [Continuance to Allow Defense.]
    - (7) Amendment.
    - (8) Proof of Service.
    - (9) Contents of Affidavit of Service.
    - (10) Procedure Where Only Part of Defendants Are Served.
5. Service and filing of pleadings and other papers.
  - (a) SERVICE—WHEN REQUIRED.
6. Time.
  - (b) ENLARGEMENT.



III. PLEADINGS AND MOTIONS

8. **General rules of pleading.**
  - (b) DEFENSES—FORM OF DENIALS.
  - (c) AFFIRMATIVE DEFENSES.
12. **Defenses and objections—When and how presented—By pleading or motion—Motion for judgment on pleadings.**
  - (b) HOW PRESENTED.
  - (d) PRELIMINARY HEARINGS.
  - (g) CONSOLIDATION OF DEFENSES IN MOTION.
  - (h) WAIVER OR PRESERVATION OF CERTAIN DEFENSES.
13. **Counterclaim and cross-claim.**
  - (h) JOINDER OF ADDITIONAL PARTIES.
15. **Amended and supplemental pleadings.**
  - (c) RELATION BACK OF AMENDMENTS.

IV. PARTIES

17. **Parties plaintiff and defendant—Capacity.**
  - (a) REAL PARTY IN INTEREST.
18. **Joinder of claims and remedies.**
  - (a) JOINDER OF CLAIMS.
19. **Joinder of persons needed for just adjudication.**
  - (a) PERSONS TO BE JOINED IF FEASIBLE.
  - (b) DETERMINATION BY COURT OF WHENEVER JOINDER NOT FEASIBLE.
  - (c) PLEADING REASONS FOR NONJOINDER.
  - (d) EXCEPTION OF CLASS ACTIONS.
20. **Permissive joinder of parties.**
  - (a) PERMISSIVE JOINDER.
23. **Class actions.**
  - (a) PREREQUISITES TO A CLASS ACTION.
  - (b) CLASS ACTIONS MAINTAINABLE.
  - (c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED—NOTICE—JUDGMENT—ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.
  - (d) ORDER IN CONDUCT OF ACTIONS.
  - (e) DISMISSAL OR COMPROMISE.
  - (f) SECURITY FOR COSTS.
- 23.1. **Derivative actions by shareholders.**
- 23.2. **Actions relating to unincorporated associations.**
24. **Intervention.**
  - (a) INTERVENTION OF RIGHT.
  - (c) PROCEDURE.

**V. DEPOSITIONS AND DISCOVERY**

- 26. **Depositions pending action.**
  - (e) OBJECTIONS TO ADMISSIBILITY.
- 28. **Persons before whom depositions may be taken.**
  - (b) IN FOREIGN COUNTRIES.
  - (e) DEPOSITION TO BE TAKEN IN SISTER STATES AND FOREIGN COUNTRIES FOR USE IN THIS STATE.
- 30. **Depositions upon oral examination.**
  - (f) CERTIFICATION AND FILING BY OFFICER—COPIES—NOTICE OF FILING.
- 33. **Interrogatories to parties.**
- 35. **Physical and mental examination of persons.**
  - (b) REPORT OF FINDINGS.
  - (2) Waiver of Privilege.

**VI. TRIALS**

- 41. **Dismissal of actions.**
  - (b) INVOLUNTARY DISMISSAL—EFFECT THEREOF.
  - (e) FAILURE TO SERVE SUMMONS.
- 43. **Evidence.**
  - (f) INTERPRETERS.
- 44. **Proof of official record.**
  - (a) AUTHENTICATION.
    - (1) Domestic.
    - (2) Foreign.
  - (b) LACK OF RECORD.
  - (c) OTHER PROOF.
- 44.1. **Determination of foreign law.**
- 46. **Exceptions unnecessary.**
- 47. **Jurors.**
  - (b) MANNER OF SELECTION AND ORDER OF EXAMINATION OF JURORS.
- 50. **Motion for a directed verdict and for judgment notwithstanding the verdict.**
  - (a) MOTION FOR DIRECTED VERDICT—WHEN MADE, EFFECT.
  - (b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.
  - (c) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT—CONDITIONAL RULINGS ON GRANT OF MOTION.
  - (d) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT—DENIAL OF MOTION.
- 52. **Findings by the court.**

## RULES OF CIVIL PROCEDURE

### VII. JUDGMENT

55. Default.

(b) JUDGMENT.

(2) By the Court.

56. Summary judgment.

(c) MOTION AND PROCEEDINGS THEREON.

59. New trials—Amendment of judgments.

(a) GROUNDS.

(b) TIME FOR MOTION.

(c) TIME FOR SERVING AFFIDAVITS.

(d) TIME FOR HEARING ON MOTION.

(e) ON INITIATIVE OF COURT.

(f) MOTION TO ALTER OR AMEND A JUDGMENT.

60. Relief from judgment or order.

(b) MISTAKES—INADVERTENCE—EXCUSABLE NEGLECT  
—NEWLY DISCOVERED EVIDENCE—FRAUD, ETC.

(c) TIME FOR HEARING AND DETERMINING MOTIONS.

### VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

68. Offer of judgment.

### IX. APPEALS

72. Appeal from a district court to the supreme court.

### X. DISTRICT COURTS AND CLERKS

77. District courts and clerks.

(e) TRANSMITTAL OF FILE ON REMOVAL.

### XI. GENERAL PROVISIONS

85. Effective date—Statutes superseded.

(a) EFFECTIVE DATE AND APPLICATION TO PENDING  
PROCEEDINGS.

(b) STATUTES SUPERSEDED.

TABLE B. List of rules superseding statutes.

C. List of statutes superseded by rules.

### I. SCOPE OF RULES—ONE FORM OF ACTION

Rule 1. Scope of rules.

#### References

Spaberg v. Johnson, 143 M 500, 392 P  
2d 78.

### II. COMMENCEMENT OF ACTION—SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

Rule 4. Persons subject to jurisdiction—Process—Service.

5. Service and filing of pleadings and other papers.

6. Time.



**Rule 4. Persons subject to jurisdiction—Process—Service.**

**A. DEFINITION OF PERSON.** As used in this rule, the word "person," whether or not a citizen or resident of this state and whether or not organized under the laws of this state, includes an individual whether operating in his own name or under a trade name; an individual's agent or personal representative; a corporation; a business trust; an estate; a trust; a partnership; an unincorporated association; and any two or more persons having a joint or common interest or any other legal or commercial entity.

**History:** En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

**Amendment**

The 1965 amendment restated this rule without change.

**B. JURISDICTION OF PERSONS.**

(1) **Subject to Jurisdiction.** All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

- (a) the transaction of any business within this state;
- (b) the commission of any act which results in accrual within this state of a tort action;
- (c) the ownership, use or possession of any property, or of any interest therein, situated within this state;
- (d) contracting to insure any person, property or risk located within this state at the time of contracting;
- (e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or
- (f) acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within this state, or as executor or administrator of any estate within this state.

(2) **Acquisition of Jurisdiction.** Jurisdiction may be acquired by our courts over any person through service of process as herein provided; or by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee.

**History:** En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

**Amendment**

The 1965 amendment restated this rule without apparent change.

**Nonresident Corporation Jurisdiction**

Montana court acquired in personam jurisdiction over nonresident corporation under portions of rule subjecting persons, who transact any business within Montana and persons entering into contracts for services to be rendered in Montana, to

jurisdiction of Montana notwithstanding corporation's contention that most of its Montana business and services it rendered and materials it furnished were within federal enclave known as Malstrom Air Force Base. *Swanson Painting Co. v. Painters Local Union No. 260*, 391 F 2d 523.

In products liability suit instituted by resident, state properly exercised in personam jurisdiction over nonresident manufacturer under long-arm provision relating to commission of act resulting in accrual within state of tort action notwithstanding manufacturer's contention that action offended due process requirements of

"fundamental fairness" and "minimum contacts"; action was proper despite facts that defendant maintained no office in state, had no representative resident in or assigned to Montana, received orders from wholesale or retail outlets in Illinois, and had Montana business consisting of less than one-half of one per cent of its total business. *Bullard v. Rhodes Pharmacal Co.*, 263 F Supp 79.

Long-arm jurisdiction obtained over nonresident defendant for commission of act which results in accrual within state of tort action and for entering into contract for services to be rendered or for materials to be furnished in state did not violate due process requirements as embodied in "minimum contacts" test in view of evidence that defendant manufactured products for national and interstate market; that valve was ordered by specifications; that defendant knew at time of shipment that it would be used in Montana; that defendant knew that negligent manufacture might constitute a serious hazard; and that the explosion allegedly resulting from defective valve occurred in Montana. *Continental Oil Co. v. Atwood & Morrill Co.*, 265 F Supp 692.

Exercise of long-arm jurisdiction over nonresident defendant for commission of act which results in accrual within state of tort action did not violate due process requirements and was within "minimum contacts" rule in view of evidence that nonresident manufacturer knew that cableway it manufactured would be used on construction site in state and that it sent several of its employees to state to inspect cableway. *Hartung v. Washington Iron Works*, 267 F Supp 408.

Montana properly exercised in personam jurisdiction over nonresident assignee of retail installment sales contract in suit for assignee's conversion of truck by repossessing it under provision relat-

ing to commission of any act which results in accrual within state of tort action; action was proper notwithstanding assignee's due process contentions in that his activities in Montana were insufficient in view of evidence that when contract was assigned, the assignee knew vehicle would be used throughout United States; that assignee did not object when truck was moved to Montana and thereafter accepted payments mailed from Montana; that following accident in South Dakota, vehicle was removed to Montana at assignee's request; and that assignee had its agent, a wholly owned subsidiary, repossess truck in Montana and take necessary steps to obtain title to it. *Boyt v. Emmco Ins. Co.*, 271 F Supp 366.

### Retroactive Application

The giving effect to the service of summons provisions of this rule, when the operative facts of the case to which the rule was applied had taken place prior to the effective date of the Montana Rules of Civil Procedure as set out in Rule 86 (a) was not a prohibited retroactive application of this rule within the meaning of section 12-201. *Weber v. Hydroponics, Inc.*, 226 F Supp 117, 118.

This rule applied to act of alleged malpractice occurring in Montana prior to effective date of this rule (Rule 86(a)) and doctor who had not resided in Montana since effective date of rule could be served properly with process, under Rule 4D(3), in California. *State ex rel. Johnson v. District Court of Fourth Judicial District*, 148 M 22, 417 P 2d 109, 111.

### Law Review

Ganz, "Doing Business" in Illinois as a Basis of Jurisdiction Over Nonresidents—Due Process and Contracts," Vol. 1, No. 4 *Illinois Continuing Legal Education* 75 (October 1963).

## C. PROCESS.

(1) **Summons—Issuance.** Upon the filing of the complaint, the clerk shall forthwith issue a summons, and shall deliver the summons either to the sheriff of the county in which the action is filed, or to the person who is to serve it, or upon request, to the attorney for said party who shall thereafter be responsible to see that the summons is served in the manner prescribed by these rules. Upon request, separate or additional summons shall issue against any parties designated in the original action, or against any additional parties who may be brought into the action.

(2) **Summons—Form.** The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to

appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. In an action brought to quiet title to real estate, there shall be added to the foregoing, the following: "This action is brought for the purpose of quieting title to land situated in \_\_\_\_\_ County, Montana, and described as follows: (Here insert descriptions of land.)." For exceptions to this form of summons see 4D(4) "Other Service," set forth hereinafter.

**History:** En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: None.

This amendment, together with the change in 4D(4), is intended to make it clear that there is no conflict between the requirements of the rules with respect to summons for publication and the requirements of section 93-6228, and that section 93-6228 governs actions to establish title to property granted to heirs of deceased entryman but has no application to other actions.

#### Amendments

The 1965 amendment made minor changes in the caption to paragraph (2) and in references to R. C. M. 1947.

The amendment of September 29, 1967 substituted the last sentence in subdivision (2) for former sentence requiring compliance with sections 84-4165 and 93-6228 and with provisions of Rule 4D(5) (h); and made minor changes in phraseology.

#### D. SERVICE.

(1) By Whom Served. Service of all process shall be made by a sheriff of the county where the party to be served is found, by his deputy, by a constable authorized by law, or by any other person over the age of 21 not a party to the action, except that a subpoena may be served as provided in Rule 45.

(2) Personal Service Within the State. The summons and complaint shall be served together, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(a) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given.

(b) Upon a minor over the age of 14 years, by delivering a copy of the summons and complaint to him personally, and by leaving a copy thereof at his dwelling house or usual place of abode with some adult of suitable discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

(c) Upon a minor under the age of 14 years, by delivering a copy of the summons and complaint to his guardian, if he has one



within the state, and if not, then to his father or mother or other person or agency having his care or control, or with whom he resides, or if service cannot be made upon any of them, then as provided by order of the court.

(d) Upon a person who has been adjudged of unsound mind by a court of this state, or for whom a guardian has been appointed in this state by reason of incompetency, by delivering a copy of the summons and complaint to his guardian, if there be a guardian residing in this state appointed and acting under the laws of this state. If there be no such guardian, the court shall appoint a guardian ad litem for the incompetent person, with or without personal service on the incompetent, as the court may direct. When a party is alleged to be of unsound mind, but has not been so adjudged by a court of this state, such party may be brought into court by service of process personally upon him. The court may also stay any action pending against a person on learning that such person is of unsound mind.

(e) Upon a domestic corporation, partnership or other unincorporated association, or upon a foreign corporation, partnership or other unincorporated association, established by the laws of any other state or country, and having a place of business within this state or doing business herein either permanently or temporarily, or which was doing business herein either permanently, or temporarily at the time the claim for relief accrued: (i) by delivering a copy of the summons and complaint to an officer, director, superintendent or managing or general agent, or partner, or associate for such corporation, partnership, or association; or by leaving such copies at the office or place of business of the corporation, partnership, or association within the state with the person in charge of such office; or (ii) by delivering a copy of the summons and complaint to any agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, partnership, or association, provided that if the agent or attorney in fact is one designated by statute to receive service, such further notice as the statute requires shall also be given; or (iii) if the sheriff shall make return that no person upon whom service may be made can be found in the county, then service may be made by leaving a copy of the summons and complaint at any office of the corporation, partnership, or unincorporated association within this state with the person in charge of such office; or (iv) if the suit is against a corporation whose charter or right to do business in the state has expired or been forfeited, by delivering a copy thereof to any one of the persons who have become trustees for the corporation and its stockholders or members.

(f) When a claim for relief is pending in any court of this state against a corporation organized under the laws of this state, or against a corporation organized under the laws of any other state or country, that has filed a copy of its charter in the office of the secretary of state of Montana and qualified to do business in Montana; or against a corporation organized under the laws of any other state or country

which is subject to the jurisdiction of the courts of this state under the provisions of Rule 4B above, even though such corporation has never qualified to do business in Montana; or against a national banking corporation which, through insolvency or lapse of charter, has ceased to do business in Montana; and none of the persons designated in D(2)(e) immediately above can with the exercise of reasonable diligence be found within Montana, the party causing summons to be issued shall exercise reasonable diligence to ascertain the last known address of any such person. Upon the filing with the clerk of court in which the claim for relief is pending of an affidavit reciting that none of the persons designated in D(2)(e) can after due diligence be found within Montana upon whom service of process can be made, and reciting the last known address of any such person, or reciting that after the exercise of reasonable diligence no such address for any such person could be found, and there has also been deposited with the said clerk the sum of \$5.00 to be paid to the secretary of state as a fee for each of said defendants for whom the secretary of state is to receive said service, then the clerk of court shall issue an order directing process to be served upon the secretary of state of the state of Montana or, in his absence from his office, upon the deputy secretary of state of the state of Montana. Such affidavit shall be sufficient evidence of the diligence of inquiry made by affiant, if the affidavit recites that diligent inquiry was made, and the affidavit need not detail the facts constituting such inquiry. Whenever service is also to be made through publication as provided in 4D(5), or upon other persons as provided in 4D(6), the affidavit herein required may be combined in the same instrument with the affidavit required under 4D(5)(c) and 4D(6). The said clerk of court shall then mail to the secretary of state the original summons, one copy of the summons and one copy of the affidavit for the files of the secretary of state, one copy of the summons attached to a copy of the complaint for each of the defendants to be served by service upon the secretary of state, and the fee for service, to the office of the secretary of state. The secretary of state shall mail copy of the summons and complaint by certified or registered mail with a return receipt requested to the last known address of any of the persons designated in D(2)(e) above, if known, or, if none such is known and it is a corporation not organized in Montana, to the secretary of state of the state in which such corporation was originally incorporated, if known; and the secretary of state shall make his return as hereinafter provided under Rule 4D(6). When service is so made, it shall be deemed personal service on such corporation, and the said secretary of state, or his deputy when the secretary is absent from his office, is hereby appointed agent of such corporation for service of process in cases hereinbefore mentioned. In any action where due diligence has been exercised to locate and serve any of the persons designated in D(2)(e) above, service shall be deemed complete upon said corporation regardless of the receipt of any return receipt or advice of refusal of the addressee to receive

the process mailed, as is hereinafter required by 4D(6); provided, however, that except in those actions where any of the persons designated in D(2)(e) above have been located and served personally as hereinabove provided, then service by publication shall also be made as provided hereafter in 4D(5)(d) and 4D(5)(h); the first publication must be made within sixty days from the date the original summons is mailed to the secretary of state as herein provided, and if said first publication is not so made, the action shall be deemed dismissed as to any such party intended to be served by such publication; and service shall be complete upon the date of the last publication of summons.

When service of process is made as herein provided, and there is no appearance thereafter made by any attorney for such corporation, service of all other notices required by law to be served in such action may be served upon the secretary of state.

(g) Upon a city, village, town, school district, county, or public agency or board of any such public bodies, by delivering a copy of the summons and complaint to any commissioner, trustee, board member, mayor or head of the legislative department thereof.

(h) Upon the state, or any state board or state agency, by delivering a copy of the summons and complaint to the governor, or to any member of such state board or state agency, and also by delivering an additional copy of the summons and complaint to the attorney general.

(i) Upon an estate by delivering a copy of the summons and complaint to the personal representative thereof; upon a trust by delivering a copy of the summons and complaint to any trustee thereof.

(3) Personal Service Outside the State. Where service upon any person cannot, with due diligence, be made personally within this state, service of summons and complaint may be made by service outside this state in the manner provided for service within this state, with the same force and effect as though service had been made within this state. Where service by publication is permitted as hereinafter provided, personal service of a summons and complaint upon the defendant out of the state shall be equivalent to and shall dispense with the procedures and the publication and mailing provided for hereafter in 4(5)(c), 4(5)(d) and 4(5)(e) of this rule.

(4) Other Service. All process in any form of action shall be served in the manner specified in this rule with the exception that whenever a statute of this state or an order of the court or a citation by the court made pursuant thereto provides for the service of a notice or of an order or of a citation in lieu of summons upon any person, service shall be made under the circumstances and in the manner prescribed by the statute or order or citation; and with the further exception that all persons are required to comply with the provisions hereafter prescribed in D(5)(h), and with the provisions of sections 40-2819, 40-3405, 40-3406, 40-3423, 40-3424, 93-6228, 93-6229, 93-6230, and 93-6232, R. C. M. 1947, when the action pertains to the provisions of such sections.

(5) Service by Publication — When Permitted — Effect — Manner — Proof.



(a) When Permitted. A defendant, whether known or unknown, who has not been served under the foregoing subsections of this rule can be served by publication in the following situations only:

(i) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest therein. This subsection shall apply whether any such defendant is known or unknown.

(ii) When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real or personal property within this state.

(iii) When the action is for divorce or for annulment of marriage of a resident of this state or for modification of a decree of divorce granted by a court of this state.

(iv) When the defendant has property within this state which has been attached or has a debtor within this state, who has been garnished. Jurisdiction under this subsection may be independent of or supplementary to jurisdiction acquired under subsections (5)(a)(i), (5)(a)(ii), and (5)(a)(iii) herein.

(b) Effect of Service by Publication. When a defendant, whether known or unknown, has been served by publication as provided in this rule, any court of this state having jurisdiction may render a decree which will adjudicate any interest of such defendant in the status, property, or thing acted upon, but it may not bind the defendant personally to the personal jurisdiction of the court unless some ground for the exercise of personal jurisdiction exists.

(c) Filing of Pleading and Affidavit for Service by Publication; and Order for Publication. Before service of the summons by publication is authorized in any case, there shall be filed with the clerk in the district court of the county in which the action is commenced (i) a pleading setting forth a claim in favor of the plaintiff and against the defendant in one of the situations defined in (5)(a) above; and (ii) in situations defined in (5)(a)(i), (5)(a)(ii), (5)(a)(iii), upon return of the summons showing the failure to find any defendant designated in the complaint, an affidavit stating that such defendant resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons; or, if the defendant is a domestic or foreign corporation, that none of the persons designated in D(2)(e) above can, after due diligence, be found within the state; or, if the defendant is an unknown claimant, by showing that he has made diligent search and inquiry for all persons who claim, or might claim any right, title, estate, or interest in, or lien, or encumbrance upon, such property, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any right of dower, inchoate or accrued, and that he has specifically named as defendants in such action all such persons whose names can be ascertained; such affidavit shall

be sufficient evidence of the diligence of any inquiry made by the affiant, if the affidavit recite the fact that diligent inquiry was made, and it need not detail the facts constituting such inquiry, and if desired, it may be combined in one instrument with the affidavit required under 4D(2)(f), or 4D(6); and (iii) in the situation defined in (5)(a)(iv) above, there must be first presented to the court proof that a valid attachment or garnishment has been effected. Upon complying herewith the plaintiff may obtain an order for the service of summons to be made upon the defendants by publication, which order may be issued by either the judge or the clerk of court.

(d) Number of Publications. Service of the summons by publication may be made by publishing the same three times, once each week for three successive weeks, in a newspaper published in the county in which the action is pending, if a newspaper is published in such county, and if no newspaper is published in such county then in a newspaper published in an adjoining county and having a general circulation therein.

(e) Mailing Summons and Complaint. A copy of the summons for publication and complaint, at any time after the filing of the affidavit for publication and not later than 10 days after the first publication of the summons, shall be deposited in some post office in this state, postage prepaid, and directed to the defendant at his place of residence unless the affidavit for publication states that the residence of the defendant is unknown. If the defendant is a corporation, and personal service cannot with due diligence be effected within Montana on any of the persons designated in D(2)(e) above, then service may be completed on said corporation by service upon the secretary of state in the manner, and following the procedure outlined in D(2)(f) above.

(f) Time When First Publication or Service Outside State Must Be Made. The first publication of summons, or personal service of the summons and complaint upon the defendant out of the state, must be made within 60 days after the filing of the affidavit for publication. If not so made, the action shall be deemed dismissed as to any party intended to be served by such publication.

(g) When Service by Publication or Outside State Complete. Service by publication is complete on the date of the last publication of the summons, or in case of personal service of the summons and complaint upon the defendant out of the state, on the date of such service.

(h) Additional Information to Be Published. In addition to the form of summons prescribed above in "C. Process, (2) Summons—Form," the published summons shall state in general terms the nature of the action, and in all cases where publication of summons is made in an action in which the title to, or any interest in or lien upon real property is involved, or affected, or brought into question, the publication shall also contain a description of the real property involved, affected or brought into question thereby, and a statement of the object of the action.

(6) (a) Service on Secretary of State. Whenever service is to be made upon certain corporations as provided hereinabove in D(2)(f) and D(5)(e), the requirements of said D(2)(f) must be complied with. In all other cases, unless otherwise provided by statute, whenever the secretary of state of the state of Montana has been appointed, or is deemed by law to have been appointed, as the agent to receive service of process for any person who cannot with due diligence be found or served personally within Montana, the party, or his attorney, shall make an affidavit stating the facts showing that the secretary of state is such agent, and stating the residence and last known post-office address of the person to be served, and shall file such affidavit with the clerk of court in which such claim for relief is pending, accompanied by sufficient copies of the affidavit, summons and complaint for service upon the secretary of state, and there has also been deposited with the clerk of the court in which such claim for relief is pending the sum of five dollars to be paid to the secretary of state as a fee for each of said defendants for whom the secretary of state is to receive such service; then the clerk shall forward the original summons, one copy of the summons and one copy of the affidavit for the files of the secretary of state, and one copy of the summons attached to copy of the complaint for each of the defendants to be served by service upon the secretary of state, and the fee, to the office of the secretary of state.

Such service on the secretary of state shall be sufficient personal service upon the person to be served, provided that notice of such service and a copy of the summons and complaint are forthwith sent by registered or certified mail by the secretary of state or his deputy to the party to be served at his last known address, marked "Deliver to Addressee Only" and "Return Receipt Requested," and provided further that such return receipt shall be received by the secretary of state purporting to have been signed by said addressee, or the secretary of state shall be advised by the postal authority that delivery of said registered or certified mail was refused by said addressee, except in those cases where compliance is excused under the provisions of D(2)(f) above. The date upon which the secretary of state receives said return receipt, or receives advice by the postal authority that delivery of said registered or certified mail was refused by the addressee, shall be deemed the date of service.

As an alternative to sending the summons and complaint by registered or certified mail, as herein provided, the secretary of state, or his deputy, may cause copy of the summons and complaint to be served by any qualified law enforcement officer, in accord with the procedure set out in D(1), (2) or (3) of this rule.

The secretary of state, or his deputy, shall make an original and two copies of an affidavit reciting: (1) the fact of service upon him by the clerk of court, including the day, and hour of such service; (2) the fact of his mailing a copy of the summons and complaint and notice to the defendant, including the day and hour thereof, except in those cases where he is relieved from doing so under the provis-



ions of D(2)(f) in which cases his affidavit shall so recite; and (3) the fact of his receipt of a return from the postal department including the date, and hour thereof, and attaching to his affidavit a copy of such return. The secretary of state, or his deputy, shall then transmit the original summons, and his original affidavit along with copy of his notice to the defendant where such notice was required, to the clerk of court in which the claim for relief is pending, and it shall be filed in the claim for relief by said clerk of court; and the secretary of state shall also transmit to the attorney for the plaintiff copy of the affidavit of the secretary of state along with copy of the notice to the defendant where such notice was required. The secretary of state shall keep on file in his office a copy of the summons, a copy of the affidavit served on him by the clerk of court, and a copy of the affidavit executed and issued by the secretary of state.

(b) [Continuance to Allow Defense.] In any of the cases provided for in Rule 4D(2)(f) above, or provided for hereinabove in 4D(6)(a), the court in which the claim for relief is pending may order such continuance as may be necessary to afford reasonable opportunity to defend the action.

(7) Amendment. At any time, in its discretion, and upon such notice and terms as it deems just, the court may allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(8) Proof of Service. Proof of the service of the summons and of the complaint or notice, if any, accompanying the same must be as follows:

(a) If served by the sheriff or other officer, his certificate thereof;

(b) If by any other person, his affidavit thereof;

(c) In case of publication an affidavit of the publisher and an affidavit of the deposit of a copy of the summons and complaint in the post office as required by law, if the same shall have been deposited; or

(d) The written admission of the defendant showing the date and place of service.

The certificate or affidavit of service mentioned in this subdivision must state the time, date, place, and manner of service.

(9) Contents of Affidavit of Service. Whenever a process, pleading, order of court, or other paper is served personally by a person other than the sheriff or person designated by law, the affidavit of service when made, shall state that the person so serving is of legal age, and the date and place of making the service. It also shall state that the person making such service knew the person served to be the person named in the papers served and the person intended to be served.

(10) Procedure Where Only Part of Defendants Are Served. If the summons is served on one or more, but not all, of the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants on whom the process is served, and may at any time there-

after have a summons against the defendant not served with the first process to cause him to appear in said court to show cause why he should not be made a party to such judgment. Upon such defendant being duly served with such process, the court shall hear and determine the matter in the same manner as if such defendant had been originally brought into court, and such defendant shall also be allowed the benefit of any payment or satisfaction which may have been made on the judgment before recovered.

**History:** En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The 1965 amendment rewrote paragraphs (e) and (f) of subdivision (2), for previous text of which see parent volume; substituted "if the defendant is a domestic or foreign corporation, that none of the persons designated in D(2)(e) above can" for "that the defendant, if a domestic or foreign corporation, has no agent for the service of process, nor managing nor business agent, cashier, secretary, or other officer who can" in clause (ii) of paragraph (5)(c); inserted "and if desired, it may be combined in one instrument with the affidavit required under 4 D(2)(f), or 4 D(6)" at the end of clause (ii) of paragraph (5)(c); substituted the second sentence of paragraph (5)(e) for two sentences applying only to foreign corporations, for text of which see parent volume; substituted "any party intended to be served by such publication" for "any person not served within said 60-day period" at the end of paragraph (5)(f); completely rewrote subdivision (6), for previous text of which see parent volume; inserted "by" in clause (8)(b); and made minor style changes in paragraphs (3), (4), and (5)(a)(iv).

The amendment of September 7, 1965, in subdivision (2), deleted "or attorney" in clause (i) of paragraph (e) and, in paragraph (f), substituted "court of this state" for "court in this state" in the first clause of the first sentence, substituted "subject to the jurisdiction \* \* \* Rule 4B above" for "actually doing business within Montana or was actually doing business in Montana at the time the claim for relief arose," in the second clause of the first sentence, and substituted "persons" for "person" in the fourth sentence.

The amendment of November 28, 1966 added paragraph (i) of subdivision (2); in the second sentence of subdivision (3), deleted "of summons" after "Where service," deleted "made after the filing of the

required complaint and required affidavit for publication" after "out of the state," inserted the reference to 4(5)(c), and made other changes in phraseology; and, in clause (8)(d), substituted "date" for "time."

The amendment of September 29, 1967, in subdivision (4), inserted "with the provisions hereafter prescribed in D(5)(h), and" and "93-6228."

#### Commission Note to 1965 Amendment

Because of criticism from several members of the Bar, as well as the office of the Secretary of State, changes have been made in the provisions of Rule 4. In addition, some housekeeping changes have also been made.

We have inserted at the points where changes or additions have been made the new language italicized [not italicized herein; see Amendment note above].

Several members of the Bar have called the attention of the Rules Committee to the fact that particularly in quiet title actions, where defunct corporations were involved, and where none of the persons could be found with due diligence upon whom service could be completed that would be binding on the defunct corporation, that effective service could not be obtained by reason of the requirement of a return of a registered receipt showing delivery of the summons and complaint to the defunct corporation. We have now corrected that defect. In doing so, we have also brought within the framework of Rule 4 the provisions of R. C. M. 1947, Sections 93-3008, 93-3011, and 93-3012, which will be superseded. In addition, as long as we are changing Rule 4, we have now specified and delineated the same persons to be served whether or not the defendants are domestic or foreign corporations, or domestic or foreign partnerships or other unincorporated associations. It will be recalled that when Rule 4 was first promulgated, and in an effort not to bring about any changes in our prior practice, the old, separate, segregated statutes pertaining to domestic and foreign corporations were segregated in Rule 4. There is no reason, however, why the same persons should not be delineated for both domestic and foreign corporations, and we have now done so in this new writing of Rule 4.

In lieu of the requirement of a return receipt signed on behalf of the corporations, which in many instances cannot be accomplished, as pointed out in the criticism from the Bar, we have now added a requirement for publication of summons against such corporation where none of the persons can be found with due diligence upon whom personal service can be completed. (See the new D(2)(f). In so providing, however, we have now spelled out that the same procedure for publications shall be followed for serving corporations personally in in personam actions, as we have provided for serving such corporations by publication in in rem actions (see D(5)(e)).

Accordingly, we have made an effort to combine and streamline service on corporations by designating the same individual persons who can be served, whether the corporations are domestic or foreign, and providing the same procedure of publication where such persons cannot be found with due diligence, whether or not the defendants are domestic and foreign, and we have eliminated the necessity of the return of a signed registry receipt objected to so heavily by the Bar.

A second important change in the rule is specific authorization for an attorney for the plaintiff to incorporate within the framework of one single affidavit all the material necessary for serving defunct corporations personally, for serving by way of publication, and for serving the secretary of state.

Changes have also been made in those portions of the rule providing for service on the secretary of state. We have eliminated the necessity of the intermediate step of having summons and complaint go through the hands of the sheriff in Lewis and Clark County; we have cut down on the papers that must be kept on file by the secretary of state, particularly eliminating the necessity of his keeping a copy of the complaint; and we have provided a requirement that the secretary of state shall now serve upon the attorney for the plaintiff the factual information showing what was done by the secretary of state in effecting service, and the date when it was accomplished.

There are other minor housekeeping changes in the rule, and wherever there is any change, omission, alteration, or new language, reference to it is contained at the points where such is accomplished.

#### DECISIONS UNDER FORMER LAW

##### Paragraph (2)

The doctrine of ostensible agency under section 2-205 has no application in determining whether service of process has been legally made on a "managing or general agent" within the meaning of this

##### Commission Note to September 7, 1965 Amendment

The amendments to Rule 4D(2) as to (e) is to remove an "attorney" because of doubt as to who would be such within the meaning of the Rule. As to (f) to avoid possible conflict of the provisions of this subdivision and those of 4B.

The other amendments [Rules 50(b), 52(b), 59(e) and 60(c)] will expedite the hearing and determination of the motions involved, and provide a time after submission within which the motions are deemed denied if the court fails to decide them.

##### Advisory Committee's Note to November 28, 1966 Amendment

Rule 4D(2)(i): The purpose of the amendment is to remove doubts as to the manner of suing an estate and a trust, resultant from the inclusion of "an estate" and "a trust" in the definition of a person in 4A.

Rule 4D(3): To make it clear that the personal service outside this state dispenses with the necessity for following the procedure for service by publication prescribed by 4D(5). The provision for service of "a summons and complaint" permits personal service of either the original summons or the summons for publication, together with the complaint. As provided in 4D(5)(g), in case of personal service outside of this state service is complete on the date of such service.

Rule 4D(8)(d): To make it clear that it is the date and not the hour of day which should be shown in the admission of service. The time requirement in certificates or affidavits of personal service is considered desirable and no change in the last paragraph of 4D(8) is recommended.

##### Advisory Committee's Note to September 29, 1967 Amendment

Source: None.

See Committee's Note to 42C(2).

##### Retrospective Application

Rule 4B(1), applied to act of alleged malpractice occurring in Montana prior to the effective date of this rule (Rule 86(a)) and doctor who had not resided in Montana since effective date of rule could properly be served with process in California under this rule. *State ex rel. Johnson v. District Court of Fourth Judicial District*, 148 M 22, 417 P 2d 109, 111.

rule. *Kraus v. Treasure Belt Min. Co.*, 146 M 432, 408 P 2d 151.

##### Paragraph (5)

Jurisdiction of the court attaches at the time of personal service of the complaint



and summons, so that a prematurely entered default judgment is voidable and not void. *Sowerwine v. Sowerwine*, 145 M 81, 399 P 2d 233.

#### Paragraph (8)

Appearance and waiver executed by a

foreign corporation, not qualified to do business in Montana, acknowledging receipt of amended complaint filed by plaintiff sufficiently complied with former section 93-3018. *Greene Plumbing & Heating Co. v. Morris*, 144 M 234, 395 P 2d 252, 255.

### Rule 5. Service and filing of pleadings and other papers.

(a) SERVICE—WHEN REQUIRED. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

History: En. Sec. 5, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967 inserted "Except as otherwise provided in these rules" at the beginning of the first sentence; deleted "affected thereby, but" at the end of the first sentence, making the remainder of the original sentence into the second sentence.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 5(a), as amended 1963.

Explanation of change: The words "affected thereby" stricken out by the amendment, introduced a problem of interpretation. The amendment eliminates this difficulty and promotes full exchange of information among the parties by requiring service of papers on all the parties to the action, except as otherwise provided in the rules.

### Rule 6. Time.

#### (a) COMPUTATION.

##### Statute of Limitations

Complaint filed three years and one day after act in suit governed by three-year statute of limitations was timely where

last day of three-year period was Sunday. *Grey v. Silver Bow County*, 149 M 213, 425 P 2d 819.

(b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d), (e) and (f), and 60(b), except to the extent and under the conditions stated in them.

History: En. Sec. 6, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

#### Advisory Committee's Note to May 21, 1969 Amendment

Explanation of change: Reference to "59(f)" is added to conform with amendments to Rule 59.

#### Amendments

The amendment of May 21, 1969 inserted the reference to Rule 50(f).

## III. PLEADINGS AND MOTIONS

## Rule 8. General rules of pleading.

12. Defenses and objections—When and how presented—By pleading or motion—Motion for judgment on pleadings.
13. Counterclaim and cross-claim.
15. Amended and supplemental pleadings.

## Rule 7. Pleadings allowed—Form of motions.

## (a) PLEADINGS.

## Reply

A plaintiff is not required to reply to an answer where not specifically ordered to do so by the court, nor is it mandatory to reply to an affirmative defense of a release, since under Rule 8(d), where no responsive pleading is required, the aver-

ment is deemed denied. *Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

## References

*Rambur v. Diehl Lumber Co.*, 143 M 432, 391 P 2d 1.

## (c) DEMURRERS, PLEAS, ETC., ABOLISHED.

## References

*Payne v. Mountain States Telephone and Telegraph Co.*, 142 M 406, 385 P 2d 100.

## Rule 8. General rules of pleading.

## (a) CLAIMS FOR RELIEF.

## Separate Claims on Note and Mortgage

Upon default in an action against the unconditional guarantors of a note and to foreclose mortgage securing the note, the holder of the note may properly proceed at its option against either security in the same action. *Bozeman Deaconess Foundation v. Cowgill*, 143 M 98, 387 P 2d 435.

## References

*Hidden Hollow Ranch v. Collins*, 146 M 321, 406 P 2d 365; *Williams v. Superior Homes, Inc.*, 148 M 38, 417 P 2d 92, 93.

(b) DEFENSES—FORM OF DENIALS. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

**History:** En. Sec. 8, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

## Amendment

The 1964 amendment substituted "or" for "of" after "only a part" in the fourth sentence.

(c) **AFFIRMATIVE DEFENSES.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

**History:** En. Sec. 8, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

#### **Amendment**

The 1964 amendment substituted "affirmatively" for "affirmative" after "shall set forth" in the first sentence.

#### **Res Judicata**

Where supreme court affirmed dismissal of complaint by trial court on ground that complaint was unverified as required by section 93-3702 and on additional ground that complaint failed to state a claim upon which relief could be granted and a week later plaintiff filed a second verified amended complaint which eliminated confusion, the issue of *res judicata* was not so clear that the

supreme court on the second appeal could say that the trial court could have found the defense of *res judicata* available without an answer under Rule 8(c) or responsive pleading to present the record of the former judgment plus a statement to show why it should be treated as *res judicata*. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 748.

#### **Unavoidable Accident**

Unavoidable accident is not among defenses that must be pleaded affirmatively and is covered under general denial of negligence. *Graham v. Rolandson*, 150 M 270, 435 P 2d 263.

#### **References**

*Interstate Mfg. Co. v. Interstate Products Co.*, 146 M 449, 408 P 2d 478.

### (d) EFFECT OF FAILURE TO DENY.

#### **Reply**

The stipulation in this rule that averments in answer to which no responsive pleading is required are denied, read in conjunction with Rule 7(a), does not

compel the plaintiff to reply to an answer averring the affirmative defense of a release. *Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

### **Rule 9. Pleading special matters.**

#### (b) FRAUD, MISTAKE, CONDITION OF THE MIND.

##### **References**

*Brooks v. Brooks Pontiac, Inc.*, 143 M 256, 389 P 2d 185.

#### (c) CONDITIONS PRECEDENT.

##### **General Denial**

In action by materialman against general contractor for material supplied subcontractor, contractor could not make affirmative defense that statutory notice was not given under materialmen's statute after materialman alleged that he had complied with all conditions precedent to bringing suit and contractor entered general denial; general denial of allegation

that all conditions precedent were performed did not put matter in issue and would be treated as admission that they were performed. *Treasure State Industries, Inc. v. Leigland*, 151 M 288, 443 P 2d 22.

##### **References**

*Interstate Mfg. Co. v. Interstate Products Co.*, 146 M 449, 408 P 2d 478.

### **Rule 11. Signing of pleadings.**

#### **Lack of Verification**

Where a complaint was prepared to conform to this rule but lacked verifica-

tion, and defendant waited until after he received an adverse judgment to raise the issue in a motion to dismiss on appeal,



such motion failed as his proper remedy would have been a motion to strike under

Rule 12. *Adams v. Davis*, 142 M 587, 386 P 2d 574.

**Rule 12. Defenses and objections—When and how presented—By pleading or motion—Motion for judgment on pleadings.**

**(a) WHEN PRESENTED.**

**Pleading after Denial of Motion**

Defendants had twenty days from day on which motion to dismiss complaint

was denied in which to serve and file responsive pleading. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

**DECISIONS UNDER FORMER LAW**

**Default Taken Prematurely**

Husband who went to Canada and was personally served there in divorce action had forty days in which to answer under the combined time allotted in former Rules 4(D)(5)(g) and 12(a), M. R. Civ. P., and default taken before that time was voidable. *Sowerwine v. Sowerwine*, 145 M 81, 399 P 2d 233.

**Jurisdiction**

Jurisdiction of the court attaches at the time of personal service of the complaint and summons, so that a prematurely entered default judgment is voidable and not void. *Sowerwine v. Sowerwine*, 145 M 81, 399 P 2d 233.

**(b) HOW PRESENTED.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to the claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

(i) The cases in which place of trial may be changed are specified in section 93-2906, R. C. M. 1947.

(ii) If the county designated in the complaint is not the proper county for trial of the action, the defendant must at the time of his first appearance request by motion that the trial be had in the proper county. Every defense in law or fact, to a claim for relief in any pleading which defendant desires to present by way of motion as hereinabove provided must be joined with, or inserted in, the motion requesting a change in the place of trial. If the court in which the action is commenced grants the request for change of venue, that court shall not consider nor pass upon

other defenses in law, or fact, presented by the motion, but such shall be considered and decided by the court sitting in the proper county after the transfer has been completed. No request for change of venue is waived by being joined in a motion with other defenses or objections in law or fact.

(iii) Any request for change in place of trial for grounds 2 and 3 of section 93-2906, R. C. M. 1947, must be presented by motion within 20 days after the answer to the complaint, or to the cross-claim where a cross-claim is filed, or the reply to any answer, in those cases in which a reply is authorized, has been filed; except that whenever at some time more than twenty days after the last pleading has been filed an event occurs which thereafter affords good cause to believe that an impartial trial cannot be had under ground 2 of said section 93-2906, and competent proof is submitted to the court that such cause of impartiality did not exist within the twenty-day period after the last pleading was filed, then the court may entertain a motion to change the place of trial under ground 2 of section 93-2906 within twenty days after that later event occurs.

(iv) With respect to ground 4 of section 93-2906, R. C. M. 1947, the party who disqualifies a district judge, and who desires a change of venue, must include such request in a motion filed along with the affidavit of disqualification. If the party who does not disqualify the district judge desires a change of venue, he shall make such request by motion within 5 days after being served with a copy of the affidavit of disqualification. Unless the parties have agreed in writing upon another district judge, or upon a member of the bar as judge pro tempore, the disqualified district judge must either call in another district judge within fifteen days after filing of the affidavit of disqualification, or ten days after filing of the motion for change of venue, or, if no other judge is called in, grant the motion for change of venue. If any other qualified district judge shall be called in, as herein provided, and shall, within thirty days after the motion for change of venue has been filed, appear and assume jurisdiction of the cause and of all matters and proceedings therein, no change of the place of trial shall be made. If the other qualified district judge called in, as herein provided, fails to appear and assume jurisdiction within thirty days after the motion for change of venue has been filed, then the disqualified judge must immediately grant the motion and order a change in the place of trial to some other county.

**History:** En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The 1965 amendment renumbered some of the numbered clauses in the first sentence and added subdivisions (i) to (iv). See Commission Note below.

The amendment of September 29, 1967, in the introductory paragraph, substituted "a party under Rule 19" for "an indispensable party" in item (7); and, in the fourth sentence, substituted "the" for "that" before "claim for relief."

#### **Commission Note to 1965 Amendment**

The numbering of the defenses which may be made by motion is changed to conform to that of the Federal Rule, which results in there being no "(3)" because "improper venue" as a ground for motion to dismiss was deleted in 1963. Subdivisions (i), (ii), (iii), and (iv) are added to clarify and detail the time and manner for motions for change of place of trial in the cases specified in Section 93-2906, R. C. M. 1947.

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 12(b), as amended 1966.

Explanation of change: The terminology is changed to accord with the amendment of Rule 19. The numbering of listed defenses of the Montana Rule is retained: "(3) improper venue" is omitted; and the provisions of subdivisions (i), (ii), (iii) and (iv), dealing with motions for change of place of trial, remain unchanged.

#### Involuntary Dismissal

Rule 41(b), providing for involuntary dismissal which operates as an adjudication upon the merits, has no application to a motion to dismiss for failure to state a claim under this rule. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 750.

#### Motion to Dismiss

A motion to dismiss under this rule is equivalent to a demurrer under former procedure. *Payne v. Mountain States Telephone and Telegraph Co.*, 142 M 406, 385 P 2d 100; *Holtz v. Babcock*, 143 M 341, 389 P 2d 869; *Rambur v. Diehl Lumber Co.*, 143 M 432, 391 P 2d 1.

While a motion to dismiss for failure to state a claim on which relief can be granted is the same as a demurrer under former Montana procedure and therefore

admits to all facts well pleaded, it does not admit to controversial conclusions of law or to the accuracy of alleged construction of written instruments set forth in the pleading. *Holtz v. Babcock*, 143 M 341, 389 P 2d 869.

An order sustaining a motion to dismiss is not appealable. *Rambur v. Diehl Lumber Co.*, 143 M 432, 391 P 2d 1.

A motion to dismiss was proper under this rule where return was made more than three years after commencement of action in violation of Rule 41(e), and lack of jurisdiction did not have to be pleaded as an affirmative defense. *Whitcraft v. Semenza*, 145 M 97, 399 P 2d 757.

#### Res Judicata

Where supreme court affirmed lower court judgment dismissing complaint for failure to state a claim upon which relief could be granted under this rule, the judgment was not res judicata as to a second amended complaint under the provisions of Rule 56(c) treating motion as a summary judgment where matters outside the pleadings were presented to and not excluded by the court. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 749.

### (c) MOTION FOR JUDGMENT ON THE PLEADINGS.

#### References

*Steffes v. Crawford*, 143 M 43, 386 P 2d 842.

(d) PRELIMINARY HEARINGS. The defenses specifically enumerated (1) [to] (7) in subdivision (b) of this rule whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until trial.

**History:** En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Compiler's Notes

The compiler inserted the bracketed "to" near the beginning of this subdivision.

#### Amendments

The amendment of September 29, 1967 substituted "(7)" for "(6)" and deleted "the" before "trial" at the end of the section.

#### Advisory Committee's Note to September 29, 1967 Amendment

Explanation of change: "(7)" has been substituted for "(6)" to correct misnumbering and conform to the defenses enumerated in subdivision (b) [Rule 12(b)].

(g) CONSOLIDATION OF DEFENSES IN MOTION. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted,



except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

**History:** En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967, in the first sentence, substituted "any" for "the" before "other motions"; in the second sentence, substituted "but omits therefrom any defense or objection" for "and does not include therein all defenses and objections" and "on the defense or objection" for "on any of the defenses or objections"; inserted "a motion" after "except"; and substituted "subdivision (h)(2) \* \* \* there stated" for "subdivision (h) of this rule."

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 12(g) and (h), as amended 1966.

Explanation of change: Where a dilatory defense is omitted from a preanswer motion, under the language of these subdivisions [Rule 12(g) and 12(h)] the cases are divided on the question of whether the defense can be included in the answer although it is not permitted in another motion. This amendment prevents the inclusion of such omitted defenses in the answer as well as in another preanswer motion. This change follows the provisions of the federal amendment, except that "improper venue" is not included in the enumeration in (h)(1)(A), because the times for making motions for a change of venue are specified in subdivisions (b)(ii), (iii) and (iv) of the Montana Rule [12(b)].

The substance of subdivision (g) has not been changed.

### (h) WAIVER OR PRESERVATION OF CERTAIN DEFENSES.

(1) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

**History:** En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967 rewrote this rule, dividing it into three subdivisions. For text of former rule, see parent volume.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 12(g) and (h), as amended 1966.

Explanation of change: See Advisory Committee's Note under Rule 12(g).

## Rule 13. Counterclaim and cross-claim.

### (g) CROSS-CLAIM AGAINST COPARTY.

#### DECISIONS UNDER FORMER LAW

##### Parties to Cross-claim

District court did not have jurisdiction

and power to adjudicate mechanics' liens of cross-complainants, materialmen, where

they failed to serve the principal contractor with process. *Greene Plumbing &*

*Heating Co. v. Morris*, 144 M 234, 395 P 2d 252, 256.

(h) **JOINDER OF ADDITIONAL PARTIES.** Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

**History:** En. Sec. 13, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 13(h), as amended 1966.

Explanation of change: The amendment to Rule 13(h) incorporates by direct reference the revised criteria and procedures

of Rule 19, as amended. The amendment also expressly refers to Rule 20 thus correcting an existing inadequacy by calling attention to the fact that a party pleading a counterclaim or a cross-claim may join additional persons when the conditions for permissive joinder of parties under Rule 20 are satisfied. Hereafter, for the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be, and amended Rules 19 and 20 are to be applied in the usual fashion.

### **Rule 14. Third-party practice.**

#### **(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY.**

##### **Insurance Coverage**

Federal court dismissed action for declaratory judgment declaring obligations of casualty insurance company under an automobile casualty insurance policy which had allegedly been canceled prior to the time of the accident involving the automobile of the insured sued for injuries resulting from the accident, since the issues which did not involve federal law, could be solved in the state court wherein third-party complaint under this rule had been filed by the insured against the insurer in which the insured sought to hold the insurer to the terms of the policy, where the state court could dispose of the coverage problems first under M. R. Civ. P., Rule 42(b). *Western Cas-*

*ualty & Surety Co. v. Pinson*, 255 F Supp 624, 625.

##### **Separate Trial of Third Party Action**

Third party claim initiated by hospital, which was being sued by minor patient burned by defective television switch while in hospital, against lessor of television equipment should have been separated from main action between hospital and patient and tried separately. *Crosby v. Billings Deaconess Hospital*, 149 M 314, 426 P 2d 217.

##### **References**

*Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

### **Rule 15. Amended and supplemental pleadings.**

#### **(a) AMENDMENTS.**

##### **Discretionary Power of Court**

Where it was very clear that the supreme court, upon a former appeal of the same case, was unanimous in its decision to affirm the jury verdict and as to the ineffectiveness of additur order, the fact that the supreme court affirmed the jury verdict and thereby finally determined the amount of the award withdrew any discretion that might have been otherwise possessed by the trial judge to allow amendments to the pleadings. State acting by and through State Highway Commission v. Schmidt, 148 M 316, 420 P 2d 153, 155.

Trial court's discretionary power to grant leave to amend pleadings may be limited by a decision of the supreme court upon a former appeal of the same case. State acting by and through State Highway Commission v. Schmidt, 148 M 316, 420 P 2d 153, 155.

##### **Right to Amendment of Course**

The motion to dismiss for failure to state a claim is not a responsive pleading within the provisions of this rule that complaint may be amended once as a matter of course before a responsive pleading is served. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 748.

(c) **RELATION BACK OF AMENDMENTS.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The requirements of clauses (1) and (2) hereof are satisfied with respect to any city, village, town, school district, county, or public agency, board or officer of such public bodies, and with respect to the state or any state board, agency or officer thereof, to be brought into the action as defendant, if process is served as provided by Rule 4D(2)(g) and (h) for service upon such defendant.

**History:** En. Sec. 15, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967 added the last sentence of the first paragraph and added the second paragraph.

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 15(c), as amended 1966.

**Explanation of change:** This amendment is designed to avoid problems which have arisen in instances in which the complaint named the wrong defendant and the statute of limitations expired prior to an amendment correcting the error. Where the newly named defendant received notice of the action and knew or should have known that he was the intended defendant, it seems unjust to prohibit relation back.

The most serious difficulties under the Federal Rules have been in suits against

the United States or an agency or officer thereof. The second paragraph of the federal amendment contains specific provisions for such cases and the second paragraph of this amendment adapts the federal provision to suits where the true defendant is the state or a political subdivision thereof.

The change will also further the objective of the provision of Rule 25(d) for automatic substitution of the successor public officer.

#### **Amendment after Running of Limitations**

If original complaint is timely filed, amended complaint dealing with same transaction set out in original complaint will relate back to original complaint, even though amended complaint changes legal theory of action, adds claim arising out of same transaction or states facts more specifically, and even though amended complaint is filed after running of statute of limitations. *Rozan v. Rosen*, 150 M 121, 431 P 2d 870.

### **(d) SUPPLEMENTAL PLEADINGS.**

#### **Notice**

Trial court was justified in refusing to grant defendants' motion to amend their answer by adding an affirmative defense of compromise and settlement, even though it was represented that some

sort of compromise settlement had been reached after filing of complaint and answer, since defendants had not given plaintiffs notice of this motion as required by this section. *Montgomery v. Gehring*, 145 M 278, 400 P 2d 403.

### **Rule 16. Pretrial procedure—Formulating issues.**

#### **Discretion of Court**

Pretrial procedure is optional, it being left to trial court's discretion whether to

utilize procedure and to what extent. *Lenz v. Mehrens*, 149 M 394, 427 P 2d 297.



## IV. PARTIES

- Rule 17. Parties plaintiff and defendant—Capacity.  
 18. Joinder of claims and remedies.  
 19. Joinder of persons needed for just adjudication.  
 20. Permissive joinder of parties.  
 23. Class actions.  
 23.1. Derivative actions by shareholders.  
 23.2. Actions relating to unincorporated associations.  
 24. Intervention.

**Rule 17. Parties plaintiff and defendant—Capacity.**

(a) **REAL PARTY IN INTEREST.** Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state of Montana so provides, an action for the use or benefit of another shall be brought in the name of the state of Montana. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

**History:** En. Sec. 17, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Amendments**

The amendment of September 29, 1967 deleted the conjunction "but" between the present first and second sentences and made them separate sentences; and added the third sentence.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 17(a), as amended 1966.

A bailee is added to the list of real parties in interest; and a minor change is made in the text to make it clear that the specific instances enumerated are not ex-

ceptions to, but illustrations of, the rule, and carry no negative implications.

The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, etc., keeps pace with modern decisions which, in the interests of justice, are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is filed.

**References**

State ex rel. Farmers Elevator Co. of Reserve v. District Court, 147 M 72, 410 P 2d 160.

**Rule 18. Joinder of claims and remedies.**

(a) **JOINDER OF CLAIMS.** A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims either legal or equitable or both as he has against an opposing party or co-party.

**History:** En. Sec. 18, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Amendments**

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 18(a), as amended 1966.

Explanation of change: Under the prior rule some courts have inferred that the standards of Rules 19, 20, and 22 relate to and limit Rule 18(a) in multiple party cases. Thus, Rule 20(a) resulted in a holding that, unless each claim arose from a single transaction or series of transactions and involved a question common to all defendants, there could be no joinder. *Federal Housing Admr. v. Christianson*, 26 F Supp 419 (D. Conn. 1939). This amendment is designed to overcome such decisions and to state clearly that a party asserting a claim (original claim, counterclaim, cross-claim, third party claim) may join as many claims as he has against an opposing party regardless of the fact that there are multiple parties. The joinder is subject to the court's power to direct

appropriate procedure for trying the claims. See Rules 42(b), 20(b), 21. Joinder of parties is governed by other rules operating independently.

In addition to the changes in the Federal Rules the words "or co-party" are added to the Montana amendment for consistency with the provisions of this amendment for cross-claims and Rule 13(g).

**Divorce Action**

Where wife brought suit for divorce and husband filed cross complaint for adjudication of his right to property acquired by their joint effort, the general equity powers of the court were properly invoked by joining in a single action the prayer for divorce and adjudication of the dispute between the parties concerning property rights. *Tolson v. Tolson*, 145 M 87, 399 P 2d 754.

**DECISIONS UNDER FORMER LAW****Assignor Bringing Action**

Assignee of one-half interest of an overriding royalty agreement with plaintiff-assignor and defendant could not be joined as a party plaintiff in a suit to

compel defendant to pay the other half interest to plaintiff whether assignor was a trustee for the assignee or they were tenants in common. *Lowe & Lynn v. Flank Oil Co.*, 144 M 499, 398 P 2d 608.

**Rule 19. Joinder of persons needed for just adjudication.**

(a) **PERSONS TO BE JOINED IF FEASIBLE.** A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

**History:** En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Amendments**

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: This is a substitution for existing Rule 19 in its entirety. The changes are intended to make clear that whenever feasible the persons materially interested in the subject of an action should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

The change straightens out difficulties in the wording of the old rule. The word "indispensable" is used only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the fac-

tors mentioned in subdivision (b), it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it. The factors mentioned in subdivision (b) of the rule are not intended to be exclusive and others may be applicable in particular situations. The court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed.

#### **Injured Party in Dispute between Insurers**

Party who brought original action for injuries but who was not party to either of policies of insurance involved and was only indirectly interested in outcome of litigation between two insurance companies was improper party in declaratory action to determine which of two insurance companies was liable. *National Farmers Union Property & Casualty Co. v. General Guaranty Ins. Co.*, 150 M 297, 434 P 2d 708.

(b) **DETERMINATION BY COURT OF WHENEVER JOINDER NOT FEASIBLE.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

**History:** En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: see Advisory Committee's Note under Rule 19(a).

(c) **PLEADING REASONS FOR NONJOINDER.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

**History:** En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.



**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: see Advisory Committee's Note under Rule 19(a).

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: see Advisory Committee's Note under Rule 19(a).

#### Amendments

The amendment of September 29, 1967 rewrote Rule 19 in general and added Rule 19(d) as a separate subdivision of the rule.

### Rule 20. Permissive joinder of parties.

(a) PERMISSIVE JOINDER. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

**History:** En. Sec. 20, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

This amendment fits into the amendment to Rule 18, and clarifies the antecedent of the word "them."

#### Amendments

The amendment of September 29, 1967 substituted "these persons" for "of them" near the end of the first sentence; and "defendants" for "of them" near the end of the second sentence.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 20(a), as amended 1966.

#### Scope

The scope of this rule is procedural in nature and removes obstacles to joinder without affecting the substantive rights of the parties, so that in a suit by real estate agents against buyer and seller, judgment for plaintiff would not, in effect, make the buyer a party to a prior contract between the agents and the seller. *Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

### (b) SEPARATE TRIALS.

#### References

*Wheat v. Safeway Stores, Inc.*, 146 M 317, 404 P 2d 317.

### Rule 21. Misjoinder and nonjoinder of parties.

#### References

*Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

**Rule 23. Class actions.**

(a) **PREREQUISITES TO A CLASS ACTION.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

**History:** En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Compiler's Notes**

The order of September 29, 1967 revised Rule 23 in general and rewrote Rule 23(a) in particular. For text of former Rule 23(a), see parent volume.

(b) **CLASS ACTIONS MAINTAINABLE.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

**History:** En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 23, as amended 1966.

Explanation of change: The amended rule describes in more practical terms than existed under the old rule the occasions for maintaining class actions; provides that all actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers

**Compiler's Notes**

The order of September 29, 1967 rewrote Rule 23 generally. For text of former Rule 23(b), "Secondary Action By Shareholders," see parent volume, and see Rule 23.1, "Derivative Actions By Shareholders" in this supplement.

to the measures which can be taken to assure the fair conduct of these actions. It is designed to clear up difficulties in drawing distinctions between joint, common, secondary or several rights, and in

defining categories in terms of "true," "hybrid," and "spurious," and to give a better guide to the extent and binding effect of judgments.

**(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED—NOTICE—JUDGMENT—ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

**History:** En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Compiler's Notes**

The order of September 29, 1967 rewrote Rule 23 generally. Former Rule 23(c), "Dismissed On Compromise," was somewhat similar to present Rule 23(e). For text of former rules, see parent volume.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 23, as amended 1966.

**Explanation of change:** In order to avoid the necessity for awaiting final judgment before obtaining review by the supreme court of an order under subdivision (c)(1) refusing to permit a class action to be maintained as such, Rule (1)(b) of the Montana Rules of Appellate Civil Procedure is amended to make such an order appealable. There does not seem to be a corresponding necessity for direct appeal, as distinct from appeal from the final judgment, where the court determines that the action may be maintained as a class action.

**(d) ORDER IN CONDUCT OF ACTIONS.** In the conduct of actions to which this rule applies, the court may make appropriate orders:



(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

**History:** En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Compiler's Notes

The order of September 29, 1967 re-wrote Rule 23 generally. For text of former Rule 23(d), "Orders To Ensure Adequate Representation," see parent volume.

(e) **DISMISSAL OR COMPROMISE.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

wrote Rule 23 generally and added Rules 23(e) and 23(f). For text of former Rule 23(c), "Dismissal or Compromise," see parent volume.

#### Compiler's Notes

The order of September 29, 1967 re-

(f) **SECURITY FOR COSTS.** Security for costs and charges, which may be awarded against a representative party, may be required by an opposing party. When required, all proceedings in the action must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the representative party by judgment, or in the progress of the action, not exceeding the sum of one thousand dollars. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking is executed and filed.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Advisory Committee's Note to September 29, 1967 Amendment

#### Compiler's Notes

The order of September 29, 1967 re-wrote Rule 23 generally and added Rules 23(e) and 23(f).

Explanation of change: In addition to the changes of the Federal Rule [23], subdivision (f) is added to the Montana Rules in order to afford protection against selection of a representative party who may not be responsible for costs and charges.

**Rule 23.1. Derivative actions by shareholders.**

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 23.1, as adopted 1966.

Explanation of change: A derivative action by a shareholder of a corporation or by a member of an unincorporated association has distinctive aspects which require the special provisions set forth in the new rule. The next-to-the-last sentence recognizes that the question of adequacy of representation may arise when the plaintiff is one of a group of shareholders or members.

The court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings

and require that any appropriate notice be given to shareholders or members.

The Montana amendment conforms to the 1966 federal amendment, except that it omits the federal provision that the complaint be verified and allege "(1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have." No reason is apparent for requiring a verified complaint in this type of action and not in others, and the allegations required by the federal amendment and omitted from this proposal appear to be designed to prevent abuse of federal jurisdiction and to be unnecessary in state practice.

**Rule 23.2. Actions relating to unincorporated associations.**

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Advisory Committee's Note**

Source: Fed. R. Civ. P. 23.2, as adopted 1966.

Explanation of change: Although an action by or against representatives of the membership of an unincorporated associ-

ation has often been viewed as a class action, the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17. Rule 23.2 deals separately with these actions, referring where appropriate to Rule 23.

**Rule 24. Intervention.**

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

**History:** En. Sec. 24, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Amendments**

The amendment of September 29, 1967 rewrote item (2), substituting it for former items (2) and (3), allowing intervention when representation of applicant's interest might be inadequate and he might be bound by judgment and when applicant would be adversely affected by court's disposition of property.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 24(a), as amended 1966.

Explanation of change: Subdivision (2) is changed because a class member who claims that his "representative" does not adequately represent him, and is able to establish that proposition with sufficient probability, should not, as was required under the prior rule, be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Rather he should, as general rule, be entitled to intervene in the action.

The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by

existing parties. The Rule 19(a)(2)(i) criterion imports practical consideration, and the deletion of the "bound" language similarly frees the rule from undue preoccupation with strict considerations of *res judicata*.

The representation whose adequacy comes into question under the amended rule is not confined to formal representation like that provided by a trustee for his beneficiary or a representative party in a class action for a member of the class. A party to an action may provide practical representation to the absentee seeking intervention although no formal relationship exists between them, and the adequacy of this practical representation will then have to be weighed.

Subdivision (3) is deleted for if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of as was required under that subdivision. Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion.

(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene. When the constitutionality of an act of the legislative assembly affecting the public interest is drawn in question in any action to which neither the state nor any agency or officer thereof is a party, the court shall notify the attorney general of the state and the attorney general may within 20 days thereafter intervene in the same manner on behalf of the state.



**History:** En. Sec. 24, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 24(a), as amended 1963.

Explanation of change: This amendment conforms to the amendment of Rule 5(a). See note to that amendment.

**Amendments**

The amendment of September 29, 1967, in the first sentence, substituted "the" for "all" before "parties" and "as provided in Rule 5" for "affected thereby" after "parties."

**Rule 25. Substitution of parties.**

(a) DEATH.

**Waiver of Substitution Requirements**

Failure of plaintiff to substitute executrix of doctor's estate for doctor, in tort action initiated against doctor before his death was waived where attorneys for doctor were also attorneys for executrix,

attorneys and executrix were present at trial of action and attorneys for executrix had filed motion for additional time in which to perfect appeal from judgment against doctor. *Nagaard v. Feda*, 149 M 190, 425 P 2d 79.

**V. DEPOSITIONS AND DISCOVERY**

- Rule 26. Depositions pending action.
- 28. Persons before whom depositions may be taken.
- 30. Depositions upon oral examination.
- 33. Interrogatories to parties.
- 35. Physical and mental examination of persons.

**Rule 26. Depositions pending action.**

(b) SCOPE OF EXAMINATION.

**References**

State ex rel. State Highway Commis-

sion v. District Court, 147 M 348, 412 P 2d 832.

(e) OBJECTIONS TO ADMISSIBILITY. Subject to the provisions of Rules 28(b) and 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

**History:** En. Sec. 26, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 26(e), as amended 1963.

Explanation of change: This amendment conforms to the amendment of Rule 28(b).

**Amendments**

The amendment of September 29, 1967 inserted reference to Rule 28(b) and "the" after "require the exclusion of."

**Rule 28. Persons before whom depositions may be taken.**

(b) IN FOREIGN COUNTRIES. In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to letter rogatory. A commission or

a letter rogatory shall be issued on application and notice, and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these Rules.

**History:** En. Sec. 28, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967 deleted "state or" after "In a foreign"; substituted "may" for "shall" after "depositions"; and rewrote the remainder of the Rule. For text of former Rule, see parent volume.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 28(b), as amended 1963.

Explanation of change: The amendment of clause (1) is designed to facilitate depositions in foreign countries by enlarging the class of persons before whom the depositions may be taken on notice.

It makes clear that the appointment of a person by commission in itself confers

power upon him to administer any necessary oath.

It negates the judicial requirement sometimes stated that letters rogatory will not issue unless the use of a notice or commission is shown to be impossible or impractical. It permits a sound choice between depositions under a letter rogatory and on notice or by commission in the light of all the circumstances.

In executing a letter rogatory the courts of other countries may be expected to follow their customary procedure for taking testimony. The last sentence of the amended subdivision provides, contrary to the implications of some authority, that evidence recorded in such a fashion need not be excluded on that account. Whether or to what degree the value or weight of the evidence may be affected by the method of taking or recording the testimony is left for determination according to the circumstances of the particular case.

(e) DEPOSITION TO BE TAKEN IN SISTER STATES AND FOREIGN COUNTRIES FOR USE IN THIS STATE. Whenever the deposition of any person is to be taken in a sister state or a foreign country, or any other jurisdiction, foreign or domestic, for use in this state, pursuant either to notice or stipulation, the Clerk or equivalent officer of any Court having jurisdiction at the place where the witness is to be served or the deposition taken, upon proof that notice has been duly served for taking of the deposition or that the parties have stipulated to such taking, may issue the necessary subpoenas or equivalent court instruments to require such witness to attend for the taking of the deposition at the time and place in the sister state or foreign country, or any other jurisdiction, foreign or domestic, designated in the notice or stipulation.

**History:** En. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969.

#### Advisory Committee's Note

Officials in some sister states have in-

sisted upon some specific authorization for the issuance of subpoenas by them for use in Montana litigation. The amendment provides that authority.

**Rule 30. Depositions upon oral examination.****(b) ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS.****Limitation of Examination**

In a libel action it was not error for the trial judge to issue a minute entry order refusing to require the defendant to answer questions submitted by the plaintiff as the court has the power to limit the examination and protect him from annoyance, embarrassment or oppression.

*Steffes v. Crawford*, 143 M 43, 386 P 2d 842.

**References**

*State ex rel. State Highway Commission v. District Court*, 147 M 348, 412 P 2d 832.

(f) CERTIFICATION AND FILING BY OFFICER—COPIES—NOTICE OF FILING. (1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

(2) and (3). \* \* \* [Same as parent volume.]

**History:** En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Amendments**

The amendment of September 29, 1967, in clause (1), inserted "as certified" before "mail to the clerk" in the last sentence.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 30(f), as amended 1963.

This proposal is patterned after the 1963 federal amendment, and conforms to provisions of Rule 4 which permit the use of certified mail as an alternative to the use of registered mail.

**Rule 33. Interrogatories to parties.**

Any party may serve upon any adverse party, who has been served with process or who has appeared, written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. A party serving interrogatories upon an adverse party shall file the same in the court in which the action is pending. The interrogatories shall be answered separately and fully in writing under oath. The party answering the interrogatories shall set forth a verbatim re-copy of each of the interrogatories, followed by the answer thereto, and shall file the answers in the court in which the action is pending. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served for answer shall serve a copy of the answers upon every party who has made written appearance within 20 days after the service of interrogatories upon him, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 20 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as



provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

**History:** En. Sec. 33, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967.

#### Amendments

The amendment of April 1, 1965 added a third paragraph which read: "A party desiring to serve interrogatories upon an adverse party shall file and serve a copy thereof upon every other party. The party answering the interrogatories shall file the answers in the court in which the action is pending and serve a copy thereof upon every other party."

The amendment of November 28, 1966, in the first paragraph, inserted the second and fourth sentences and substituted "for answer shall serve a copy of the answers upon every party who has made a written appearance" for "shall serve a copy of the answers on the party submitting the interrogatories" in the fifth sentence; and deleted the paragraph added in 1965.

#### Commission Note to 1965 Amendment

This amendment is consistent with Rule 5. The requirement of service of inter-

rogatories and answers upon all other parties to the litigation may save other parties additional time and effort in duplication of interrogatories resultant from lack of knowledge of what other parties have done. The requirement of filing of answers makes them available to judges who may want to see them.

#### Commission Note to 1966 Amendment

To put the interrogatories and answers into one document for convenience of use, and to remove any obstacle to the service of interrogatories which may result from the requirement of service upon "every other party."

#### Scope

Although this section should be liberally construed to make all relevant facts available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage, it cannot become a weapon for punishment or forfeiture, or an instrument for the avoidance of a trial on the merits. *Wolfe v. Northern Pacific Ry. Co.*, 147 M 29, 409 P 2d 528.

### Rule 34. Discovery and production of documents and things, etc.

#### Inspection of Land

State's motion for inspection to drill wells on condemnee's property should have been allowed. *State ex rel. State Highway Commission v. District Court*, 147 M 348, 412 P 2d 832.

#### Real Estate Appraisals

In proceeding to condemn strip of land in front of leased building, highway commission could not be compelled by lessee to produce appraisals containing no opinion as to damages to, or value of, leasehold. *State Highway Commission v. District Court*, 149 M 384, 427 P 2d 49.

### Rule 35. Physical and mental examination of persons.

(b) REPORT OF FINDINGS. (1). \* \* \* [Same as parent volume.]

(2) Waiver of Privilege. Either by (1) requesting and obtaining a report of the examination ordered as provided herein, or by taking the deposition of the examiner, or by (2) commencing an action which places in issue the mental or physical condition of the party bringing the action, the party examined, or the party bringing the action, waives any privilege he may have in that action or any other action involving the same controversy, regarding the testimony of every person who has treated, pre-

scribed, consulted, or examined or may thereafter treat, consult, prescribe or examine, such party in respect to the same mental or physical condition; but such waiver shall not apply to any treatment, consultation, prescription or examination for any mental or physical condition not related to the pending action. Upon motion seasonably made, and upon notice and for good cause shown, the court in which the action is pending, may make an order prohibiting the introduction in evidence of any such portion of the medical record of any person as may not be relevant to the issues in the pending action.

**History:** En. Sec. 35, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-6, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967 rewrote clause (2). For text of former rule, see parent volume.

#### Advisory Committee's Note to September 29, 1967 Amendment

This amendment extends the existing

modification by Rule 35 of subparagraph 4 of R. C. M. 1947, sec. 93-701-4. The purpose is to facilitate the obtaining of competent medical testimony and the use of testimony of the original attending physician, especially in personal injury cases. The proposal coincides with the view recommended in Wigmore on Evidence (McNaughton rev. 1961), Vol. VIII, secs. 2380 and 2380a.

### Rule 36. Admission of facts and of genuineness of documents.

#### (a) REQUEST FOR ADMISSION.

##### Construction

The intent of this rule is that the party served shall make a sworn statement of the truth of any relevant matters of fact set forth in the request for admissions. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

##### Discretion of Trial Court

Where defendant failed to file admissions on plaintiff's request and was not permitted to file them later or to reopen hearing on summary judgment, whether defendant's admissions, which were signed and verified by defendant's counsel as being made from a letter received from

the defendant, met the intent of this rule was a matter within the discretion of the trial court. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

##### Failure To Answer

In suit by client against his attorney for money which attorney failed to forward to client, request for admissions were deemed admitted where attorney failed to answer. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

##### References

*Olson v. City Commission of City of Helena*, 146 M 386, 407 P 2d 374.

### Rule 37. Refusal to make discovery—Consequences.

#### (a) REFUSAL TO ANSWER.

##### Appellate Review

An appellate court will reverse a trial court judge, who has refused to invoke the sanctions of this section, only when his judgment may materially affect the substantial rights of the parties and allow a possible miscarriage of justice. *Wolfe v. Northern Pacific Ry. Co.*, 147 M 29, 409 P 2d 528.

##### Judge's Discretion

It was not an abuse of discretion for trial judge to allow witness for oil refinery to testify as to condition of ground about railroad tracks where plaintiff-

switchman crushed his hand beneath wheel of oil tank car when he allegedly slipped in oil or grease on concrete walkway of refinery in trying to mount the train, even though railroad had not included witness' name in its answer to plaintiff's interrogatories, since witness was the oil refinery's and plaintiff, knowing oil refinery had been joined as a third-party defendant, had failed to seek disclosure from it, or a pretrial conference, and had allowed other witnesses to testify to the same matter at trial. *Wolfe v. Northern Pacific Ry. Co.*, 147 M 29, 409 P 2d 528.

## VI. TRIALS

Rule 41. Dismissal of actions.

43. Evidence.

44. Proof of official record.

44.1. Determination of foreign law.

46. Exceptions unnecessary.

47. Jurors.

50. Motion for a directed verdict and for judgment notwithstanding the verdict.

52. Findings by the court.

**Rule 38. Jury trial of right.****(a) RIGHT RESERVED.****Declaratory Judgment**

A party has a right to a jury trial on demand where the suit is for a declara-

tory judgment and there are triable issues of fact. *Mahan v. Hardland*, 147 M 78, 410 P 2d 156.

**Rule 39. Trial by jury or by the court.****(c) ADVISORY JURY AND TRIAL BY CONSENT.****New Trial**

In an equity action for specific performance tried before an advisory jury, where the court granted defendant's mo-

tion for a new trial, the court was not required to order that the new trial be by jury as had the original proceedings. *Waite v. Waite*, 143 M 248, 389 P 2d 181.

**Rule 41. Dismissal of actions.****(a) VOLUNTARY DISMISSAL—EFFECT THEREOF.****Dismissal As Affecting Counterclaim**

Motion to dismiss complaint was properly granted where counterclaiming defendant did not object to dismissal, where trial was in fact had on defendant's counterclaim and where defendant in fact obtained judgment against plaintiff on coun-

terclaim. *Ratcliff v. Murphy*, 150 M 31, 430 P 2d 627.

**References**

*Vennes v. Nollmeyer*, 144 M 43, 394 P 2d 178.

**(b) INVOLUNTARY DISMISSAL—EFFECT THEREOF.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or failure to join a party under Rule 19, operates as an adjudication upon the merits.

**History:** En. Sec. 41, Ch. 13, L. 1961; amd. Sec. 1, Ch. 111, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Amendments**

The amendment of September 29, 1967 inserted "in an action tried by the court without a jury" before "has completed" in the second sentence and deleted the same



phrase from the beginning of the third sentence; and, in the last sentence, substituted "failure to join a party under Rule 19" for "for lack of an indispensable party."

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 41(b), as amended 1963 and 1966.

Explanation of change: Under the prior text of the second sentence of this subdivision [Rule 41(b)], the motion for dismissal at the close of the plaintiff's evidence may be made in a case tried to a jury as well as in a case tried without a jury. But when made in a jury-tried case, this motion overlaps the motion for a directed verdict under Rule 50(a), which is also available in the same situation. This overlap has caused confusion. Accordingly it is amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to nonjury cases (including cases tried with an advisory jury). Hereafter the correct motion in jury-tried cases would be a motion for a directed verdict. This amendment involves no change of substance.

The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or to comply with the Rules or any order of court, and the general provisions of the last sentence remain applicable in jury as well as nonjury cases.

This amendment also changes the last sentence of this subdivision to accord with the amendment to Rule 19.

#### **Failure To Prosecute**

Case was properly dismissed for failure of plaintiff to prosecute where nothing was done to bring it to trial for over twelve years despite fact that defendant had shown no injury by delay, that attorneys had agreed to get together and try

to work out agreement and that defendant had filed cross-complaint which was defensive in character. *Cremer v. Braaten*, 151 M 18, 438 P 2d 553.

Trial court abused discretion in dismissing action for failure of plaintiff to prosecute where case was returned by supreme court to lower court for new trial but trial court failed to set it for trial at next jury term as per order of supreme court. *Jangula v. United States Rubber Co.*, 149 M 241, 425 P 2d 319.

#### **Failure To State a Claim**

This rule has no application to a motion to dismiss for failure to state a claim under Rule 12(b). *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 750.

#### **Findings and Conclusions**

Lower court ruling that "no cause of action or claim exists or has been proven" and "the same is hereby dismissed" was sufficient compliance with the Rules despite plaintiff's contention that findings of fact and conclusions of law did not meet requirements of Rules. *Mondakota Gas Co. v. Becker*, 151 M 513, 445 P 2d 745.

#### **Insufficiency of Evidence**

District court erred in not granting defendant's motions for dismissal and directed verdict where evidence, viewed in light most favorable to plaintiff, did not support verdict for him. *MacDonald v. Protestant Episcopal Church*, 150 M 332, 435 P 2d 369.

Defendant was entitled to have motion for involuntary dismissal granted where plaintiff wholly failed to establish prima facie case of negligence. *Knowlton v. Sandaker*, 150 M 438, 436 P 2d 98.

#### **References**

*Whitcraft v. Semenza*, 145 M 97, 399 P 2d 757.

### **DECISIONS UNDER FORMER LAW**

#### **Insufficient Evidence**

Where plaintiff's property was damaged by the dropping of fire retardant from airplanes and at the trial he failed to show the lack of proper care under the circumstances, the trial court properly nonsuited plaintiff upon defendant's motion. *Stocking v. Johnson Flying Service*, 143 M 61, 387 P 2d 312.

No cause should be withdrawn from the jury unless evidence is susceptible of but one construction by reasonable men and that in favor of the defendant, or the evidence is in such condition that if the jury

returned a verdict in favor of the plaintiff, it would be the court's duty to set it aside. *Jackson v. William Dingwall Co.*, 145 M 127, 399 P 2d 236.

Trial court properly granted directed verdict for defendant, employer and ranch foreman, where plaintiff, a ranch hand, was injured while riding atop a bobsled loaded with hay, since plaintiff failed to make out a prima facie case that tipping of bobsled was due to negligence. *Jackson v. William Dingwall Co.*, 145 M 127, 399 P 2d 236.

(e) **FAILURE TO SERVE SUMMONS.** No action heretofore or hereafter commenced shall be further prosecuted as to any defendant who

has not appeared in the action or been served in the action as herein provided within three years after the action has been commenced, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, or unless summons issued within one year shall have been served and return made and filed with the clerk of the court within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years. When more than one defendant has been named in an action, the action may within the discretion of the trial court be further prosecuted against any defendant who has appeared within three years, or upon whom summons which has been issued within one year has been served and return made and filed with the clerk within three years as herein required.

**History:** En. Sec. 1, Ch. 111, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

#### **Amendment**

The 1965 amendment inserted "as to any defendant who has not appeared in the action or been served in the action as herein provided within three years after the action has been commenced" in the first part of the first sentence; substituted "unless summons shall have been issued within one year, or unless summons issued within one year shall have been served and return made and filed with the clerk of the court" for "summons shall have been served and return made" in the latter part of the first sentence; and added the second sentence.

#### **Commission Note to 1965 Amendment**

This clarifies and brings together the laches provisions with respect to issuance and service of summons. At present Rules 4 C(1), 41(e), Section 93-3002, R. C. M. 1947, and Rule 12(b) all need to be referred to. This amendment incorporates the laches provision of Section 93-4705 (7), R. C. M. 1947, which was repealed by Chapter 13 of the 1961 Session Laws.

This amendment renders Section 93-3002, R. C. M. 1947, unnecessary, and that section superseded and added to Tables B and C.

#### **How Raised**

Where return was made more than

three years after commencement of action, this subsection, since it is not a statute of limitations, could be raised by motion under Rule 12(b), rather than pleaded as an affirmative defense. *Whitcraft v. Semenza*, 145 M 97, 399 P 2d 757.

#### **Pending Actions**

Even though there was a lapse of a year between repeal of former section 93-4705, R. C. M. 1947, and adoption of this rule, which is identical, application of this rule to a pending action in which return was made more than three years after commencement of the action was proper, since not only was a reasonable time allowed before the effective date of the change, but the information was widely distributed. *Whitcraft v. Semenza*, 145 M 97, 399 P 2d 757.

#### **Probate Matters**

Rule does not apply to service of summons in suit on rejected claim in probate which is governed exclusively by statute providing for contesting rejected claims in probate. *Werning v. McFarland*, 149 M 137, 423 P 2d 851.

#### **Renewal of Claim**

A judgment is not *res judicata* unless it is on the merits, so that a dismissal under this rule, since it is not a statute of limitations, does not constitute a bar to another suit on the same claim. *Whitcraft v. Semenza*, 145 M 97, 399 P 2d 757.

### **DECISIONS UNDER FORMER LAW**

#### **Quashing Summons**

District court exceeded its jurisdiction in denying motion to quash summons and dismiss action where the summons had not been served and returned within the

three years required by this rule prior to 1965 amendment. *State ex rel. Belwin, Inc. v. Davison*, 148 M 345, 420 P 2d 842, 844.

## Rule 42. Consolidation—Separate trials.

### (b) SEPARATE TRIALS.

#### Insurance Coverage

Federal court dismissed action for declaratory judgment declaring obligations of casualty insurance company under an automobile insurance policy, which allegedly had been canceled prior to the time of the accident involving the automobile of the insured who was being sued for injuries resulting from the accident in the state court, since the issues, which did not involve federal law, could be solved in the state court wherein third-party complaint under M. R. Civ. P., Rule 14(a), had been filed by the insured against the insurer in which insured sought to hold the insurer to the terms

of the policy, where state court could dispose of the coverage problem first under this rule. *Western Casualty & Surety Co. v. Pinson*, 255 F Supp 624, 625.

#### Permissive Joinder

Since this section allows for separate trials, practically, it seems desirable to give the broadest possible reading to the permissive language of Rule 20. *Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

#### References

*Bozeman Deaconess Foundation v. Cowgill*, 143 M 98, 387 P 2d 435.

## Rule 43. Evidence.

### (b) SCOPE OF EXAMINATION AND CROSS-EXAMINATION.

#### Plaintiff Called as Defense Witness

Where plaintiff appeared as her own only witness and was not cross-examined by the defendant who then called her as a defense witness, the defense was bound by her testimony even though it came after the plaintiff herself had rested her case. *Close v. Ruegsegger's Estate*, 143 M 32, 386 P 2d 739.

#### Statutory Proceedings

In statutory action brought to remove administrator for misappropriation of funds of estate, administrator could be examined as adverse witness since Rule 81, excluding statutory proceedings from Rules of Civil Procedure to extent that statutory proceedings are contrary to Rules, does not bar examination of administrator as adverse witness. In *re Estate & Guardianship of Wyman*, 149 M 525, 429 P 2d 629.

### (e) EVIDENCE ON MOTIONS.

#### Summary Judgments

Oral testimony may be heard on mo-

tions for summary judgment. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

(f) INTERPRETERS. The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Advisory Committee's Note

Source: Fed. R. Civ. P. 43(f), as amended 1966.

Explanation of change: This new subdivision authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs.

## Rule 44. Proof of official record.

### (a) AUTHENTICATION.

(1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy at-



tested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

**History:** En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967 rewrote all but the first sentence of this rule and divided it into two clauses; in the first sentence, the amendment inserted "kept within the United States \* \* \* Ryukyu Islands" and substituted "by" for "with" before "a certificate that."

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 44, as amended 1966.

Explanation of change: The new provisions of subdivision (a)(1) on proof of official records kept within the United States are similar in substance to those heretofore appearing in Rule 44. There is a more exact description of the geographical areas covered.

Under subdivision (a)(2) foreign official records may be proved as heretofore, by means of official publications thereof.

The rest of subdivision (a)(2) aims to provide greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records. It is provided that an attested copy may be obtained from any person authorized by the law of the foreign country to make the attestation without regard to whether he is charged with responsibility for maintaining the record or keep it in his custody. The amendment specifically permits use of the chain-certificate method of authentication.

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. Therefore the final sentence of subdivision (a)(2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. Reasonable effort must be made to satisfy the basic requirements.

(b) LACK OF RECORD. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the

case of a foreign record, is admissible as evidence that the records contain no such record or entry.

**History:** En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 44, as amended 1966.

Explanation of change: Subdivision (b) [Rule 44(b)] is accommodated to the changes made in subdivision (a) [Rule 44(a)].

#### Amendments

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

(c) **OTHER PROOF.** This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

**History:** En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967 substituted "authorized by law" for "any applicable statute or by the rules of evidence at common law."

### Rule 44.1. Determination of foreign law.

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

the notice need not be given in the pleadings.

The rule affords a procedure for raising and determining an issue of foreign law. It does not require the court to take judicial notice of the foreign law.

#### Advisory Committee's Note

Source: Fed. R. Civ. P. 44.1, as adopted 1966.

Explanation of change: This is new and clears up uncertainty as to whether foreign law must be pleaded. Under this rule

The rule appears to be consistent with and complementary to Rule 9(d) and R. C. M. 1947, section 93-501-6.

### Rule 46. Exceptions unnecessary.

Except as provided in Rule 52, with respect to findings by the court, formal exceptions to rulings or orders of the court are unnecessary; but for all purposes it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

**History:** En. Sec. 46, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

**Advisory Committee's Note to May 21, 1969 Amendment**

Explanation of change: The attention of the Committee has been invited to considerable confusion existing under the old wording of this rule, of Rule 52, and of Section 93-5305, R. C. M. 1947, which statute is now being superseded. It is thought by rewriting Rule 46 and Rule 52 the existing confusions can be avoided.

#### Amendments

The amendment of May 21, 1969 inserted "Except as provided in \* \* \* findings by the court" at the beginning of this rule.

**Exceptions to Findings and Conclusions**

Effect of rule providing that formal exceptions are unnecessary but requiring aggrieved party to make objections and grounds therefor known to court, when considered with statute providing that no judgment will be reversed on appeal for defects in findings unless exceptions are

made to findings complained of in lower court, is that counsel must point out exceptions to findings so that trial court may have opportunity to correct them and upon failure to do so, findings become final and judgment will not be reversed. *Stapp v. Nickels*, 150 M 220, 434 P 2d 141.

**Rule 47. Jurors.**

(b) **MANNER OF SELECTION AND ORDER OF EXAMINATION OF JURORS.** From the entire jury panel, an initial panel of 20 jurors shall be called in the first instance, and before any voir dire examination of the jury shall be had. Examination of all jurors in the initial panel shall be completed by the plaintiff before examination by the defendant. If challenges for cause are allowed, an additional juror shall be called from the entire panel immediately upon the allowance of challenge, and the juror called to replace the juror excused for cause shall take the number of the juror who has been excused, to provide a full initial panel of 20 jurors, whose examination shall be completed before any peremptory challenges are made. When the voir dire examination has been completed, each side shall have four peremptory challenges, and they shall be exercised by the plaintiff first striking one, the defendant then striking one, and so on, until each side has exhausted or waived its right. In event one or more alternate jurors are called, the next jurors remaining in the initial panel, if any, shall be called by the clerk to be the alternate jurors. In event all jurors remaining of original initial panel of 20 jurors, including those substituted for those jurors excused for cause, have been subjected to peremptory challenge, then the clerk shall call additional jurors from the remainder of the jury panel to provide alternate jurors who will be subject to challenge as provided by law. In event there is more than one party defendant, and should it appear that each defendant is entitled to peremptory challenges, then the original panel shall be increased to provide four additional jurors for each defendant who is entitled to exercise peremptory challenges. The clerk shall keep a record of the order in which jurors are called, and in event the entire initial panel has not been exhausted by challenges, the court shall excuse sufficient of the last called jurors until a jury of twelve persons and the determined number of alternates shall remain to make up the trial jury.

**History:** En. Sec. 47, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

**Amendments**

The amendment of May 21, 1969 inserted "and the juror called \* \* \* who has been excused" in the second sentence.

**Advisory Committee's Note to May 21, 1969 Amendment**

Explanation of change: In some judicial districts the practice is that the replacement juror takes a new number at the bottom of the list, in others the replacement takes the same number as the juror excused. This amendment expressly adopts the latter and makes the practice uniform throughout the state.



**Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.**

(a) **MOTION FOR DIRECTED VERDICT—WHEN MADE, EFFECT.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

**History:** En. Sec. 50, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967 added the last sentence, giving effect to an order for directed verdict even without the jury's assent.

#### **Advisory Committee's Note to September, 29, 1967 Amendment**

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: The practice, after the court has granted a motion for a directed verdict, of requiring the jury to express assent to a verdict they did not reach by their own deliberations serves no useful purpose and may give offense to members of the jury.

#### **Circumstances Under Which Motion Should Be Granted**

Denial of motion for directed verdict,

(b) **MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after service of notice of entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

made by lessor of destroyed building in suit by lessee claiming that premises were repairable, was cause for reversal where, viewing evidence most favorable to plaintiff lessee and considering as proven everything which evidence tended to prove, reasonable man could come to no other conclusion but that building involved was destroyed. *Solich v. Hale*, 150 M 358, 435 P 2d 883.

#### **Granting Motion at End of Plaintiff's Case**

Court erred in granting plaintiff's motion for directed verdict before defendant had opportunity to present his case, where defendant was precluded from offering evidence to rebut presumption of negligence raised by plaintiff's case in chief based on doctrine of *res ipsa loquitur*, notwithstanding fact that plaintiff had examined all witnesses to accident during his case in chief. *Baker v. Rental Service Co.*, 150 M 166, 432 P 2d 624.

Motions provided by this subdivision shall be heard and determined within the times provided by Rule 59 for the hearing and determination of motions for new trial.

**History:** En. Sec. 50, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

#### **Amendments**

The amendment of September 7, 1965 added the second paragraph.

The amendment of September 29, 1967 substituted the present heading for "Reservation of decision on motion" and, in the second sentence of the first paragraph, substituted "Not later than 10 \* \* \* judgment" for "Within 10 days after the reception of a verdict."

The amendment of May 21, 1969, in the second paragraph, substituted "Rule 59 \* \* \* for new trial" for "Section 93-5606 of the 1947 Revised Codes of Montana in the case of motions for new trial."

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.

This departs from the federal amendment in providing that the time limit for making a motion for judgment n.o.v. is 10 days after service of notice of entry of judgment, rather than 10 days after entry of judgment as provided in the federal amendment. This is consistent with the provisions of Rules 59(b) (time for motion for a new trial) and 52(b) (time for motion to amend findings by the court).

#### **Advisory Committee's Note to May 21, 1969 Amendment**

Explanation of change: A housekeeping change to conform with superseding section 93-5606, R. C. M. 1947, by the amendment of Rule 59.

### **(c) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT—CONDITIONAL RULINGS ON GRANT OF MOTION.**

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the supreme court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the supreme court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after service of notice of entry of the judgment notwithstanding the verdict.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Advisory Committee's Note**

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: The procedure

where a party joins a motion for a new trial with his motion for judgment n.o.v., or prays for a new trial in the alternative has often been misunderstood. This amendment summarizes the practice. It does not alter the effects of a jury verdict or the scope of appellate review.

(d) **MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT—DENIAL OF MOTION.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the supreme court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the supreme court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Advisory Committee's Note**

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: This subdivision does not attempt a regulation of all aspects of the procedure where the motion

for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice.

### **Rule 51. Instructions to jury—Objection.**

#### **Refusal to Give Instructions**

Denial of offered instructions which were adaptable to defendant's theory of the case was prejudicial error where such denial deprived him of a possible defense of assumption of risk. *Wollan v. Lord*, 142 M 498, 385 P 2d 102, distinguished in 145 M 486, 488, 402 P 2d 41.

It is not error for the trial judge to refuse to give specific instruction where the subject in question has been adequately covered by other instructions. *Holland v. Konda*, 142 M 536, 385 P 2d 272.

### **Rule 52. Findings by the court.**

(a) Upon a trial of a question of fact by the court in contested cases, its findings must be given in writing, filed with the clerk, and forthwith served upon all parties.

In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. Findings of fact and conclusions of law are unnecessary on decisions with respect to motions made under Rules 12 or 56, or any other motion except as provided in Rule 41(b).

**History:** En. Sec. 52, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

#### **Amendments**

The amendment of May 21, 1969 deleted the heading "Effect"; rewrote the first portion of the rule, making it a separate first paragraph; and, in the last sentence of the second paragraph, substituted "with respect to" for "of."

**Advisory Committee's Note to May 21, 1969 Amendment**

Explanation of change: Sections 93-5302, 93-5305, 93-5306, and 93-5307, R. C. M. 1947, are hereby superseded. The pur-

pose of changing Rule 52, along with the change made in Rule 46, is twofold. It should eliminate the confusions that now exist with respect to the lack of necessity of making exceptions to the rulings and orders of the court, as distinct from the requirement that appropriate exceptions be made to findings of the court on trial of fact issues. In addition, it incorporates in this one rule the existing practice and procedure with respect to exceptions to findings of the court, and eliminates the necessity of researching for, and referring separately to, controlling statutes, case decisions, and rules, and then trying to correlate all three.



**Appellate Review of Findings**

Findings of fact made by trial court will not be disturbed where they are supported by preponderance of evidence. *Western Foundry, Inc. v. Matelich*, 150 M 228, 433 P 2d 789.

**Sufficiency of Findings**

Lower court ruling that "no cause of action or claim exists or has been proven" and "the same is hereby dismissed" was

sufficient compliance with Rules despite plaintiff's contention that findings of fact and conclusions of law did not meet requirements of Rules. *Mondakota Gas Co. v. Becker*, 151 M 513, 445 P 2d 745.

**References**

*Stokes v. Delaney & Sons, Inc.*, 143 M 516, 391 P 2d 698; *Tolson v. Tolson*, 145 M 87, 399 P 2d 754.

(b) In contested cases tried by the court, each party shall request in writing the findings of fact desired by such party either at the close of the evidence, or within such reasonable time thereafter as may be fixed by order of the court, and such requests shall be entered in the minutes of the court. No judgment shall be reversed on appeal for want of findings at the instance of any party who has failed to request such findings in writing as herein specified.

Within 10 days after copy of the finding or findings have been served or within such additional reasonable time thereafter not to exceed 30 days as may be ordered by the court upon good cause shown, a party shall serve on all other parties and file with the court in writing any exceptions which such party may have with respect to the finding or findings, and at the same time may move for an order to amend the findings, or to make additional findings. Within 15 days thereafter the court shall either deny the exceptions or the motion, or grant them in whole or in part, or otherwise amend or revise the original finding or findings, and if the court shall fail to act, the exceptions shall be deemed denied. The failure of the court to act, as well as any action taken by the court shall be deemed excepted to by all parties adversely affected thereby.

**History:** En. Sec. 52, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Aug. 1, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, May 21, 1969, eff. July 1, 1969.

**Amendments**

The amendment of August 1, 1965 inserted "service of notice of" before "entry" in the former first paragraph, for text of which see parent volume.

The amendment of September 7, 1965 added the former second paragraph stating that motions hereunder should be heard and determined within time provided by section 93-5606 for new trial motions.

The amendment of May 21, 1969 deleted the heading "Amendment" and rewrote this rule.

**Commission Note to August 1, 1965 Amendment**

Under Rule 77(d) the prevailing party has 10 days after the entry of judgment to give the unsuccessful parties notice of such entry. The change in 52(b) is an ad-

justment to this provision, and is designed to meet the possibility that the prevailing party is the only party that knows of the entry of the judgment and waits 10 days before giving the unsuccessful party notice of such entry. The provision is similar to that found in Rule 59(b) and (e).

**Advisory Committee's Note to May 21, 1969 Amendment**

See Advisory Committee's Note under Rule 52(a).

**Amendment of Findings and Judgment**

A motion to alter, amend, and supplement findings of fact, conclusions of law and the judgment combined with a motion for a new trial, filed on September 28, 1965, was a motion contemplated by this rule and Rule 59(e) and was not governed by the time limits of section 93-5606. *State ex rel. Rozan v. District Court of Sixteenth Judicial Dist.*, 147 M 532, 416 P 2d 19, 21.

**References**

*Sztaba v. Great Northern Ry. Co.*, 147 M 185, 411 P 2d 379.

## DECISIONS UNDER FORMER LAW

**Exceptions Required for Reversal**

Under former statute which was superseded by this Rule, objections to findings of district court could not be raised for the first time upon appeal. *Rozan v. Rosen*, 150 M 121, 431 P 2d 870.

Mandate of former statute (superseded by this Rule) that findings of district court would not be reviewed on appeal unless exceptions were taken was not changed by fact that counsel on appeal was not same counsel who tried case in district court. *Olsen v. United Benefit Life Ins. Co.*, 150 M 147, 432 P 2d 381.

Rule providing that formal exceptions

are unnecessary if aggrieved party makes his objections and grounds therefor known to court and former statute (superseded by this Rule) providing that no judgment will be reversed on appeal for defects in findings unless exceptions are made in lower court were required to be read together with result that it was necessary for counsel to point out exceptions to findings so that trial court might have opportunity to correct them and failure to do so meant findings became final and judgment would not be reversed. *Stapp v. Nickels*, 150 M 220, 434 P 2d 141.

(c) Either at the time its original findings are filed in writing, or at the time any modifications have been made, the court shall promptly separately state its conclusions of law thereon, and direct the entry of the appropriate judgment.

**History:** En. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

**Rule 53. Masters.****(e) REPORT.****Hearing on Report**

No hearing is necessary when no objections are made to report by parties after being notified by clerk that special

master has filed his report. *State ex rel. Ross v. District Court, Fourth Judicial District*, 150 M 233, 433 P 2d 778.

## VII. JUDGMENT

**Rule 55. Default.****56. Summary judgment.****59. New trials—Amendment of judgments.****60. Relief from judgment or order.****Rule 54. Judgments—Costs.****(b) JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.****Amendment To Include Codefendant**

Case would be remanded to district court for purpose of amending, by incorporating appropriate terms, judgment which omitted to name defaulting codefendant who was jointly and severally liable on obligation. *White v. Nollmeyer*, 151 M 387, 443 P 2d 873.

unconditional guarantors of a note and to foreclose mortgage securing the note, the holder of the note could properly proceed at its option against either security in the same action. *Bozeman Deaconess Foundation v. Cowgill*, 143 M 98, 387 P 2d 435.

**Separate Claims on Note and Mortgage**  
Upon default in an action against the**References**

*State ex rel. Kober and Kyriss v. District Court*, 147 M 116, 410 P 2d 945.

**(c) DEMAND FOR JUDGMENT.****Divorce Proceedings**

Where proper notice of hearing on application for judgment of divorce was given defendant in accordance with M.

R. Civ. P., Rule 55(b) and no relief different from that demanded in the complaint was granted in violation of this rule, an appeal on those grounds was

dismissed by supreme court upon its own motion where no application to set aside default or judgment was made under Rule

60(b). *Sowerwine v. Sowerwine*, 148 M 195, 418 P 2d 859, 861.

## Rule 55. Default.

### (a) ENTRY.

#### Answer Filed after Entry by Clerk

Plaintiff was entitled to judgment by default where defendants filed answer after entry of default by clerk and receipt of notice of hearing on motion for default, but before actual hearing on the motion, since entry of default by clerk requires no

notice to party in default, answer was filed after defendants had received notice of motion for default and defendants failed to move to set aside entry of default for "good cause shown" as they were entitled to do under rules. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

### (b) JUDGMENT. Judgment by default may be entered as follows:

#### (1). \* \* \* [Same as parent volume.]

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative, or guardian ad litem, who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the state of Montana.

**History:** En. Sec. 55, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

#### Amendment

The 1964 amendment inserted "an" before "account" in the final sentence of paragraph (2).

#### Answer Filed after Entry by Clerk

Plaintiff was entitled to judgment by default where defendants filed answer after entry of default by clerk and receipt of notice of hearing on motion for default, but before actual hearing on the motion, since entry of default by clerk requires no notice to party in default, answer was filed after defendants had received notice of motion for default and defendants failed to move to set aside entry of default for "good cause shown" as they were entitled to do under rules. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

#### Clerk's Error

Entry of default judgment by clerk of court without requiring affidavit from

plaintiff of amount due and owing rendered the judgment voidable but not void. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

Motion to set aside default judgment because of plaintiff's failure to file affidavit of amount due and owing when it requested entry of default judgment was properly denied where defendant permitted judgment to be satisfied from her property, and no reason to avoid the voidable judgment had been presented. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

Under Rule 61 omission of clerk of court to require affidavit of amount due under this rule before entry of default judgment in favor of plaintiff is not fatal unless refusal to take action with respect to the omission appears to the court inconsistent with substantial justice. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)



**Divorce Proceedings**

Where proper notice of hearing on application for judgment of divorce was given defendant in accordance with this rule and no relief different from that demanded in the complaint was granted in violation of M. R. Civ. P., Rule 54(c), an appeal on those grounds was dismissed by the supreme court on its own motion where no application to set aside the default or judgment was made under Rule 60(b). *Sowerwine v. Sowerwine*, 148 M 195, 418 P 2d 859, 861.

**Ministerial Function**

Clerk of court in entering a default judgment is performing a ministerial function and must follow procedures in detail

and absolutely. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

**Nonprejudicial Error**

Where record showed that defendant took no action for nearly three months after default judgment had been entered, defendant was not prejudiced by plaintiff's failure to give written notice of application for default judgment as required by paragraph (2) of this rule and district court did not abuse its discretion in denying defendant's motion to vacate the default judgment filed under M. R. Civ. P., Rule 55(c). *Williams v. Superior Homes, Inc.*, 148 M 38, 417 P 2d 92, 94.

**(c) DEFAULT—SETTING ASIDE—EXTENSION OF TIME, ETC.****Answer Filed after Entry by Clerk**

Plaintiff was entitled to judgment by default where defendants filed answer after entry of default by clerk and receipt of notice of hearing on motion for default, but before actual hearing on the motion, since entry of default by clerk requires no notice to party in default, answer was filed after defendants had received notice of motion for default and defendants failed to move to set aside entry of default for "good cause shown" as they were entitled to do under rules. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

**Discretion of Court**

Where record showed that defendant took no action for nearly three months after default judgment had been entered, defendant was not prejudiced by plain-

tiff's failure to give written notice of application for default judgment as required by M. R. Civ. P., Rule 55(b)(2), and district court did not abuse its discretion in denying defendant's motion to vacate the default judgment filed under this rule. *Williams v. Superior Homes, Inc.*, 148 M 38, 417 P 2d 92, 94.

**Voidable Judgments**

A default judgment entered prematurely pursuant to this section could not be set aside under M. R. Civ. P., Rule 60(b)(4), since Rule 60(b)(4) applies to void and not voidable judgments. *Sowerwine v. Sowerwine*, 145 M 81, 399 P 2d 233.

**References**

*Kraus v. Treasure Belt Min. Co.*, 146 M 432, 408 P 2d 151.

**DECISIONS UNDER FORMER LAW****Terms of Opening of Default**

Fact that corporate defendant claimed sheriff had never served summons upon the corporation, sheriff did not remember service of the summons, and default was not taken until seven years after the

plaintiff was injured constituted clear, unequivocal and convincing proof to rebut weight accorded sheriff's return of service of process under section 16-2707 to open default judgment. *Sewell v. Beatrice Foods Co.*, 145 M 337, 400 P 2d 892.

**Rule 56. Summary judgment.****(a) FOR CLAIMANT.****Negligence Actions**

Ordinarily, issue of negligence is not susceptible of summary adjudication but should motion for summary judgment be made, burden is on moving party to estab-

lish clearly that there is no factual issue to be determined and opposing party does not have burden of showing prima facie case. *Mally v. Asanovich*, 149 M 99, 423 P 2d 294.

**(b) FOR DEFENDING PARTY.****Denial of Motion**

In suit by guardians of patient for personal injuries sustained when patient was

being X-rayed, district court erred in granting defendant-hospital's motion for summary judgment where there was an

issue of fact as to whether radiologist was an independent contractor rather than an agent of the hospital. *Kober v. Stewart*, 148 M 117, 417 P 2d 476, 479.

### Support Proceedings

Defendant was properly granted motion for summary judgment in action to en-

force amount agreed upon for support in separation agreement which had been reduced by subsequent court modifications. *Gessell v. Jones*, 149 M 418, 427 P 2d 295.

### References

*Silloway v. Jorgenson*, 146 M 307, 406 P 2d 167.

(c) **MOTION AND PROCEEDINGS THEREON.** The motion shall be served at least 10 days before the time fixed for the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Affidavits shall not be considered for any purpose on motion for summary judgment. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**History:** En. Sec. 56, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

### Amendment

The 1965 amendment inserted "answers to interrogatories" in the first sentence.

### Commission Note to 1965 Amendment

The amendment expressly includes "answers to interrogatories" among material which may be considered on motion for summary judgment. This conforms to an amendment to the Federal Rule adopted January 21, 1963, the Federal Rule having inadvertently omitted the phrase. The courts have generally reached by interpretation the result required by the amendment.

### Burden of Proof

The moving party for a summary judgment has the burden of showing the absence of any genuine factual issue. *Kober v. Stewart*, 148 M 117, 417 P 2d 476, 478.

### Matters Considered

While this rule does not mention oral testimony as material to be used at the summary judgment hearing, Rule 43(e) permits the use of oral testimony upon motions, so that oral testimony may be considered upon a motion for summary judgment. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

In case in which plaintiff's deposition alone was sufficient to permit the trial judge to determine that the case contained no issue of material fact or controversy relating to the testatrix's incompetency, the trial court was correct in granting summary judgment and had no duty to anticipate possible proof that might have been offered under the pleadings. *Silloway v. Jorgenson*, 146 M 307, 406 P 2d 167.

### Pleadings Not Controlling

On a motion for summary judgment the formal issues presented by the pleadings are not controlling and the court must consider the depositions, answers to interrogatories, and admissions on file, oral testimony and exhibits presented. *Hager v. Tandy*, 146 M 531, 410 P 2d 447.

### Principal and Agent

Purported agent and principal were entitled to summary judgment where plaintiff wholly failed to establish prima facie case of negligence on the part of either even though evidence raised question of fact as to existence of agency since it would be impossible to impute negligence to principal where negligence had not been established against supposed agent. *Knowlton v. Sandaker*, 150 M 438, 436 P 2d 98.

### Proof of Issue of Fact

Motion for summary judgment was properly granted where it was apparent from record that there was no genuine issue as to any material fact, notwithstanding aggrieved party's argument on appeal that had he been allowed to go to trial he would have presented proofs establishing genuine issue of fact, since aggrieved party presented no such proofs at hearing on original motion nor at hearing on motion to vacate judgment. *Brown v. Thornton*, 150 M 150, 432 P 2d 386.

### Purpose

The general purpose of this rule is to dispose promptly of actions in which there is no genuine issue of fact, thereby eliminating unnecessary trial, delay, and expense. *Silloway v. Jorgenson*, 146 M 307, 406 P 2d 167.

### Res Judicata

Where supreme court affirmed lower

court judgment dismissing complaint for failure to state a claim upon which relief could be granted under Rule 12(b), the judgment was not res judicata as to a second amended complaint under this section where matters outside the pleadings were presented to and not excluded by court. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 749.

### Third Party Complaint

Summary judgment should not have been granted in favor of third party defendant on third party complaint initiated

### Rule 57. Declaratory judgments.

#### References

*Harrer v. Northern Pacific Ry. Co.*, 147 M 130, 410 P 2d 713; *Empire Fire &*

by hospital sued for negligence by minor patient burned by defective television switch while in hospital where third party complaint raised genuine issue of material fact as to whether minor patient was injured solely through negligence of third party defendant who had leased television equipment to hospital. *Crosby v. Billings Deaconess Hospital*, 149 M 314, 426 P 2d 217.

#### References

*Brannon v. Lewis and Clark County*, 143 M 200, 387 P 2d 706.

*Marine Ins. Co. v. Goodman*, 147 M 396, 412 P 2d 569.

### Rule 59. New trials—Amendment of judgments.

(a) **GROUND.** A new trial may be granted to all or any of the parties and on all or part of the issues for any of the reasons provided by the statutes of the state of Montana. On motion for a new trial in an action tried without a jury, the court may take additional testimony, amend the findings of fact and conclusions of law or make new findings and conclusions, set aside, vacate, modify or confirm any judgment that may have been entered or direct the entry of a new judgment.

**History:** En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

#### Amendments

The amendment of May 21, 1969 made no change in this rule.

#### Appellate Review

In condemnation proceeding, where state appraised land at \$18,000, condemnee appraised it at \$95,000 and jury awarded condemnee \$21,000, granting of new trial because award was inadequate was not such an abuse of trial judge's discretion as to warrant reversal in spite of the fact there was no rebuttal of state's only expert witness. *State Highway Commission v. Greenfield*, 145 M 164, 399 P 2d 989.

#### Inadequacy of Award

Court abused discretion in granting new

trial "upon the grounds of insufficiency of the evidence to justify the verdict in that the verdict awarded by the jury to the plaintiff is wholly inadequate" where there was conflict in evidence and where it was question for jury whether injuries suffered by passenger were caused by grossly negligent operation of car or whether passenger assumed risk of going into car driven by man who had several drinks. *Heen v. Tiddy*, 151 M 265, 442 P 2d 434.

#### Jury Misconduct

New trial was properly granted where foreman of jury made his own investigation at the scene of the accident after hearing testimony and informed the other members of jury, during their deliberation, of the results of his investigation. The foreman was guilty of misconduct upon which verdict could be impeached by affidavits of jurors. *Goff v. Kinzie*, 148 M 61, 417 P 2d 105, 107.

### DECISIONS UNDER FORMER LAW

#### Right To Appeal

Defendant was entitled to appeal, in spite of time limitation of section 93-5606 for filing bill of exceptions where motion for new trial was combined with motion to amend findings and request for

review of facts, conclusions of law and judgment, since limitation under section 93-5606 did not apply prior to enactment of new rules of civil procedure. *Crissey v. State Highway Commission*, 147 M 374, 413 P 2d 308.

(b) **TIME FOR MOTION.** A motion for a new trial shall be served not later than 10 days after service of notice of the entry of the judgment.



**History:** En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

**References**

Clark v. Worrall, 146 M 374, 406 P 2d 822.

**Amendments**

The amendment of May 21, 1969 made no change in this rule.

(c) **TIME FOR SERVING AFFIDAVITS.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which periods may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

**History:** En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

**Amendments**

The amendment of May 21, 1969 made no change in this rule.

(d) **TIME FOR HEARING ON MOTION.** Hearing on the motion shall be had within 10 days after it has been served, or within 10 days after the party opposing the motion for new trial has served his affidavits as set forth in subparagraph (c) hereinabove except that at any time after the notice of hearing on the motion has been served the court may issue an order continuing the hearing for not to exceed 30 days. In case the hearing is continued by the court, it shall be the duty of the court to hear the same at the earliest practicable date thereafter, and the court shall rule upon and decide the motion within 15 days after the same is submitted. If the court shall fail to rule upon the motion within said time, the motion shall, at the expiration of said period, be deemed denied.

The decision on the motion may be entered in the minutes of the court, or may be made in writing in chambers or in any county in the state where the judge may be, and be filed with the clerk of court in the county where the action is pending. Upon the hearing, reference may be had in all cases to the pleadings and the orders of the court on file, and reference may also be had to any depositions and documentary evidence offered on the trial, and to the proceedings on the trial and, when necessary, reference may be had to the notes of the court reporter.

If the motion is not noticed up for hearing and no hearing is held thereon, it shall be deemed denied as of the expiration of the period of time within which hearing is required to be held under this Rule 59.

**History:** En. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

**Compiler's Notes**

The amendment of Rule 59 by Supreme Court Order No. 10750-9 enacted this subparagraph as Rule 59(d) and designated former Rules 59(d) and 59(e) as 59(e) and 59(f), respectively.

**Advisory Committee's Note to May 21, 1969 Amendment**

Explanation of change: Section 93-5606, R. C. M. 1947, is hereby superseded.

There has been some confusion by reason of ambiguous language in section 93-5606, R. C. M. 1947, a hold-over statute from the practice which existed before the rules were adopted, and because of the necessity of researching for, and referring to, the case decisions under the statute spelling out the jurisdictional time limits and the effect thereof. It is felt that by incorporating our practice into this one rule, and eliminating the necessity of referring to statutes and case decisions, that it will be easier for the practitioner to comply.

## DECISIONS UNDER FORMER LAW

**Appellate Review**

The appellate court may not disturb the findings of the trial court in ordering a new trial without a showing of abuse of discretion. *Campeau v. Lewis*, 144 M 543, 398 P 2d 960.

**Disqualification of Judge**

Section 93-901 does not permit disqualification of a judge pending motion for a new trial under this rule. *State ex rel. Peery v. District Court*, 145 M 287, 400 P 2d 648.

**Judge's Discretion**

The jury is delegated the task of finding the facts, but the trial judge has the discretion to prevent a miscarriage of justice by granting a new trial if there is an insufficiency of evidence to support the verdict. *Campeau v. Lewis*, 144 M 543, 398 P 2d 960.

**Purpose of Rule**

The purpose of this rule is to give a trial judge power to prevent what he considers a miscarriage of justice. *Campeau v. Lewis*, 144 M 543, 398 P 2d 960.

(e) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

**History:** En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

**Compiler's Notes**

The amendments of Rule 59 by Supreme Court Order No. 10750-9 designated this former Rule 59(d) as Rule 59(e).

**Amendments**

The amendment of September 29, 1967 added the second sentence and made changes in phraseology.

**Scope**

This rule permits the trial judge to order a new trial on his own initiative for the same reasons one could be ordered pursuant to section 93-5603 and is subject to the same interpretations as expressed in previous opinions on motions for new trials before adoption of the rule. *Campeau v. Lewis*, 144 M 543, 398 P 2d 960.

**Time Limits**

Combined motion for new trial and to alter, amend and supplement findings of fact, conclusions of law and judgment was not subject to time limits of former section 93-5606 requiring prompt hearing on new trial motion and superseded by this rule. *State ex rel. Rozan v. District Court, Sixteenth Judicial District*, 147 M 532, 416 P 2d 19, 21. See also *Crissey v. State Highway Commission*, 147 M 374, 413 P 2d 308.

**References**

*Waite v. Waite*, 143 M 248, 389 P 2d 181; *State ex rel. Wilson v. District Court*, 143 M 543, 393 P 2d 39.

The amendment of May 21, 1969 made no change in the wording of this rule.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 59(d), as amended 1966.

Explanation of change: The purpose of this amendment is to make it clear that a court, after notice and opportunity to be heard, may grant a new trial even though a motion for new trial has been made, for a ground not stated in the motion. Some cases have held otherwise.

(f) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend the judgment shall be served not later than 10 days after the service of the notice of the entry of the judgment, and may be combined with the motion for a new trial herein provided for. This motion shall be heard and determined within the time provided hereinabove with respect to a motion for a new trial.

**History:** En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

#### Compiler's Notes

The amendment of Rule 59 by Supreme Court Order No. 10750-9 designated this former Rule 59(e) as Rule 59(f).

#### Amendments

The amendment of September 7, 1965 added a second paragraph which read: "Motions provided by this subdivision shall be heard and determined within the time provided by Section 93-5606 of the 1947 Revised Codes of Montana in the case of motions for a new trial."

The amendment of May 21, 1969 added "and may be combined with the motion for a new trial herein provided for" to the first sentence; substituted the second sen-

tence for the former second paragraph added in 1965; and made changes in phraseology.

#### Additur

This rule did not give the district court power to order an additur to a condemnation award as a condition of denying motion for new trial. *State Highway Commission v. Schmidt*, 143 M 505, 391 P 2d 692.

#### Time Limit

A motion to alter, amend, and supplement findings of fact, conclusions of law and the judgment, combined with a motion for a new trial filed on September 28, 1965 was a motion contemplated by this rule and Rule 52(b) and was not governed by the time limits of section 93-5606. *State ex rel. Rozan v. District Court of Sixteenth Judicial District*, 147 M 532, 416 P 2d 19, 21.

### Rule 60. Relief from judgment or order.

(b) **MISTAKES—INADVERTENCE—EXCUSABLE NEGLIGENCE—NEWLY DISCOVERED EVIDENCE—FRAUD, ETC.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) when a defendant has been personally served, whether in lieu of publication or not, not more than 60 days after the judgment, order or proceeding was entered or taken, or, in a case where notice of entry of judgment is required by Rule 77(d), not more than 60 days after service of notice of entry of judgment. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within 180 days after the rendition of any judgment in such action, to answer to the merits of the original action. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as may be required by law, or to set aside a judgment for fraud upon the court.



**History:** En. Sec. 60, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Aug. 1, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

### **Amendments**

The amendment of August 1, 1965 substituted "within 60 days when a defendant has been personally served, whether in lieu of publication or not, calculated from the date of service of notice of entry of the judgment or order or action taken in the proceeding" for "not more than one year after the judgment, order or proceeding was entered or taken" after "for reasons (1), (2), and (3)" in the second sentence; and inserted the third sentence.

The amendment of September 29, 1967 rewrote the second sentence; and substituted "required" for "provided" in the last sentence.

### **Commission Note to August 1, 1965 Amendment**

The purpose of this amendment is to make the Montana practice correspond to practice under the last sentence of R. C. M. 1947, § 93-3905 (which was repealed with the adoption of the Rules of Civil Procedure), as construed in *Smith v. Collis*, 42 Mont. 350, 365-370 (1910). The time within which the motion may be made is shortened, but considered adequate.

### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: None.

The federal rule measures the time for the motion for reasons (1), (2), and (3) from time the "judgment, order, or proceeding was entered or taken." The Montana rule measures the time from the "date of service of entry of the judgment or order or action taken"; but Rule 77(d), requiring notice of entry, is confined to judgments in actions in which an appearance has been made. This amendment, using the federal rule language adjusted to the requirements of Montana Rule 77(d), is for the purpose of avoiding ambiguity and litigation as to what, if any, time limit is imposed in cases of orders, and proceedings, and judgments where no appearance has been made.

### **Change of Counsel**

Motion to have judgment vacated as to date and redated so as to permit moving party to file exceptions to findings or take other steps counsel deemed necessary for protection of client was improperly denied, and was abuse of discretion where moving party had inadequate time in which to obtain present counsel when conflict of interest arose with prior counsel. *Schmidt v. Lloyd*, — M —, 447 P 2d 485.

### **Discretion of Court**

Where record showed that defendant took no action for nearly three months after default judgment had been entered, defendant was not prejudiced by plaintiff's failure to give written notice of application for default judgment as required by M. R. Civ. P., Rule 55(b)(2), and district court did not abuse its discretion in denying defendant's motion to vacate the default judgment under M. R. Civ. P., Rule 55(c). *Williams v. Superior Homes, Inc.*, 148 M 38, 417 P 2d 92, 94.

### **Excusable Neglect**

Defendant's contention that "personal problems drove all thought of lesser problems from his mind" was not sufficient to set aside a default judgment under subsection 1 of this section. *Dudley v. Stiles*, 142 M 566, 386 P 2d 342.

### **Judgment Obtained by Fraud**

Court of equity has inherent power, independent of statute, to vacate judgment obtained by fraud in violation of last sentence of Rule 60(b) even though party seeking relief was not necessary party in original action and motion to vacate was not made within liberal time limits prescribed by rule but was nevertheless timely considering that aggrieved party engaged attorney to file motion to vacate within thirty days after discovery of existence of judgment. *Selway v. Burns*, 150 M 1, 429 P 2d 640.

### **Probate Matters**

Final decree of distribution and discharge in probate will not be set aside on ground of inadvertence or fraud either under statute or Rule 60(b) in absence of manifest abuse of court's discretion in case where moving party had every opportunity to protect his claim in probate and failed to do so. *Werning v. McFarland*, 149 M 137, 423 P 2d 851.

### **Voidable Judgment**

This rule does not apply to voidable judgments. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

This rule has no application to prematurely entered default judgments since it applies to void and not voidable judgments. *Sowerwine v. Sowerwine*, 145 M 81, 399 P 2d 233.

### **Waiver of Right to Relief**

Where proper notice of hearing on application for judgment of divorce was given defendant in accordance with M. R. Civ. P., Rule 55(b) and no relief different from that demanded in the complaint was granted in violation of Rule 54(c), an

appeal on those grounds was dismissed by the supreme court on its own motion where no application to set aside the default or judgment was made under this rule. *Sowerwine v. Sowerwine*, 148 M 195, 418 P 2d 859, 861.

(c) **TIME FOR HEARING AND DETERMINING MOTIONS.** Motions provided by subdivisions (a) and (b) of this rule shall be heard and determined within the times provided by Rule 59 in the case of motions for new trials and amendment of judgment.

**History:** En. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

#### Amendments

The amendment of May 21, 1969 substituted "Rule 59" for "section 93-5606 of the 1947 Revised Codes of Montana" and "trials" for "trial"; and added "and amendment of judgment."

### Rule 61. Harmless error.

#### Clerk's Error

Omission of clerk of court to require affidavit of amount due under Rule 55(b) (1) before entry of default judgment in favor of plaintiff is not fatal unless refusal to take action with respect to the omission appears to the court inconsistent with substantial justice. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

#### Contributory Negligence

Submitting issue of contributory negligence to jury was harmless error in light of substantial evidence showing that defendant was not negligent and substantial evidence that even if defendant was negligent plaintiff was not injured in accident or injury was not result of defendant's negligence. *Brown v. Reel*, 148 M 381, 421 P 2d 454.

In a wrongful death action by father of eight and one-half year old boy, who, while riding a bicycle, was struck and killed by automobile, court's instruction that deceased boy was incapable of contributory negligence and court's refusal of defendant's offered instruction on contributory negligence was not reversible error, irrespective of question of boy's capacity, since there was no substantial credible evidence of contributory negli-

#### References

*Kraus v. Treasure Belt Min. Co.*, 146 M 432, 408 P 2d 151; *Wolfe v. Northern Pacific Ry. Co.*, 147 M 29, 409 P 2d 528.

#### Advisory Committee's Note to May 21, 1969 Amendment

Explanation of change: Since section 93-5606, R. C. M. 1947, is being superseded because of changes in Rules 46, 52 and 59, the change in Rule 60(c) is likewise required.

gence in fact on part of deceased boy. *Graham v. Rolandson*, 150 M 270, 435 P 2d 263.

#### Joint Enterprise

Court's rulings with respect to issue of joint enterprise, if error, was harmless error, since driver was sole proximate cause of accident in which passenger suing owner of cattle was injured when car struck cattle on highway. *Ratcliff v. Murphy*, 150 M 31, 430 P 2d 627.

#### Poll of Jury

Lower court abused discretion in granting new trial based solely on ground that it had erred in refusing request for poll of jury since error, if any, was harmless in light of evidence affirmatively showing that verdict was rendered in open court in presence of all counsel, that in response to question by judge, foreman of jury advised him they had agreed upon verdict, and that following reading of verdict signed by foreman, judge inquired of jury if it was true verdict of at least eight of them and jury answered in affirmative. *Martello v. Darlow*, 151 M 232, 441 P 2d 175.

#### References

*Steffes v. Crawford*, 143 M 43, 386 P 2d 842.

### Rule 62. Stay of proceedings to enforce a judgment.

(a) Superseded—M. R. App. Civ. P., Rule 7.

#### Supersession

This section (Sec. 62, Ch. 13, L. 1961), relating to stay of proceedings upon entry

of judgment, is superseded by M. R. App. Civ. P., Rule 7.

(d) Superseded—M. R. App. Civ. P., Rule 7.

**Supersession**

This section (Sec. 62, Ch. 13, L. 1961), relating to stay of proceedings upon ap-

peal, is superseded by M. R. App. Civ. P., Rule 7.

(e) STAY IN FAVOR OF THE STATE OF MONTANA OR AGENCY THEREOF.

**Eminent Domain Proceeding**

Where state highway commission filed notice of appeal and perfected their appeal after writ of execution under section 93-9918 had issued, the appeal stayed the

judgment although no bond was filed as required by section 93-8011, since under this rule no security was required from the state. *Robertson v. State Highway Commission*, 148 M 275, 420 P 2d 21, 24.

## VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 68. Offer of judgment.

### Rule 65. Injunctions.

**References**

*Holtz v. Babcock*, 143 M 341, 389 P 2d 869.

### Rule 68. Offer of judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

**History:** En. Sec. 67, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Amendments**

The amendment of September 29, 1967 added the last sentence.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 68, as amended 1966.

This logical extension of the concept of offer of judgment is suggested by the common admiralty practice of determining liability before the amount of liability is determined.



**Fraud on Court**

Although proper procedure was followed under rule providing for offer of judgment, conduct of parties in perpetrating fraud on court required that judgment

be vacated on motion of aggrieved beneficiary who was not party to suit against estate. *Selway v. Burns*, 150 M 1, 429 P 2d 640.

**IX. APPEALS**

**Rule 72.** Appeal from a district court to the supreme court.

**Rule 72. Appeal from a district court to the supreme court.**

When an appeal is permitted by law from a district court to the supreme court of Montana, or in any case where original proceedings are commenced in the supreme court, such appeal or original proceeding shall be taken, perfected, and prosecuted pursuant to the provisions of the Montana Rules of Appellate Civil Procedure and controlling statutes to the extent that they are not superseded by the Montana Rules of Appellate Civil Procedure.

**History:** En. Sec. 71, Ch. 13, L. 1961, amd. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Amendments**

The 1965 amendment rewrote this section. For previous text, see parent volume.

**Advisory Committee's Note**

Subdivision (a) of Rule 41, M. R. App. Civ. P. merely adapts the Montana Rules of Civil Procedure to these Appellate Rules.

**X. DISTRICT COURTS AND CLERKS**

**Rule 77.** District courts and clerks.

**Rule 77. District courts and clerks.**

(e) **TRANSMITTAL OF FILE ON REMOVAL.** Upon being served with a notice of the removal of any state district court action to the district court of the United States, district of Montana, the clerk of such state district court shall promptly deliver to the clerk of court of the district court of the United States, district of Montana, all papers then in the original state court file, or theretofore issued and subsequently file only the notice of removal and such papers as were filed with the notice of removal.

**History:** En. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969.

**Advisory Committee's Note**

To define procedure and avoid unnecessary duplication of papers in state and fed-

eral court files. The proposed amendment correlates with Rule 10, Revised Rules of Procedure of the United States District Court for the District of Montana effective January 1, 1968.

**XI. GENERAL PROVISIONS**

**Rule 86.** Effective date—Statutes superseded.

**Rule 81. Applicability in general.****(a) SPECIAL STATUTORY PROCEEDINGS.****Action To Remove Administrator**

In statutory action for removal of administrator for misappropriation of funds

of estate, administrator could be examined as adverse witness under Rule 43 notwithstanding provisions of Rule 81. In re

Estate & Guardianship of Wyman, 149 M 525, 429 P 2d 629.

**References**

Stokes v. Delaney & Sons, Inc., 143 M 516, 391 P 2d 698.

**(b) APPEALS TO DISTRICT COURTS.****References**

Stokes v. Delaney & Sons, Inc., 143 M 516, 391 P 2d 698.

**(c) RULES INCORPORATED INTO STATUTES.****References**

Steffes v. Crawford, 143 M 43, 386 P 2d 842.

**Rule 86. Effective date—Statutes superseded.**

**(a) EFFECTIVE DATE AND APPLICATION TO PENDING PROCEEDINGS.** These Rules became effective January 1, 1962. In accordance with Chapter 16, Laws of 1963, proposed amendments to these rules shall be first prepared by the advisory committee, which shall distribute copies thereof to the bench and resident bar of the state for their consideration and suggestions. Submission of proposed amendments to the court shall be made by the advisory committee only after the advisory committee has considered suggestions received from the bench and bar. Submissions to the court shall be noticed by the court by mailing notice, containing copies of the submitted proposals to all district judges and resident attorneys licensed to practice in the Montana courts as shown by the records of the clerk of the court, and the court will receive written suggestions and objections within the time fixed in the notice, which shall be not less than ninety (90) days thereafter. Oral hearings on proposals will be held only on special order of the court. Amendments adopted by the court will become effective on January 1 unless a different time be fixed in the order.

The court will annually, at least thirty (30) days prior to January 1, cause to be published all amendments to these rules which are to become effective on the succeeding January 1, and transmit the same to all judges and resident lawyers of the state. Such rules as are to become effective at times other than January 1 will be published and transmitted at least thirty (30) days prior to their effective date. These rules and amendments govern all proceedings and actions brought after they take effect, and also all further proceedings in actions then pending, except to the extent that in the opinion of the district court their application in a particular action pending when the rules or amendments take effect would not be feasible, or would work injustice, in which event the procedure existing at the time the action was brought applies.

**History:** En. Sec. 79, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

**Amendment**

The 1964 amendment divided subdivision (a) into two paragraphs; inserted the second, third, fourth, fifth, and sixth sen-

tences of the first paragraph and the first and second sentences of the second paragraph; substituted "These rules and amendments" for "They" at the beginning of the third sentence of the second paragraph; inserted "or amendments" after "particular action pending when the rules" in the latter part of the third sentence of

Rule 86(b)

RULES OF CIVIL PROCEDURE

the second paragraph; and substituted "became effective" for "will take effect" in the first sentence of the first paragraph.

Relation Back of Complaint

Question of relation back of complaint amended after adoption of Rules is governed by provisions of Rules even though action originated prior to effective date of Rules in absence of finding by court having jurisdiction that Rules should not control. *Rozan v. Rosen*, 150 M 121, 431 P 2d 870.

Retroactive Application

The giving effect to the service of summons provisions of Montana Rules of Civil Procedure, Rule 4, subd. B, when the operative facts of the case to which the rule applied had taken place prior to the effective date provided in this section, was not a prohibited retroactive application of Rule 4, subd. B, within the meaning of section 12-201. *Weber v. Hydroponics, Inc.*, 226 F Supp 117, 118.

District court had the power to consider motion under procedure that was in effect when the motion was filed where the court believed application of amended rule would work an injury. *State ex rel. Rozan v. District Court of Sixteenth Judicial District*, 147 M 532, 416 P 2d 19, 21.

Rule 4B(1), M. R. Civ. P., applied to act of alleged malpractice occurring in Montana prior to effective date of the Montana Rules of Civil Procedure and doctor who had not resided in Montana since the effective date of the rules could properly be served with process, under Rule 4D(3), in California. *State ex rel. Johnson v. District Court of Fourth Judicial District*, 148 M 22, 417 P 2d 109, 110.

References

*Steffes v. Crawford*, 143 M 43, 386 P 2d 842.

(b) STATUTES SUPERSEDED. Upon the taking effect of these rules or amendments thereto all statutes and parts of statutes in conflict therewith and the statutes listed in Tables B and C are superseded in respect of practice and procedure in the district courts.

History: En. Sec. 79, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

Amendment

The 1964 amendment inserted "or amendments thereto" after "these rules"; and made another minor change in phraseology.

Table B. List of Rules Superseding Statutes.

Statutes Superseded	
Rule	(R. C. M. 1947, sections)
4D	16-809, 93-3008, 93-3011, 93-3012
41(e)	93-3002
52(a)	93-5302, 93-5303, 93-5411
52(b)	93-5305, 93-5306, 93-5307
59(a), (b), (c), (d)	93-5605, 93-5606

History: En. Sec. 82, Ch. 13, L. 1961; amd. Sec. 3, Ch. 14, L. 1963; amd. Sec. 2, Ch. 190, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Amendments

The 1965 amendment added sections 16-809, 93-3008, 93-3011, and 93-3012 to the

list of sections superseded by Rule 4 D; and added section 93-3002 to the list of sections superseded by Rule 41(e).

The 1969 amendment added section 93-5302 to the list of sections superseded by Rule 52(a); inserted sections 93-5305, 93-5306, and 93-5307 as being superseded by Rule 52(b); added section 93-5606 to the list of sections superseded by Rule 59(d).



**Table C. List of Statutes Superseded by Rules.**

Statutes Superseded (R. C. M. 1947, sections)	Rules
93-3002 -----	41(e)
93-3008 -----	4D
93-3011 -----	4D
93-3012 -----	4D
93-5302 -----	52(a)
93-5305 -----	52(b)
93-5306 -----	52(b)
93-5307 -----	52(b)
93-5606 -----	59(d)
16-809 -----	4D

**History:** En. Sec. 83, Ch. 13, L. 1961; amd. Sec. 4, Ch. 14, L. 1963; amd. Sec. 3, ch. 190, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

**Amendments**

The 1965 amendment added sections 16-809, 93-3002, 93-3008, 93-3011, and 93-3012 to the table.

The 1969 amendment added sections 93-5302, 93-5305 to 93-5307 and 93-5606 to the table.

**CHAPTER 2901—SUPPORT OF CHILDREN BORN OUT OF WEDLOCK**

**93-2901-1. Obligations of the father.**

**NOTE.**—Uniform State Law. Sections 93-2901-1 to 93-2901-11 constitute the "Uniform Act on Paternity" approved by the National Conference of Commission-

ers on Uniform State Laws and the American Bar Association in 1960 and adopted in substance in Kentucky and Mississippi.



## CHAPTER 3001

### MONTANA RULES OF APPELLATE CIVIL PROCEDURE

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#### I. APPLICABILITY OF RULES

##### Rule

1. Scope of rules—From what judgment or order an appeal may be taken.
2. What the court may review on an appeal from a judgment.
3. Suspension of the rules.

#### II. APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS

##### 4. How taken.

- (a) FILING THE NOTICE OF APPEAL.
- (b) JOINT APPEALS.
- (c) CONTENT OF THE NOTICE OF APPEAL.
- (d) SERVICE OF NOTICE OF APPEAL.

##### 5. Time for filing notice of appeal.

##### 6. Undertaking for costs on appeal.

- (a) [FORM OF UNDERTAKING—TIME FOR FILING.]

##### 7. Stay of judgment or order pending appeal.

- (a) [STAY UPON ENTRY OF JUDGMENT—UNDERTAKING.]
- (b) [SALE OF PERISHABLE PROPERTY.]
- (c) [CASES IN WHICH STAY OF PROCEEDINGS NOT ALLOWED.]

##### 8. Sureties and their justification.

- (a) [LIABILITY OF SURETY—ENFORCEMENT.]
- (b) [JUSTIFICATION OF SURETIES.]

##### 9. The record on appeal.

- (a) COMPOSITION OF THE RECORD ON APPEAL.
- (b) THE TRANSCRIPT OF PROCEEDINGS—DUTY OF APPELLANT TO ORDER—NOTICE TO RESPONDENT IF PARTIAL TRANSCRIPT IS ORDERED—COSTS OF PRODUCING.
- (c) STATEMENT OF THE EVIDENCE OR PROCEEDINGS WHEN NO REPORT WAS MADE OR WHEN THE TRANSCRIPT IS UNAVAILABLE.
- (d) AGREED STATEMENT AS THE RECORD ON APPEAL.
- (e) CORRECTION OR MODIFICATION OF THE RECORD.

##### 10. Transmission of the record.

- (a) TIME FOR TRANSMISSION—NUMBER OF COPIES OF TRANSCRIPT—DUTY OF APPELLANT.



## RULES OF APPELLATE CIVIL PROCEDURE

### Rule

- (b) DUTY OF CLERK TO TRANSMIT THE RECORD.
- (c) EXTENSION OF TIME FOR TRANSMISSION OF THE RECORD—REDUCTION OF TIME.
- (d) RETENTION OF THE RECORD IN THE DISTRICT COURT BY ORDER OF COURT.
- (e) STIPULATION OF PARTIES THAT PARTS OF THE RECORD BE RETAINED IN THE DISTRICT COURT.
- (f) RECORD FOR PRELIMINARY HEARING IN THE SUPREME COURT.

### 11. Docketing the appeal—Filing of the record.

- (a) DOCKETING THE APPEAL.
- (b) FILING OF THE RECORD.
- (c) DISMISSAL FOR FAILURE OF APPELLANT TO CAUSE TIMELY TRANSMISSION OR TO DOCKET APPEAL.

### 12. Effect of dismissal.

### 13. Acts of executors, administrators or guardians valid when appointment vacated.

### 14. Ruling against respondent may be reviewed.

### 15. Remedial powers of the supreme court.

### 16. Remittitur must be certified to the clerk of the district court.

## III. ORIGINAL PROCEEDINGS—EXTRAORDINARY WRITS

### 17. Acceptance and manner of conducting.

- (a) WHEN ACCEPTED.
- (b) HOW COMMENCED AND CONDUCTED.
- (c) APPLICATIONS—WHEN FILED.
- (d) APPLICATIONS—WHAT TO CONTAIN.
- (e) APPLICATIONS—HOW AND WHEN PRESENTED.
- (f) ISSUANCE OF ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE.
- (g) BRIEFS.
- (h) HEARING—WHEN HAD.

## IV. APPEALS IN FORMA PAUPERIS

### 18. Applications and manner of proceeding.

- (a) APPLICATION TO DISTRICT COURT.
- (b) APPLICATION TO THE SUPREME COURT.
- (c) FORM OF BRIEFS, APPENDICES AND OTHER PAPERS.

## V. GENERAL PROVISIONS

### 19. Record of commissions and oaths.

- (a) COMMISSIONS AND OATHS.
- (b) MINUTES OF COURT.

## RULES OF APPELLATE CIVIL PROCEDURE

### Rule

#### 20. Filing and service.

- (a) FILING.
- (b) SERVICE OF ALL PAPERS REQUIRED.
- (c) MANNER OF SERVICE.
- (d) PROOF OF SERVICE.

#### 21. Computation and extension of time.

- (a) COMPUTATION OF TIME.
- (b) EXTENSION OF TIME.
- (c) ADDITIONAL TIME AFTER SERVICE BY MAIL.

#### 22. Motions.

#### 23. Briefs.

- (a) BRIEF OF THE APPELLANT.
- (b) BRIEF OF THE RESPONDENT.
- (c) REPLY BRIEF.
- (d) REFERENCES IN BRIEFS TO PARTIES.
- (e) REFERENCES IN BRIEFS TO THE RECORD.
- (f) REPRODUCTION OF STATUTES, RULES, REGULATIONS, ETC.
- (g) LENGTH OF BRIEFS AND COSTS.
- (h) BRIEFS IN CASES INVOLVING CROSS APPEALS.

#### 24. Brief of an amicus curiae.

#### 25. The appendix to the briefs.

- (a) USE OF AN APPENDIX.
- (b) CONTENTS OF THE APPENDIX.
- (c) ARRANGEMENT OF THE APPENDIX.
- (d) REPRODUCTION OF EXHIBITS.

#### 26. Filing and service of briefs.

- (a) TIME FOR FILING BRIEFS.
- (b) NUMBER OF COPIES TO BE FILED AND SERVED.
- (c) CONSEQUENCES OF FAILURE TO FILE BRIEFS.

#### 27. Form of briefs, the appendix, motions and other papers.

- (a) FORM OF BRIEFS, APPENDICES AND SEPARATE VOLUMES OF EXHIBITS.
- (b) TYPEWRITTEN PAPERS AND MOTIONS.
- (c) FIRST PAGE AND COVER.

#### 28. Prehearing conference.

#### 29. Oral argument.

- (a) NOTICE OF HEARING—POSTPONEMENT.
- (b) TIME ALLOWED FOR ARGUMENT.
- (c) ORDER AND CONTENT OF ARGUMENT.
- (d) CROSS AND SEPARATE APPEALS.

## RULES OF APPELLATE CIVIL PROCEDURE

### Rule

- (e) NONAPPEARANCE OF COUNSEL—FAILURE TO FILE BRIEFS.
  - (f) SUBMISSION ON BRIEFS.
  - (g) USE OF PHYSICAL EXHIBITS AT HEARING—REMOVAL.
30. Entry and notice of orders and judgments.
- (a) ENTRY AND NOTICE.
31. Interest on judgments.
32. Damages for appeal without merit.
33. Costs.
- (a) COSTS ON APPEAL.
  - (b) COSTS OF BRIEFS AND APPENDICES.
  - (c) OTHER COSTS TAXABLE.
  - (d) COSTS IN ORIGINAL PROCEEDINGS.
  - (e) UNNECESSARY COSTS.
  - (f) NOTATION BY CLERK.
34. Petitions for rehearing.
35. Notice and copy of decision—Remittitur—Mandate from United States supreme court.
- (a) NOTICE AND COPY OF DECISION TO BE FURNISHED.
  - (b) REMITTITUR—WHEN ISSUED—WHEN COPY OF OPINION TO ACCOMPANY.
  - (c) MANDATE FROM UNITED STATES SUPREME COURT—PROCEDURE THEREON.
36. Voluntary dismissal.
37. Substitution of parties.
- (a) DEATH OF A PARTY.
  - (b) SUBSTITUTION FOR OTHER CAUSES.
  - (c) PUBLIC OFFICERS—DEATH OR SEPARATION FROM OFFICE.
38. Cases involving constitutional questions where the state is not a party.
39. Calendar—Withdrawal of records.
- (a) PLACING CAUSES UPON CALENDAR.
  - (b) SETTING CAUSES FOR ARGUMENT.
  - (c) ADVANCEMENT OF CAUSES.
  - (d) PERMISSION TO TAKE RECORD FROM CLERK'S OFFICE.
40. Appeals from injunction orders.
41. Statutes and rules amended.



Rule

**42. Applicability in general.**

- (a) SPECIAL STATUTORY PROCEEDINGS.
- (b) APPEALS TO DISTRICT COURTS.
- (c) RULES INCORPORATED INTO STATUTES.

**43. Title—Effective date—Statutes superseded.**

- (a) TITLE.
- (b) EFFECTIVE DATE AND APPLICATION TO PENDING PROCEEDINGS.
- (c) STATUTES AND RULES SUPERSEDED.

**Appendix of forms.**

**Table A. List of statutes and rules superseded or amended.**

- B. List of rules of appellate civil procedure superseding, in whole or in part, or amending, statutes and rules.**
- C. List of statutes and rules superseded, in whole or in part, or amended, by designated rules of appellate civil procedure.**

**I. APPLICABILITY OF RULES**

- Rule 1. Scope of rules—From what judgment or order an appeal may be taken.
- 2. What the court may review on an appeal from a judgment.
  - 3. Suspension of the rules.

**Rule 1. Scope of rules—From what judgment or order an appeal may be taken.**

These rules govern procedure in appeals in civil cases to the supreme court of Montana from Montana district courts and original proceedings in the supreme court of Montana. The party applying for original relief is known as the petitioner and the adverse party as the defendant. The party appealing is known as the appellant, and the adverse party as the respondent.

A party aggrieved may appeal from a judgment or order, except when expressly made final by law, in the following cases:

(a) From a final judgment entered in an action or special proceeding commenced in a district court, or brought into a district court from another court or administrative body.

(b) From an order granting a new trial; or refusing to permit an action to be maintained as a class action; or granting or dissolving an injunction; or refusing to grant or dissolve an injunction; or dissolving or refusing to dissolve an attachment; from an order changing or refusing to change the place of trial when the county designated in the complaint is not the proper county; from an order appointing or refusing to appoint a receiver, or giving directions with respect to a receivership, or refusing to vacate an order appointing or affecting a receiver; from an order

directing the delivery, transfer, or surrender of property; from any special order made after final judgment; and from such interlocutory judgments or orders, in actions for partition as determine the rights and interests of the respective parties and direct partition to be made. In any of the cases mentioned in this subdivision the supreme court, or a justice thereof, may stay all proceedings under the order appealed from, on such conditions as may seem proper.

(c) From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor, or administrator, or guardian; or refusing, allowing, directing the distribution or partition of any estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser setting apart a homestead.

All questions raised on an order overruling a motion for a new trial or on an order changing or refusing to change the place of trial under R. C. M. 1947, section 93-2906 subdivisions 2, 3 or 4 thereof may be raised and reviewed on an appeal from the judgment.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967, in clause (b), inserted "or refusing to permit an action to be maintained as a class action;" near the beginning of the first sentence.

#### **Advisory Committee's Note**

Section 93-8003, R. C. M. 1947, is restated and clarified. The effect of section 93-8004 (3), referring to "an order changing or refusing to change a place of trial," is limited by providing for appeals from orders re change of venue only in cases where the motion for change is based upon subdivision 1 of section 93-2906.

Since these rules only apply to appeals from district courts to the Montana supreme court, the provisions of sections 93-8001 and 93-8002 are not superseded in so far as they refer to appeals in actions in police or justice's courts: a judgment or order in a civil action in police or justice's courts, except when expressly made final, may be reviewed as prescribed in R. C. M. 1947, sections 93-7901 to 93-7908.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: None.

This adds to appealable orders an order under Rule 23(c)(1), Montana Rules of Civil Procedure, refusing to permit a class action to be maintained as such. It does not permit appeal from an order permitting a class action to be maintained as such. See Advisory Committee's Note to Rule 23 of the Montana Rules of Civil Procedure.

#### **Denial of Change of Venue**

Specification of error arising from trial court's order denying motion for change of venue was not properly before supreme court because timely appeal was not made from order as required by rules. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

#### **Denial of Motion**

Where district court exceeded its jurisdiction in denying motion to quash summons and dismiss action where the summons had not been served and returned within the three years required by M. R. Civ. P., Rule 41(e) the order was not appealable under this rule. *State ex rel. Belwin, Inc. v. Davison*, 148 M 345, 420 P 2d 842, 844.

Writ of supervisory control was proper where lessor's motion to dismiss sublessees' action for breach of lease agree-

ment, to which sublessees were not parties, was denied by the district court, the order denying the motion to dismiss not being appealable under this rule. *State ex rel. Buttrey Foods, Inc. v. District Court*, 148 M 350, 420 P 2d 845, 847.

#### Denial of Writ of Assistance

Although denial of writ of assistance, placing purchaser at sheriff's sale under mortgage foreclosure into possession of lands involved, by district court was appealable under rule either as "an order directing \* \* \* surrender of property" or as "any special order made after final judgment," writ of supervisory control to compel the district court to issue writ of assistance was available as remedy since

remedy by appeal was neither speedy nor adequate. *State ex rel. Foss v. District Court, Fourth Judicial District*, — M —, 446 P 2d 707.

#### Order Denying Summary Judgment

Although order denying summary judgment is nonappealable at time it is made because of its interlocutory character, it is nonetheless reviewable under appellate rule providing that all nonappealable intermediate orders or decisions properly excepted or objected to which involve merits or necessarily affect judgment are reviewable on subsequent appeal from final judgment. *Brown v. Midland Nat. Bank*, 150 M 422, 435 P 2d 878.

### DECISIONS UNDER FORMER LAW

#### Dismissal of Action

An order granting a motion to dismiss was not appealable under former section 93-8003. *Payne v. Mountain States Telephone & Telegraph Co.*, 142 M 406, 385 P 2d 100; *Rambur v. Diehl Lumber Co.*, 143 M 432, 391 P 2d 1.

#### Injunctions and Restraining Orders

Order denying county commissioner's motion to quash temporary injunction against use of real property valuations made by private appraisal group and relied on by reclassification officer appointed by commissioners to determine 1965 tax assessment rolls was appealable under

former section 93-8003. *State ex rel. Keast v. Krieg*, 145 M 521, 402 P 2d 405.

#### Sustaining of Demurrer

Notwithstanding that former statute providing for appeals gave party against whom demurrer was sustained plain and speedy remedy by appeal, court would not dismiss application for supervisory writ where judgment sustaining demurrer also stayed proceedings and expressly accorded losing party right to apply for supervisory writ. *State ex rel. Cave Constr. Co. v. District Court, Third Judicial District*, 150 M 18, 430 P 2d 624.

### Rule 2. What the court may review on an appeal from a judgment.

Upon appeal from a judgment, the court may review the verdict or decision, and any intermediate order or decision excepted or objected to within the meaning of Rule 46 of the Montana Rules of Civil Procedure, which involves the merits, or necessarily affects the judgment, except a decision or order from which an appeal might have been taken.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### Advisory Committee's Note

This rule incorporates R. C. M. 1947, section 93-8022.

#### Correction of Erroneous Judgment

Case would be remanded to district court for purpose of amending, by incorporating appropriate terms, a judgment which omitted defaulting codefendant who was jointly and severally liable on obligation. *White v. Nollmeyer*, 151 M 387, 443 P 2d 873.

#### Denial of Change of Venue

Specification of error arising from trial court's order denying motion for change of venue was not properly before supreme court because timely appeal was not made

from order as required by rules. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

#### Objections First Raised on Appeal

In condemnation proceedings by the state highway commission to condemn a right of way for an interstate highway which divided ranch into two large tracts making an underpass necessary, alleged error of trial court in its preliminary order of condemnation of ordering commission at its own expense to install, construct and maintain the underpass on the ground that the commission had previously agreed to install the underpass, could not be raised for the first time on appeal where the question was not raised at the time of the trial in the lower court. *State ex rel. State Highway Commission v. Wheeler*, 148 M 246, 419 P 2d 492, 496.



**Order Denying Summary Judgment**

Although order denying summary judgment is nonappealable order at time it is made because of its interlocutory character, it is nonetheless reviewable under appellate rule providing that all nonappeal-

able intermediate orders or decisions properly excepted or objected to which involve merits or necessarily affect the judgment are reviewable on subsequent appeal from final judgment. *Brown v. Midland Nat. Bank*, 150 M 422, 435 P 2d 878.

**Rule 3. Suspension of the rules.**

In the interest of expediting decision upon any matter before it, or for other good cause shown, the supreme court may, except as otherwise provided in Rule 21(b), suspend the requirements or provisions of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule is taken from Rule 2 of the Federal Draft. Its purpose is explained by the Federal Advisory Committee's Note. Adjusted to state practice, this purpose is to make clear the power of the supreme court to expedite the deter-

mination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the supreme court to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 21(b) prohibits the supreme court from extending the time for taking appeal.

**II. APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS****Rule 4. How taken.**

5. Time for filing notice of appeal.
6. Undertaking for costs on appeal.
7. Stay of judgment or order pending appeal.
8. Sureties and their justification.
9. The record on appeal.
10. Transmission of the record.
11. Docketing the appeal—Filing of the record.
12. Effect of dismissal.
13. Acts of executors, administrators or guardians valid when appointment vacated.
14. Ruling against respondent may be reviewed.
15. Remedial powers of the supreme court.
16. Remittitur must be certified to the clerk of the district court.

**Rule 4. How taken.**

(a) **FILING THE NOTICE OF APPEAL.** An appeal shall be taken by filing a notice of appeal in the district court. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the supreme court deems appropriate, which may include dismissal of the appeal.

(b) **JOINT APPEALS.** If two or more persons are entitled to appeal from a judgment or order of the district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate notices of appeal as a single appellant.

(c) **CONTENT OF THE NOTICE OF APPEAL.** The notice of appeal shall specify the party or parties taking the appeal; and shall des-

ignate the judgment or order appealed from. Form 1 in the Appendix of Forms is a suggested form of notice of appeal.

(d) **SERVICE OF NOTICE OF APPEAL.** The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address, and shall mail a copy of the notice of appeal to the clerk of the supreme court. The clerk of the district court shall note on each copy served the date on which the notice of appeal was filed. If an appellant is represented by counsel, his counsel shall provide the clerk with sufficient copies of the notice of appeal to permit the clerk to comply with the requirements of this rule. Failure of the clerk to serve notice shall not affect the validity of the appeal. The notice shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule is patterned after Rule 3 of the Federal Draft, but excludes references to criminal cases, habeas corpus proceedings and bankruptcy. Nothing other than the filing of a notice of appeal in the district court is required for the perfecting of an appeal. In the interest of providing the supreme court with prompt

notice that its jurisdiction has been invoked, the rule directs the clerk of the district court to forward a copy of the notice of appeal to the clerk of the supreme court. The requirement that the appellant furnish the clerk with the necessary number of copies of the notice of appeal and that the clerk endorse on each copy served the date on which the notice was filed are for the convenience of the clerk and litigants respectively.

### **DECISIONS UNDER FORMER LAW**

#### **Service on Respondent**

Where notice of appeal was not served on the respondent party within six months of the date of judgment, the supreme court could not acquire jurisdiction

even though notice was filed with the district court within the statutory period. *Seiffert v. Police Commission of Helena*, 144 M 52, 394 P 2d 172.

### **Rule 5. Time for filing notice of appeal.**

The time within which an appeal from a judgment or an order must be taken shall be 30 days from the entry thereof, except that in cases where service of notice of entry of judgment is required by Rule 77(d) of the Montana Rules of Civil Procedure the time shall be 30 days from the service of notice of entry of judgment, but if the state of Montana, or any political subdivision thereof, or an officer or agency thereof is a party the notice of appeal shall be filed within 60 days from the entry of the judgment or order or 60 days from the service of notice of the entry of judgment. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 7 days of the date on which the first notice of appeal was filed, or within the time otherwise provided by this rule, whichever period last expires.

The running of the time for filing a notice of appeal is suspended as to all parties by a timely motion filed in the district court by any party pursuant to the Montana Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this rule commences

to run and is to be computed from mailing by the clerk of notice of the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.

Upon showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the original time prescribed by this rule.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967, in the first sentence of the first paragraph, inserted "a judgment or" before "an order"; substituted "except that \* \* \* the time" for "and the time within which an appeal from a judgment must be taken"; deleted "as provided in Rule 77(d) of the Montana Rules of Civil Procedure" after "entry of judgment"; and inserted "or any political subdivision thereof" after "state of Montana."

#### Advisory Committee's Note

This rule is patterned after Rule 4 of the Federal Draft. (Provisions for appeals in bankruptcy, petitions for impeachment, under the Railway Labor Act, under the Interlocutory Appeals Act, and in criminal cases, are omitted.) It materially shortens the time for taking an appeal.

The Federal Draft provides that the notice of appeal shall be filed within 30 days "of the date of the entry of the judgment order appealed from." The change, which measures the time from service of notice of entry of the judgment, is for the purpose of avoiding uncertainty as to what is a judgment and reducing the possibility of lack of knowledge of the entry of the judgment or order.

The provision for added time for appeal by other parties after notice of appeal is filed by one party is new. The Federal Advisory Committee Note explains this as follows: "It not infrequently happens that a party considers himself aggrieved by the final judgment but is willing to abide by it if it is to be the final result

of the action. Such a party should be protected against the possibility that another party may file a final hour appeal and thereby oblige the forbearing party to undergo the expense of an appeal without the opportunity of presenting his own grievance" to the supreme court.

The time limit for taking an appeal would not prevent the taking of an appeal at any time after the entry of the judgment or order and before service of notice of entry.

The final paragraph permits an extension of the time for taking an appeal by the district court "upon a showing of excusable neglect." In view of the ease with which an appeal may be taken—the filing of a simple notice with the clerk of court—and the unlikelihood that there will not be actual notice of the entry of the judgment or order, it would be an extraordinary case which would justify an extension. But the district court should have the authority to extend time in extraordinary cases where injustice would otherwise result. The phrase "by any party" makes it clear that the district court may extend the time allowed for filing a cross or separate appeal after an initial appeal has been filed.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: None.

Since Rule 77(d), M. R. Civ. P., only requires service of notice of entry of judgment in cases where an appearance has been made, no time appears to be provided for filing notice of appeal from judgments in default cases. This amendment is designed to supply the deficiency.

The addition of the phrase, "or any political subdivision thereof," is added to make it clear that the 60-day provision applies to cities, counties, etc.

### Rule 6. Undertaking for costs on appeal.

(a) [Form of undertaking—Time for filing]. Within 10 days after



service of notice of appeal an undertaking for costs on appeal shall be filed in the district court, or a deposit of the money in the amount thereof be made with the clerk of the district court to abide the event of the appeal, or the undertaking be waived by the adverse party in writing. The undertaking must be executed on the part of the appellant by at least 2 sureties, or by a corporate surety as may be authorized by law, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on the dismissal thereof, not exceeding five hundred dollars. If the undertaking on appeal is not filed within the time specified, or if the undertaking filed is found insufficient, and if the action is not yet docketed with the supreme court, an undertaking may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file an undertaking may be made only in the supreme court. The undertaking for costs herein provided may be combined in a single document with a supersedeas bond under Rule 7.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

Rules 7 and 8 of the Federal Draft contain provisions for appeal bonds and the stay of judgments and orders. These provisions are not followed in the rule. Rather Rules 6, 7 and 8 hereof are substituted. These provisions are believed to be more in accord with state practice and to better fit into Montana statutes

than do the provisions of the Federal Draft. This rule supersedes R. C. M. 1947, sections 93-8005, 93-8006, 93-8012, 93-8015, and compares with Federal Rule 73(c) and (e).

The amount of the undertaking has remained at \$300 since 1895, and the rule would increase it to \$500. Also, express provision is made for corporate sureties as may be authorized by law. Such authorization is found in R. C. M. 1947, section 93-8711.

### **Rule 7. Stay of judgment or order pending appeal.**

(a) [Stay upon entry of judgment—Undertaking]. Upon entry of a judgment or order a party may apply to the district court on notice or ex parte for a stay of the execution of the judgment or order. The court in its discretion may grant said stay for such period of time and under such conditions as the court deems proper, including restraining the party from disposing of, encumbering, or concealing his property. Upon service of notice of appeal, if the court has made no such order or the appellant desires a stay for a longer period than ordered, he may present to the district court and secure its approval of a supersedeas bond which shall have such surety or sureties as are required for an undertaking for costs on appeal prescribed by Rule 6(a). The bond shall be conditioned for the satisfaction of the judgment or order in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment or order is affirmed, and to satisfy in full such modification of the judgment or order and such costs, interest, and damages as the supreme court may adjudge and award. When the judgment or order is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment or order remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the district court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment or order determines the dis-

position of property in controversy as in real actions, replevin, and actions to foreclose mortgages, or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. On application, the supreme court in the interest of justice may suspend, modify, restore, or grant any order made under this subdivision.

(b) [Sale of perishable property]. If the judgment or order appealed from directs the sale of perishable property, the district court may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the supreme court.

(c) [Cases in which stay of proceedings not allowed]. No stay of proceedings shall be allowed upon a judgment or order which adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding public office, civil or military, within this state; or which grants a writ of mandamus, or of prohibition, against a tribunal, corporation, public officer, or board, commanding certain acts to be done which ought to be done by such tribunal, corporation, public officer, or board, and not involving the payment or allowance of money or its equivalent.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule supersedes subdivisions (a) and (d) of Rule 62 of the Montana Rules of Civil Procedure. It also supersedes section 93-8013 in so far as applicable to appeals from district courts to the supreme court. However, since these rules do not apply to appeals from police and justices' courts, section 93-8013 is not superseded in so far as it provides that in cases where an undertaking is required on appeal by the provisions of sections 93-7901 to 93-7908, "a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars

in addition, shall be equivalent to filing the undertaking; and . . . the undertaking or deposit may be waived by the written consent of the respondent." Also section 93-8014 is superseded, and subdivision (c) of this rule is patterned after the last part of that section.

The provision of this rule that, upon entry of a judgment or order a party may apply to the district court on notice or ex parte for a stay of execution, is designed to afford time to obtain a supersedeas bond during which the status quo is maintained by court order. The power of the supreme court recognized by the last sentence of subdivision (a) supplements the power of the district court.

### **DECISIONS UNDER FORMER LAW**

#### **Eminent Domain Proceeding**

Where state highway commission filed notice of appeal and perfected its appeal after writ of execution under section 93-9918 had issued, the appeal stayed the

judgment although no bond was filed as required by this section, since under Rule 62(e), no security was required from the state. *Robertson v. State Highway Commission*, 148 M 275, 420 P 2d 21, 24.

### **Rule 8. Sureties and their justification.**

(a) [Liability of surety—Enforcement]. In cases where an undertaking on appeal or supersedeas bond with sureties is required, the provisions of R. C. M. 1947, sections 93-8710 to 93-8715, inclusive, apply. By entering into an undertaking on appeal or supersedeas bond given pursuant to Rules 6 and 7, the surety submits himself to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as his agent upon whom papers affecting his liability on the bond or

undertaking may be served. His liability may be enforced on motion without the necessity of any independent action. The motion and such notice of the motion as the district court prescribed may be served on the clerk of that court, who shall forthwith mail copies to each surety whose address is known.

(b) [Justification of sureties]. A party may except to the sufficiency of the sureties to any bond or undertaking mentioned in this rule at any time within 30 days after the filing of such bond or undertaking; and unless they or other sureties, within 20 days after service of notice of such exception, justify before a judge of the district court, or the clerk thereof, upon 5 days' notice to the other parties of the time and place of justification, execution of the judgment or order appealed from is no longer stayed.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

The provisions of subdivision (a) of the rule with respect to proceedings against sureties is patterned after Rule 8(b) of the Federal Draft. Subdivision (b) of the rule follows the existing Mon-

tana practice provided by R. C. M. 1947, section 93-8013, but the language is changed to avoid confusion where there are cross appeals or mixed forms of relief and to make it clear that either appellant or respondent, or both, may except to the sufficiency of sureties on a bond or undertaking furnished by the other.

### **Rule 9. The record on appeal.**

(a) COMPOSITION OF THE RECORD ON APPEAL. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) THE TRANSCRIPT OF PROCEEDINGS—DUTY OF APPELLANT TO ORDER—NOTICE TO RESPONDENT IF PARTIAL TRANSCRIPT IS ORDERED—COSTS OF PRODUCING. Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. In all cases where the appellant intends to urge insufficiency of the evidence to support the verdict, order or judgment in the district court, it shall be the duty of the appellant to order the entire transcript of the evidence. Wherever the sufficiency of the evidence to support a special verdict or answer by a jury to an interrogatory, or to support a specific finding of fact by the trial court, is to be raised on the appeal by the appellant, he shall be under a duty to include in the transcript all evidence relevant to such verdict, answer or finding. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the respondent a description of the parts of the transcript which he intends to include in the record and a statement of the issues which he intends to present on the appeal. If the respondent deems a transcript of other parts of the proceedings to be necessary he shall within 10 days after such filing and service order such parts from the reporter or procure an order from the district court requiring the appellant to so do.

The cost of producing the transcript shall be paid by the appellant, or he shall make satisfactory arrangements with the reporter for the



payment of such cost; but, if the appellant considers that any part of the record designated by the respondent for inclusion is unnecessary for the determination of the issues presented, he shall advise the respondent, and the district court may impose upon the respondent the cost of producing any part which it deems unnecessary for the determination of the issues.

The reporter shall certify the correctness of the transcript.

(c) STATEMENT OF THE EVIDENCE OR PROCEEDINGS WHEN NO REPORT WAS MADE OR WHEN THE TRANSCRIPT IS UNAVAILABLE. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may, within 10 days from the hearing or trial or such time extended as the district court may for good cause shown permit, prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the respondent, who may serve objections or propose amendments thereto within 10 days after service. Thereupon, the statement and any objections or proposed amendments shall be submitted for settlement and approval to the district judge who handled the proceedings, and as settled and approved shall be included by the clerk of the district court in the record on appeal. A judge may settle and approve such record after he ceases to be a judge. If such judge before the statement is settled and approved dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle and approve the statement, it shall be settled and approved in such manner as the supreme court may direct.

(d) AGREED STATEMENT AS THE RECORD ON APPEAL. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the supreme court as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 10. Copies of the agreed statement may be filed as the appendix required by Rule 25.

(e) CORRECTION OR MODIFICATION OF THE RECORD. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the supreme court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the supreme court.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### Advisory Committee's Note

This rule is patterned after Rule 10 of the Federal Draft.

Subdivision (a). This subdivision provides for the use of the original trial record as the official record on appeal, and judgment rolls are nowhere provided for in these Rules. This use of the trial record is now provided for in all federal circuit courts.

Subdivision (b). The Federal Advisory Committee's Note states: "The appellant is required to serve a statement of the issues which he intends to present on appeal if only a part of the proceedings is transcribed solely to allow the appellee to determine whether the partial transcript will be adequate for the determination of the issues presented by the appeal. Such a statement is not the equivalent of an assignment of errors, which is nowhere required in the proposed rules, and the statement would not result in limiting the issues on appeal. The precise statement of the issues presented by the appeal is to be made in the brief. An appellee who can show that he was misled by the statement required by this subdivision and in consequence failed to designate for transcription material parts of the reported proceedings may seek relief under subdivision (e) of this rule."

The second and third sentences of this subdivision following the title are added to the Federal Draft to make the duty which rests on the appellant more specific. Also, the second paragraph of this subdivision has been expanded to afford protection to an appellant against payment of costs of a transcript of unnecessary portions of the proceeding ordered by a respondent. And the last paragraph, requiring the reporter to certify the correctness of the transcript, has been added to the Federal Draft.

Subdivision (c). The provision of the Federal Draft for settlement has been expanded, patterned after section 93-5508; also, because memories are short, there has been added a time limit for the preparation of the statement.

Subdivisions (d) and (e) are the same as the provisions of the federal draft, adjusted to the Montana court system.

#### Cost of Transcript

Under rule providing that court "may impose upon the respondent the cost of producing any part of the record which it deems unnecessary for the determination of the issues," court determined that cost of portion of transcript ordered by respondent, which did not bear on any issue presented upon appeal, should be assessed against respondent. *Ratcliff v. Murphy*, 150 M 31, 430 P 2d 627.

### DECISIONS UNDER FORMER LAW

#### Evidence Not in Record

Merits of appeal could not be determined where purported transcript on appeal did not contain certificate of judge that records included in the transcript had been used at the hearing. *Anderson v. Mennie*, 144 M 105, 394 P 2d 853, 854.

#### Late Presentment of Bill

A bill of exceptions presented after the time prescribed in former section 93-5505 was a nullity and could not be considered on appeal. *Anderson v. Mennie*, 144 M 105, 394 P 2d 853, 854.

#### Notice of Appeal

Where appellant sought to amend notice of appeal from a nonappealable order so as to make it an appeal from final judgment, the supreme court acquired no jurisdiction to allow such amendment when the statutory provisions for time and manner of appeal were not complied with. *Payne v. Mountain States Telephone & Telegraph Co.*, 142 M 406, 385 P 2d 100.

### Rule 10. Transmission of the record.

(a) TIME FOR TRANSMISSION—NUMBER OF COPIES OF TRANSCRIPT—DUTY OF APPELLANT. The record on appeal, including the transcript necessary for the determination of the appeal, shall be transmitted to the supreme court within 40 days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subdivision (c) of this rule. Six copies of each transcript must be lodged with the clerk of this court for filing. Promptly after filing the notice of appeal the appellant shall comply with the provisions of Rule 9(b) and shall take any other action necessary to enable the

clerk to assemble and transmit the record. If more than one appeal is filed, each appellant shall comply with the provisions of Rule 9(b) and this subdivision, and a single record shall be transmitted within 40 days after the filing of the final notice of appeal.

(b) DUTY OF CLERK TO TRANSMIT THE RECORD. When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the supreme court. The clerk shall number the documents comprising the record and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. Documents in bulky containers and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the supreme court. A party must make advance arrangements with the clerk of the district court for the transportation of bulky or weighty exhibits and with the clerk of the supreme court for their receipt. Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the supreme court. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the supreme court.

(c) EXTENSION OF TIME FOR TRANSMISSION OF THE RECORD—REDUCTION OF TIME. The district court may extend the time for transmitting the record. The request for extension must be made within the time originally prescribed or within an extension previously granted, and the district court shall not extend the time to a day more than 90 days from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has denied a request therefor, the supreme court may on motion extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. A motion for an extension of time for transmitting the record made in either court shall show that the inability of the appellant to cause timely transmission of the record is due to causes beyond his control or to circumstances which may be deemed excusable neglect. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given.

The district court or the supreme court may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

(d) RETENTION OF THE RECORD IN THE DISTRICT COURT BY ORDER OF COURT. The supreme court may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the



clerk of the district court shall retain the record and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.

If the record is retained in the district court by order of either court, the clerk of the district court shall retain it subject to the order of the supreme court, and transmission of the copy of the docket entries shall constitute transmission of the record.

(e) **STIPULATION OF PARTIES THAT PARTS OF THE RECORD BE RETAINED IN THE DISTRICT COURT.** The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the supreme court shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(f) **RECORD FOR PRELIMINARY HEARING IN THE SUPREME COURT.** If prior to the time the record is transmitted a party desires to make in the supreme court a motion for dismissal, for a stay pending appeal, for additional security on the undertaking on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the supreme court such parts of the original record as the party shall designate.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule is taken from Rule 11 of the Federal Draft.

Subdivision (a). This subdivision fixes the time for transmission rather than for filing at 40 days after the filing of the notice of appeal, thus enabling the parties to know with certainty precisely when the complete record must be transmitted to the supreme court. The only justification for delay between filing the notice of appeal and the transmission of the record to the supreme court is the time required for securing a transcription of the trial proceedings. If the appellant is prevented from securing the necessary transcript within the 40-day period by circumstances beyond his control, he may seek an extension of time for transmitting the record.

The requirement that the appellant take any other action necessary to enable the clerk to assemble and transmit the record emphasizes the primary responsibility of the appellant for effecting timely transmission of the record. His responsibilities include, for example, the payment of any required fee or charge.

Subdivision (b). The appellant is allowed 40 days between the filing of the notice of appeal and the transmission of the record in order to allow him to secure the necessary transcript. If the transcript

is available sooner, the allowance is unnecessary, and either party may oblige the clerk of the district court to transmit the record forthwith. On the other hand, unless the record contains the necessary transcript, the clerk is not to transmit it.

Subdivision (c). Cause for extension of the time by either the district or the supreme court must be shown. The final sentence permits any party to expedite the appeal in cases in which the record is complete by obtaining an order that the record be transmitted and the appeal docketed at a date earlier than otherwise allowed or fixed.

Subdivision (d). This subdivision permits the record to be retained in the district court by order of the supreme court, or order of the district court subject to the order of the supreme court. Especially in cases where the judgment or order does not dispose of the entire litigation, retention of the record in the district court may be a convenience for counsel and the district court. In some cases there may be no need for the transmission of the record, and the labor and expense of transmission may be saved.

Subdivision (e). This subdivision permits parties to stipulate against transmission of designated parts of the record free from the fear that a mistake may substantially affect the scope of the appeal. The final sentence makes it clear that a stipulation that designated parts of the record not be transmitted in no way di-

minishes the record itself. In effect, a party may at any time revoke his stipulation against transmission of parts of the record.

Subdivision (f). The substance of this subdivision was taken from Fed. R. Civ. P., Rule 75(j).

### Rule 11. Docketing the appeal—Filing of the record.

(a) **DOCKETING THE APPEAL.** Within the time allowed or fixed for transmission of the record, the appellant shall pay to the clerk of the supreme court the fee for filing the record on appeal fixed by section 82-503 of the 1947 Revised Codes of Montana, and the clerk shall thereupon enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal upon the docket at or before the time of filing the record. An appeal shall be docketed under the title given to the action in the district court with such addition as is necessary to indicate the identity of the appellant

(b) **FILING OF THE RECORD.** Upon receipt of the record by the clerk of the supreme court following its timely transmittal, and after the appeal has been timely docketed, the clerk shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

(c) **DISMISSAL FOR FAILURE OF APPELLANT TO CAUSE TIMELY TRANSMISSION OR TO DOCKET APPEAL.** If the appellant shall fail to cause timely transmission of the record or to pay the filing fee if a filing fee is required, any respondent may file a motion in the supreme court to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the district court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, and the expiration date of any order extending the time for transmitting the record; and by proof that 7 days' notice in writing has been served on the appellant that application will be made for dismissal of the appeal. The clerk shall docket the appeal for the purpose of permitting the court to entertain the motion, without requiring payment of the filing fee, but the appellant shall not be permitted to appear without payment of the fees unless he is otherwise exempt therefrom. Instead of filing a motion to dismiss the appeal, the respondent may cause the record to be transmitted and may docket the appeal, in which event the appeal shall proceed as if the appellant had caused it to be docketed.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### Advisory Committee's Note

This rule is patterned after Rule 12 of the Federal Draft, with adjustments to state practice. The provision of section 82-503 for a fee for filing the "transcript" on appeal will apply to the "record" on appeal pursuant to these rules.

The appellant's responsibility with respect to docketing and filing are specified. The appellant may pay the filing fee at any time after filing the notice of appeal,

and it is then the duty of the clerk of the supreme court to enter the appeal on the docket. The appellant's responsibility is (1) to pay the filing fee at or before the time allowed or fixed for transmission of the record, and (2) to insure that the record is transmitted to the supreme court within the time allowed or fixed for its transmission. The clerk of the supreme court is directed to assign to cases on appeal the title which was used in the district court in the interest of facilitating future reference and citation and location of cases in indexes.

DECISIONS UNDER FORMER LAW

**Notice of Appeal**

Where appellant sought to amend notice of appeal from a nonappealable order so as to make it an appeal from final judgment, the supreme court acquired no jurisdiction to allow such amendment

when the statutory provisions for time and manner of appeal were not complied with. *Payne v. Mountain States Telephone & Telegraph Co.*, 142 M 406, 385 P 2d 100.

**Rule 12. Effect of dismissal.**

The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates R. C. M. 1947, section 93-8020.

**Rule 13. Acts of executors, administrators or guardians valid when appointment vacated.**

When the judgment or order appointing an executor, or administrator, or guardian is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates R. C. M. 1947, section 93-8016.

**Rule 14. Ruling against respondent may be reviewed.**

Whenever the record on appeal shall contain any order, ruling, or proceeding of the trial court against the respondent, affecting his substantial rights on the appeal of said cause, together with any required objection or exception of such respondent, the supreme court on such appeal shall consider such orders, rulings, or proceedings, and the objections and exceptions thereto, and shall reverse or affirm the cause on said appeal according to the substantial rights of the respective parties, as shown upon the record. And no cause shall be reversed upon appeal by reason of any error committed by the trial court against the appellant, where the record shows that the same result would have been attained had such trial court not committed an error or errors against the respondent.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates R. C. M. 1947,

section 93-8023, but eliminates references to bills of exceptions and statements of the case properly settled because these rules nowhere provide for such bills and statements.

**Rule 15. Remedial powers of the supreme court.**

When the judgment or order is reversed or modified, the supreme court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judg-



ment, or had under process issued upon the judgment, on an appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent, enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates R. C. M. 1947,

section 93-8024, substituting "supreme court" for "appellate court" and eliminating the provision for damages when the appeal is made for delay. Rule 32 covers the matter of damages.

**Rule 16. Remittitur must be certified to the clerk of the district court.**

When judgment is rendered upon the appeal, it must be certified by the clerk of the supreme court to the clerk of the district court from which the appeal is taken. The clerk of the district court must enter at length in the records of the court the certificate received. Also, in cases of appeal from a judgment, the clerk must enter a minute of the judgment of the supreme court on the docket against the original entry; and in cases of appeal from an order, he must enter a minute against the entry of the order appealed from, containing a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified by the supreme court on appeal.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates the substance of

R. C. M. 1947, section 93-8025, but eliminates references to the judgment roll, which is nowhere provided for in these rules.

### III. ORIGINAL PROCEEDINGS—EXTRAORDINARY WRITS

**Rule 17. Acceptance and manner of conducting.**

**Rule 17. Acceptance and manner of conducting.**

(a) **WHEN ACCEPTED.** The supreme court is an appellate court but it is empowered by the constitution of Montana to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its jurisdiction. The institution of such original proceedings in the supreme court is sometimes justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy, or when supervision of a trial court other than by appeal is deemed necessary or proper.

(b) **HOW COMMENCED AND CONDUCTED.** Proceedings commenced in the supreme court originally to obtain writs of habeas corpus, injunction, review, mandate, quo warranto, supervisory control, and other remedial writs or orders, shall be commenced and conducted in the manner prescribed by the Code of Civil Procedure for the conduct of such or analogous proceedings and by these additional rules. All papers filed shall conform to the requirements of Rule 27.

(c) **APPLICATIONS—WHEN FILED.** The moving party's application shall be filed with the clerk of the supreme court one hour prior to its presentation to the court.

(d) **APPLICATIONS—WHAT TO CONTAIN.** The application for the issuance of any of the above writs or orders must set forth, in addition to the other requisite matters, the particular questions and issues anticipated or expected to be raised in the proceeding, and also the fact which renders it necessary and proper that the writ should issue originally from the supreme court; the said matters will be taken into consideration by the court in determining the necessity and propriety of accepting jurisdiction and granting the alternative writ or order to show cause. Each application shall also set forth as exhibits, without repetition of title of court and cause, a copy of each judgment, order, notice, pleading, document, proceeding or court minute referred to in the application, or necessary to make out a *prima facie* case or to substantiate the pleading or conclusion or legal effect. A memorandum of authorities must be filed with the application.

(e) **APPLICATIONS—HOW AND WHEN PRESENTED.** The supreme court will receive and hear original applications in open court on any day when the court is in session; but at least an hour's prior notice of such presentation shall be given by counsel to the chief justice or acting chief justice. Not over fifteen minutes shall be allowed for the presentation of any such application unless on prior request further time is granted.

(f) **ISSUANCE OF ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE.** This court will, as promptly as possible after the presentation of an application, either dismiss the same, issue an alternative writ, order to show cause, or such other remedial writ or order as it deems expedient.

(g) **BRIEFS.** At or before the time set for final hearing, each party shall serve and file his brief in full conformance with Rules 20, 23 and 27, and containing a statement of the facts and of the points of law applicable, with the authorities relied upon.

(h) **HEARING—WHEN HAD.** Unless otherwise ordered the hearing shall be had at the time fixed for the return. At or prior to said return time the opposing party shall serve and file, without waiver, any and all pleadings and motions desired to be presented, including answer or return, and all issues shall be argued at the hearing, the applicant opening and closing, and the parties being allowed the same time as upon argument of appeals. If testimony becomes necessary a reference will be ordered.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule incorporates Montana Supreme Court Rule IV, with changes in subdivisions (e) and (f) designed to recognize that on original applications the court is not limited to the issuance of alternative writs or orders to show cause, but may issue whatever remedial writ or order it deems expedient.

#### **Alternative Writs**

State highway commission, ordered by district court to produce certain appraisals under discovery rules, was entitled to have order reviewed on allegations that order required production of irrelevant and privileged matter in excess of lower court's jurisdiction, that it was not an appealable order and that commission had no remedy at law, which allegations were sufficient to authorize issuance of alternative writ. *State Highway Commission v. District*

## Rule 18 RULES OF APPELLATE CIVIL PROCEDURE

Court, First Judicial District, 149 M 384,  
427 P 2d 49.

### References

State ex rel. Buttrey Foods, Inc. v.  
District Court, 148 M 350, 420 P 2d 845,  
847.

## IV. APPEALS IN FORMA PAUPERIS

Rule 18. Applications and manner of proceeding.

### Rule 18. Applications and manner of proceeding.

(a) APPLICATION TO DISTRICT COURT. A party who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed together with an affidavit showing, in the detail prescribed by Form 2 of the Appendix of Forms, his inability to pay the fees and costs of the appeal or to give security therefor, his belief that he is entitled to redress, and a statement of the issues he intends to present on appeal. If the motion is granted, the party may proceed on appeal without further application to the supreme court and without payment of fees or costs or the giving of security therefor. If the motion is denied, the district court shall state the reasons for the denial.

(b) APPLICATION TO THE SUPREME COURT. If the motion for leave to proceed on appeal in forma pauperis is denied by the district court, a motion for leave so to proceed may be filed in the supreme court within 30 days after entry of the order of denial. The motion shall be accompanied by a copy of the affidavit filed in the district court and of the statement of reasons for denial given by the district court.

(c) FORM OF BRIEFS, APPENDICES AND OTHER PAPERS. Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### Advisory Committee's Note

This rule is patterned after Rule 23 of the Federal Draft, but omits the last clause of the Federal Draft reading "and

may request that the appeal be heard on the original record without an 'appendix.'" This change is made because these rules do not adopt the appendix system of Rule 30 of the Federal Draft. See Rule 25. This rule is believed to be consistent with R. C. M. 1947, section 93-8625.

## V. GENERAL PROVISIONS

- Rule 19. Record of commissions and oaths.  
20. Filing and service.  
21. Computation and extension of time.  
22. Motions.  
23. Briefs.  
24. Brief of an amicus curiae.  
25. The appendix to the briefs.  
26. Filing and service of briefs.  
27. Form of briefs, the appendix, motions and other papers.  
28. Prehearing conference.  
29. Oral argument.  
30. Entry and notice of orders and judgments.  
31. Interest on judgments.  
32. Damages for appeal without merit.  
33. Costs.  
34. Petitions for rehearing.  
35. Notice and copy of decision—Remittitur—Mandate from United States Supreme Court.



36. Voluntary dismissal.
37. Substitution of parties.
38. Cases involving constitutional questions where the state is not a party.
39. Calendar—Withdrawal of records.
40. Appeals from injunction orders.
41. Statutes and rules amended.
42. Applicability in general.
43. Title—Effective date—Statutes superseded.

#### Rule 19. Record of commissions and oaths.

(a) **COMMISSIONS AND OATHS.** The commissions and oaths of the justices and the clerk of this court, and the attorney general shall be recorded in the records of this court.

(b) **MINUTES OF COURT.** The minutes of this court shall be approved by the chief justice (or in his absence by the associate justice having the shortest term to serve), and attested by the clerk.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule incorporates Montana Supreme Court Rule I.

#### Rule 20. Filing and service.

(a) **FILING.** Papers required or permitted to be filed must be placed in the custody of the clerk within the time fixed for filing. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are actually received within the time fixed for filing. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with him, in which event he shall note thereon the dates of filing and shall thereafter transmit it to the clerk.

(b) **SERVICE OF ALL PAPERS REQUIRED.** Copies of all papers, including any transcript, filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by the party or person acting for him on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

(c) **MANNER OF SERVICE.** Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) **PROOF OF SERVICE.** Papers presented for filing shall contain acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment of proof of service but shall require such to be filed promptly thereafter.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

cluding any transcript" has been added to subdivision (b) to make it clear that copies of any transcript are to be served on all parties. The first paragraph of Montana Supreme Court Rule III is superseded.

#### **Advisory Committee's Note**

This rule is taken from Rule 25 of the Federal Draft, but the phrase "in-

**Rule 21. Computation and extension of time.**

(a) **COMPUTATION OF TIME.** In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) **EXTENSION OF TIME.** The court for good cause shown may upon motion extend the time prescribed by these rules or by its order for doing any act, and may thereby permit an act to be done after the expiration of such time if the failure to act was excusable under the circumstances; but the court may not extend the time for filing a notice of appeal, except as provided in Rule 5.

(c) **ADDITIONAL TIME AFTER SERVICE BY MAIL.** Whenever a party is required or permitted to do any act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule is patterned after Rule 26 of the Federal Draft. There are omitted provisions of the Federal Draft with respect to petitions for allowance, applica-

tions for permission to appeal, appeals from advisory agencies, and a definition of "legal holiday." A definition of "legal holiday" is contained in R. C. M. 1947, section 19-107.

It is believed that these provisions are consistent with R. C. M. 1947, section 90-407.

**Rule 22. Motions.**

Unless another form is prescribed by these rules, an application for an order or other relief shall be made by filing a motion in writing for such order or relief. The motion shall state with particularity the grounds therefor and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Motions for procedural orders may be determined ex parte. The supreme court may authorize disposition of motions for procedural orders by a single judge. If a motion seeks dismissal of the appeal or other substantial relief, any party may file an answer in opposition within 7 days after service of the motion, or within such time as the court may direct. Motions, supporting papers and any response thereto may be typewritten.

At the time of filing a motion counsel shall present a proposed order, together with sufficient copies for service upon all counsel of record.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule supersedes Montana Supreme Court Rule XI. It is patterned after Rule 27 of the Federal Draft, but the last

sentence of the Federal Draft requiring the filing of three copies of motions and supporting papers has been omitted. Also, there has been added as a last paragraph the amendment of the Montana Supreme Court Rule XI, effective January 1, 1965.

**Rule 23. Briefs.**

(a) **BRIEF OF THE APPELLANT.** The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case and its disposition in the court below, e.g.: "The plaintiff brought this action in the district court to recover damages for the wrongful death of her husband. The jury returned a verdict for the plaintiff. On motion of the defendant the trial judge entered judgment for the defendant n. o. v. on the ground that there was no evidence to support a finding of negligence on the part of the defendant. From this judgment the plaintiff appeals."

There shall follow a statement of the facts relevant to the issues presented for review, with references to the pages of the parts of the record at which material facts appear (see subdivision (e)).

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and pages of the record relied on.

(5) A short conclusion stating the precise relief sought.

(b) **BRIEF OF THE RESPONDENT.** The brief of the respondent shall conform to the requirements of subdivision (a) (1) to (4), except that a statement of the issues or of the case need not be made unless the respondent is dissatisfied with the statement of the appellant.

(c) **REPLY BRIEF.** The appellant may file a brief in reply to the brief of the respondent. The reply brief must be confined to new matter raised in the brief of the respondent. No further briefs may be filed except with leave of court.

(d) **REFERENCES IN BRIEFS TO PARTIES.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such formal designations as "appellant" and "respondent." It promotes clarity to use names or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) **REFERENCES IN BRIEFS TO THE RECORD.** Whenever a reference is made in the briefs to the record, the reference must be to particular parts of the record, suitably designated, and to specific pages of each part, e. g., Answer, p. 7; Motion for Summary Judgment, p. 3; Transcript, p. 231. Intelligible abbreviations may be used. If reference is made to an exhibit, reference shall be made to the pages of the transcript on which the exhibit was identified, offered, and received or rejected.

(f) **REPRODUCTION OF STATUTES, RULES, REGULATIONS, ETC.** If determination of the issues presented requires the study of



statutes, rules, regulations, etc., or relevant parts thereof, they may be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form. No such reproduction is required, unless ordered by the supreme court.

(g) **LENGTH OF BRIEFS AND COSTS.** Except by permission of the court briefs shall not exceed 50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. For purposes of assessing costs under R. C. M. 1947, section 93-8606, reasonable costs shall be limited as follows: For appellant's brief fifty (50) pages; for respondent's brief forty (40) pages; for reply brief fifteen (15) pages. In addition, reasonable costs for briefs shall be limited to \$250 for appellant's brief and \$200 for respondent's brief.

(h) **BRIEFS IN CASES INVOLVING CROSS APPEALS.** If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 25 and 26, unless the parties otherwise agree or the court otherwise orders. The brief of the respondent shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule is patterned after Rule 28 of the Federal Draft, adjusted to state practice. The second paragraph of subdivision (e) of the Federal Draft is omitted, since these rules do not adopt

the "appendix" system of Rule 30 of the Federal Draft. See Rule 25.

Also, in the Federal Draft, subdivision (f) requires reproduction of statutes, rules, regulations, etc. This has been changed, so that reproduction is permissive, unless ordered by the supreme court.

#### **Rule 24. Brief of an amicus curiae.**

A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. A motion of an amicus curiae for leave to participate in the oral argument will be granted only for extraordinary reasons.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule is taken from Rule 29 of the

Federal Draft. It follows the practice of a majority of federal circuits in requiring leave of court to file an amicus brief unless the litigants consent to its filing.

#### **Rule 25. The appendix to the briefs.**

(a) **USE OF AN APPENDIX.** At any time before final decision, the supreme court may order an appendix to any brief. Also, either the appellant or respondent may, if he deems it desirable, prepare, file and serve with his brief an appendix.

(b) **CONTENTS OF THE APPENDIX.** Unless otherwise ordered by the supreme court, an appendix shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant pleading and relevant

portions of the charge, finding and opinion; (3) the judgment, order or decision in question; and (4) such other parts of the record as any party deems it essential for the judges of the court to read in order to decide the issues presented. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference or examination and shall not engage in unnecessary designation.

(c) **ARRANGEMENT OF THE APPENDIX.** At the beginning of the appendix there shall appear a chronological list of the parts of the record which it contains. Each part of the record shall be listed by the descriptive title given to that part by the reference made to it in the briefs. The page or pages of the appendix at which each part of the record thus listed appears shall be set out opposite each listing in a column at the right, so as to permit immediate location in the appendix of the parts of the record referred to in the briefs and contained in the appendix.

The relevant docket entries in the proceeding below shall follow the list of contents. Thereafter, the parts of the record shall be set out in chronological order. The original paging of each part of the record set out in the appendix shall be indicated by placing in brackets the number of the original page at the place where that page begins. Omissions in the text of papers or of testimony must be indicated by asterisks. A question and its answer may be contained in a single paragraph.

(d) **REPRODUCTION OF EXHIBITS.** Exhibits may be contained in a separate volume, suitably indexed.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

Rules 30 and 31 of the Federal Draft, require post-brief appendices, unless dispensed with by court rule or order. The

rule does not follow the Federal Draft at this point. Rather, under this rule the supreme court may order an appendix, or either party may if he chooses use an appendix. When an appendix is used it is to be filed and served with the brief.

**Rule 26. Filing and service of briefs.**

(a) **TIME FOR FILING BRIEFS.** The appellant shall serve and file his brief within 30 days after the date on which the record is filed. The respondent shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the respondent, but, except for good cause shown, a reply brief must be served and filed at least 3 days before argument.

(b) **NUMBER OF COPIES TO BE FILED AND SERVED.** Ten copies of each brief shall be filed with the clerk of the supreme court unless otherwise ordered by the court, and one copy of each brief shall be served on counsel for each party separately represented. The clerk will not accept a brief for filing unless it is accompanied by acknowledgment or proof of service as required by Rule 20.

(c) **CONSEQUENCES OF FAILURE TO FILE BRIEFS.** If an appellant fails to file his brief within the time provided by this rule,

## Rule 27 (a)      RULES OF APPELLATE COURT PROCEDURE

or within the time extended, a respondent may move for dismissal of the appeal. If a respondent fails to file his brief, he will not be heard at oral argument except by permission of the court.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

### **Advisory Committee's Note**

This rule is patterned after Rule 31 of the Federal Draft.

Subdivision (a) follows the time fixed for filing of briefs provided in the Federal Draft, and that is the time now allowed by a majority of the federal circuits.

Subdivision (b) of the Federal Draft is omitted, since it provides a post-brief time for filing the appendix. Under Rule

25 an appendix must be filed and served with the brief, unless otherwise ordered by the supreme court.

Subdivision (b) of this rule is patterned after subdivision (c) of the Federal Draft. The number of copies to be filed and served, however, are adjusted to fit state practice and the present requirement of Montana Supreme Court Rule II.

Subdivision (c) of this rule follows subdivision (d) of Rule 31 of the Federal Draft.

### **Rule 27. Form of briefs, the appendix, motions and other papers.**

(a) **FORM OF BRIEFS, APPENDICES AND SEPARATE VOLUMES OF EXHIBITS.** Briefs, appendices and separate volumes of exhibits may be produced by standard typographic printing or by any duplicating or copying process capable of producing a clear black image on white paper. Typewritten copies of briefs, appendices and separate volumes of exhibits may not be submitted without permission of the chief justice of the supreme court, except in behalf of parties allowed to proceed in forma pauperis. Pica solid is the smallest letter and the most compact form of composition allowed for all printed matter. Briefs, appendices and separate volumes of exhibits shall be on white uncalendered book paper in book or booklet form. If produced by the standard typographic printing process, the pages shall be ten inches long and seven inches wide, with a margin on the outer edge not less than one inch wide and on the inner edge not less than two inches wide. If produced by a duplicating or copying process, the pages shall be eleven inches long and eight and one-half inches wide, with a margin on the outer edge not less than one inch wide and on the inner edge not less than two inches wide. The pages shall be fastened at the side and numbered at the top.

(b) **TYPEWRITTEN PAPERS AND MOTIONS.** Papers not required to be produced in a manner prescribed by subdivision (a) of this rule shall be plainly and legibly written by a typewriter with a new black ribbon and new black carbon paper of good grade, in double spacing, except that quotations may be single spaced, on one side only of white typewriter paper, eight and one-half inches wide and thirteen inches long, numbered at the bottom, with a ruled margin of one and one-half inches on the left-hand side of the page and one inch on the right-hand side, and numbered lines, not more than thirty-two lines to the page. The pages shall be bound at the left-hand side into volumes not containing more than two hundred fifty pages; provided, however, that if the pages number fifty or less they may be bound at the top.

In collating typewritten papers the copies shall not be mixed, but each copy shall consist throughout of uniform pages. Each page of every copy shall be opaque and each line of print thereon plainly legible. The difficulty of examining transparent, illegible and nonuniform type-



written copies has become so great that this rule will be strictly applied and papers not complying with it will not be received.

(c) **FIRST PAGE AND COVER.** All papers shall be bound in cardboard or pasteboard covers, unless bound at the top under subdivision (b) of this rule, in which case they may be bound in cover paper. On the first page and cover of all papers must be stated the title of this court, the title of the case as in the court below, adding to the words "Plaintiff" and "Defendant," the words "Appellant" and "Respondent" as the case may require, the names of counsel for appellant and respondent, the title of the papers, as "Appellant's Brief," "Appendix to Appellant's Brief," etc., and the venue from which the appeal is taken.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

Rule 32 of the Federal Draft is adjusted to conform to the paper and forms

prescribed for state practice and Montana Supreme Court Rule II, as amended effective January 1, 1965. The provisions requiring the use of pica type and two typewritten originals are stricken as being obsolete or unnecessary.

**Rule 28. Prehearing conference.**

The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceedings by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issue to those not disposed of by admission or agreements of counsel, and such order when entered controls the subsequent course of the proceedings, unless modified to prevent manifest injustice.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule is taken from Rule 33 of the Federal Draft.

**Rule 29. Oral argument.**

(a) **NOTICE OF HEARING—POSTPONEMENT.** The clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the hearing must be made by motion filed reasonably in advance of the date fixed for hearing.

(b) **TIME ALLOWED FOR ARGUMENT.** Upon oral argument of an appeal or original proceeding, 40 minutes will be allowed appellant or applicant and 30 minutes to respondent. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary by motion filed reasonably in advance of the date fixed for hearing. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(c) **ORDER AND CONTENT OF ARGUMENT.** The appellant or applicant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case, and the closing argument shall be limited to rebuttal of respondent's argument. Counsel will not be permitted to read at length from briefs, records or authorities.

(d) **CROSS AND SEPARATE APPEALS.** A cross or separate appeal shall be argued with the initial appeal at a single hearing, unless the court otherwise directs. If a case involves a cross appeal, the plaintiff in the action below shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument at the hearing.

(e) **NONAPPEARANCE OF COUNSEL—FAILURE TO FILE BRIEFS.** If counsel for a party fails to appear to present argument, the court may hear argument on behalf of a party whose counsel is present, and the case will be decided on the briefs and the argument heard. If no counsel appear for any party, the case will be decided on the briefs unless the court shall otherwise order.

(f) **SUBMISSION ON BRIEFS.** By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(g) **USE OF PHYSICAL EXHIBITS AT HEARING—REMOVAL.** If physical exhibits other than documents are to be used at the hearing, counsel shall arrange to have them placed in the courtroom before the court convenes on the date of the hearing. After the hearing counsel shall cause the exhibits to be removed from the courtroom unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule is patterned after Rule 34 of the Federal Draft, but the time provisions are more liberal than those of the Federal Draft which allows 30 minutes to each side. It is intended that the time be afforded to opposing interests rather than to individual parties, as is true under the

Federal Draft. Thus, if there are multiple appellants they have together but 40 minutes, and multiple respondents have a total of 30 minutes. The 40 minutes for the appellant or applicant may be divided between the opening and closing statement, as the appellant or applicant chooses.

In other particulars this rule follows the usual practice among the federal circuits.

### **Rule 30. Entry and notice of orders and judgments.**

(a) **ENTRY AND NOTICE.** The notation of a judgment or order in the docket constitutes entry thereof. Upon entry of a judgment or order, the clerk shall promptly mail to all parties a copy of the judgment or order, and notice of the date of entry thereof.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule is patterned after Rule 36 of the Federal Draft. The purpose is to clarify what constitutes an entry of a

judgment or order. The provision for mailing by the clerk is for the convenience of the parties but does not affect the time for taking an appeal, which is controlled by Rule 5. As to the entry of judgments, see M. R. Civ. P., Rule 58.

### **Rule 31. Interest on judgments.**

If a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was

rendered or made in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

The language of Rule 37 of the Federal Draft is modified to conform to R. C. M. 1947, section 93-8622.

**Rule 32. Damages for appeal without merit.**

If the supreme court is satisfied from the record and the presentation of the appeal, that the same was taken without substantial or reasonable grounds, but apparently for purposes of delay only, such damages may be assessed on determination thereof as under the circumstances are deemed proper.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

The language of Montana Supreme Court Rule XIX is substituted for that of Rule 38 of the Federal Draft.

**Rule 33. Costs.**

(a) **COSTS ON APPEAL.** Costs on appeal will be taxed as provided by R. C. M. 1947, section 93-8606, and if not otherwise provided by the Court in its decision, will automatically be awarded to the successful party against the other party. All costs on appeal shall be claimed as provided by section 93-8621, R. C. M. 1947.

(b) **COSTS OF BRIEFS AND APPENDICES.** The cost of printing or otherwise producing briefs and appendices shall be taxable at rates not higher than specified in Rule 23(g).

(c) **OTHER COSTS TAXABLE.** Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

(d) **COSTS IN ORIGINAL PROCEEDINGS.** Costs in original proceedings, including reviews other than by appeal, will be taxed as provided by R. C. M. 1947, sections 93-8602, 93-8603, 93-8604 and 93-8611, and if not otherwise provided by the court in its decision, will be awarded to the successful party against the other party; provided, however, that costs awarded to plaintiff or relator in special proceedings to review inferior court rulings, orders or judgments will ordinarily be assessed against the real party in interest, namely, the party interested in upholding the inferior court's action, rather than against the state, county, municipality, subdivision, judge or justice.

(e) **UNNECESSARY COSTS.** Whenever it appears that the successful party has caused any redundant, useless or unnecessary matter



to be incorporated in the record, briefs, or appendices, whether on appeal or in a special proceeding, he shall not recover as part of his costs so much of the expense as is occasioned thereby.

(f) **NOTATION BY CLERK.** The clerk of the supreme court shall, in all cases, include in the order of judgment of affirmance, reversal or modification on appeal, or for the issuance of a peremptory writ in an original proceeding, and in the remittitur, peremptory writ or judgment, a clause awarding the costs in accordance with this rule or the special order of this Court, to be recovered after claim and ascertainment or taxation thereof in the manner prescribed by law; and the clerk shall also furnish therewith an itemized statement of such costs as have been paid by him.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969.

#### **Amendments**

The amendment of September 10, 1968, in subdivision (a), added the last sentence; in subdivision (b), deleted "in the supreme court" after "taxable" and deleted a second sentence reading "A party who desires such costs to be taxed shall state them in a verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after entry of judgment"; in subdivision (c), substituted the present caption for "costs taxable in the District Court[s]"; in subdivision (f), inserted "the" before "costs in accordance", deleted "in the supreme court" before "in accordance" and substituted "by" for "to" before "him."

#### **Advisory Committee's Note**

This rule is a combination of Rule 39 of the Federal Draft and Montana Supreme Court Rule XVIII. With some adjustment of language, subdivision (a) is taken from the Montana Rule; subdivisions (b) and (c) from the Federal Draft; and subdivisions (d), (e) and (f) from the Montana Rule.

#### **Advisory Committee's Note to September 10, 1968 Amendment**

The amendments to Rule 33(a), (b), (c) and (f) are to make it clear that all costs on appeal are claimed in the court below after remittitur and eliminate the former duplication of cost bills in both the supreme court and district court.

### **Rule 34. Petitions for rehearing.**

When, in appeals or special proceedings, it is ordered that remittitur, peremptory writ or judgment issue forthwith, no petition for rehearing will be entertained. In all other cases a petition for rehearing may be filed within 10 days after the decision of the supreme court has been rendered, unless the time is shortened or enlarged by order, and the adverse party shall have 7 days thereafter in which to serve and file his objections thereto. Extensions of time will be granted only upon showing of unusual merit, and in no event in excess of 10 days. A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed. Oral argument in support of the petition will not be permitted. Six copies of the petition and six copies of objections thereto, which may be in typewritten form, shall be filed with the clerk.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Amendments**

The amendment of September 29, 1967 substituted "fact" for "facts" following the colon; deleted a former, next to last sentence reading "No reply to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will not ordinarily be granted in the absence of such a request"; and substituted "and six copies of objections \* \* \* form" for "produced in accordance with Rule 27(a)."

**Advisory Committee's Note**

This rule is patterned in part after Rule 40 of the Federal Draft. However, the first sentence is added from Montana Supreme Court Rule XV, as is the statement of the grounds for the petition and the procedure for serving and filing objections; also the 14 days for filing provided in the Federal Draft has been shortened to conform to state practice,

and the number of copies required has been reduced from 25 to 6. The second sentence provides for filing of the petition within 10 days after "the decision of the supreme court has been rendered," rather than after "entry of judgment" as provided by the Federal Draft. The purpose is to avoid uncertainty as to when a judgment has been entered, which might exist under the language of the Federal Draft where the mandate of the supreme court is returned to the district court and there entered.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: None.

This amendment would dispense with requests by the court as a condition to filing replies to petitions for rehearing, and would permit petitions and objections thereto to be typewritten in the form prescribed by Rule 27(b).

**Rule 35. Notice and copy of decision—Remittitur—Mandate from United States supreme court.**

(a) NOTICE AND COPY OF DECISION TO BE FURNISHED. Upon the decision of a cause, notice thereof, together with a copy of the court's written decision, will immediately be mailed to counsel for each party.

(b) REMITTITUR — WHEN ISSUED — WHEN COPY OF OPINION TO ACCOMPANY. Remittitur may, in cases where it is deemed proper, be ordered forthwith; otherwise the same shall be issued promptly upon expiration of time for filing petition for rehearing, or, if such petition is filed, then upon the denial thereof, unless a modification of the decision is made which permits a further petition for rehearing. A copy of the opinion must accompany the remittitur when the judgment or order of the trial court is reversed or modified and the case remanded for further proceedings other than the entry of a final judgment or order terminating the proceedings in the trial court.

(c) MANDATE FROM UNITED STATES SUPREME COURT—PROCEDURE THEREON. Upon receipt by the clerk of the supreme court of Montana of a mandate from the supreme court of the United States in any case at law or in equity theretofore taken from the supreme court of Montana to the supreme court of the United States, it shall be the duty of said clerk forthwith to issue under his hand and the seal of the supreme court of Montana a remittitur to the district court by which the judgment was rendered, commanding such court to take such action in the premises as by the mandate shall be proper, and said remittitur shall also contain therein a recital in haec verba of the said mandate, and all the costs subsequent to the appeal from said district court shall be taxed in such remittitur.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates Montana Supreme Court Rules XIV, XXI, and XXII.

**Rule 36. Voluntary dismissal.**

If the parties to an appeal or other proceeding shall sign and file with the clerk an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, and shall give to each party a copy of the agreement filed; but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as to costs as may be agreed upon by the parties or fixed by the court. If an appeal has not been docketed the appeal may be dismissed by the court from which the appeal was taken upon the filing in that court of a stipulation for dismissal signed by all parties, or upon motion and notice by the appellant.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule is taken from Rule 42 of the Federal Draft.

**Rule 37. Substitution of parties.**

(a) **DEATH OF A PARTY.** If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the supreme court, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the supreme court. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 20. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the supreme court may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the supreme court in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by his personal representative, or, if he has no personal representative, by his attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the supreme court in accordance with this subdivision.

(b) **SUBSTITUTION FOR OTHER CAUSES.** If substitution of a party in the supreme court is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) **PUBLIC OFFICERS—DEATH OR SEPARATION FROM OFFICE.**

(1) When a public officer is a party to an appeal or other proceeding in the supreme court in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.



(2) When a public officer is a party to an appeal or other proceeding he may be described as a party by his official title rather than by name; but the court may require his name to be added.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule is taken from Rule 43 of the Federal Draft.

**Rule 38. Cases involving constitutional questions where the state is not a party.**

It shall be the duty of counsel who challenges the constitutionality of any act of the Montana legislature in any suit or proceeding in the supreme court to which the state of Montana, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record to give immediate notice in writing to the court of the existence of said question, specifying the section of the Code or the chapter of the session law to be construed. The clerk shall thereupon certify such fact to the attorney general of the state of Montana.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule is patterned after Rule 44 of the Federal Draft.

**Rule 39. Calendar—Withdrawal of records.**

(a) **PLACING CAUSES UPON CALENDAR.** Thirty days after the appellant's brief has been filed, the cause shall be placed on the calendar as ready for oral argument.

(b) **SETTING CAUSES FOR ARGUMENT.** As often as found convenient, causes on the calendar will be set for argument by the court in the chronological order in which they have been placed on the calendar, except such causes as are determined entitled to precedence or as otherwise ordered by the court. Oral arguments will not be heard during the months of July and August.

(c) **ADVANCEMENT OF CAUSES.** Appeals from orders dissolving, refusing to dissolve, granting or refusing to grant writs of injunction, appeals from orders dissolving or refusing to dissolve attachments, appeals from orders appointing or refusing to appoint receivers, appeals from orders or judgments holding appellant in custody, and workmen's compensation appeals, are entitled to precedence and will, upon motion of either party, be advanced on the calendar.

(d) **PERMISSION TO TAKE RECORD FROM CLERK'S OFFICE.** The records and other papers of the supreme court shall not be taken therefrom except by counsel pursuant to a written order of a justice of the court, which order shall specify the time the same may be retained out of the clerk's office; provided, that the court or a justice thereof may require the same to be returned within a shorter period upon notice. The clerk shall preserve each order and counsel's receipt until the papers therein mentioned shall be returned.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

Montana Supreme Court Rules XIII and XVI have been substituted for the provisions of Rule 45 of the Federal Draft.

**Rule 40. Appeals from injunction orders.**

Upon appeal from an order dissolving or refusing an injunction, if the appellant desires to continue in force the injunction order dissolved by the district court, or to obtain such injunction order pending the appeal, he shall apply to the district court under Rule 62 of the Montana Rules of Civil Procedure. In the event the relief there requested be not granted he may file in the supreme court his sworn application, setting forth the proceedings appealed from and the relief desired, and present with it to the supreme court, a verified copy of the affidavits or evidence used on the hearing in the district court. Such application will be heard ex parte and without argument, and the court, upon such record will make such order in the premises as may be proper.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates the substance of Supreme Court Rule XXIII, as amended effective April 3, 1963.

**Rule 41. Statutes and rules amended.**

[This rule amended Rule 72 of the Montana Rules of Civil Procedure, and R. C. M. 1947, sections 93-5708, 93-8001, 93-8002, 93-8013 and 93-9905, subdivision 3. For text of amendments see the designated sections.]

**Rule 42. Applicability in general.**

(a) **SPECIAL STATUTORY PROCEEDINGS.** The statutory proceedings listed in Table A of the Montana Rules of Civil Procedure and any other special statutory proceedings, whether or not listed in said Table A, are excepted from these rules in so far as they are inconsistent or in conflict with the procedure and practice provided by these rules.

(b) **APPEALS TO DISTRICT COURTS.** These rules do not supersede the provisions of statutes relating to appeals to or review by the district courts, which shall govern procedure and practice relating thereto in so far as they are not inconsistent with these rules.

(c) **RULES INCORPORATED INTO STATUTES.** Where any statute heretofore or hereafter enacted, whether or not applicable to a special statutory proceeding or listed in any table appended hereto, provides that any act in a civil proceeding in a district court or in the Montana supreme court shall be done in the manner provided by law or as in a civil action or as provided by any statute superseded by these rules, such act shall be done in accordance with these rules and the procedure thereon shall conform to these rules, in so far as practicable.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This Rule is patterned after Rule 81 of the Montana Rules of Civil Procedure. It excepts inconsistent special statutory proceedings and appeals to and reviews by the district courts to the extent that

they are governed by inconsistent statutes and it is impracticable to incorporate procedures provided by these rules. But statutes such as sections 93-9302, 93-9303, 93-9718, 93-9719, and 93-9922, which contain catch-all references to the applicability of statutes which have been superseded, are brought into line with these rules in so far as practicable.

**Rule 43. Title—Effective date—Statutes superseded.**

(a) **TITLE.** These Rules shall be known as the Montana Rules of Appellate Civil Procedure and may be cited as M. R. App. Civ. P.

(b) **EFFECTIVE DATE AND APPLICATION TO PENDING PROCEEDINGS.** These rules will take effect on January 1, 1966. They govern all appeals and original proceedings brought after they take effect, and also all further proceedings in appeals and original proceedings then pending, except to the extent that in the opinion of the supreme court their application in a particular appeal or original proceeding pending when the rules take effect would not be feasible, or would work injustice, in which event the procedure existing at the time the appeal or original proceeding was brought applies.

(c) **STATUTES AND RULES SUPERSEDED.** Upon the taking effect of these rules all statutes and rules, and parts thereof, in conflict herewith, and the statutes and rules listed in Tables A, B, and C, in so far as they relate to civil proceedings, are superseded in respect of practice and procedure on appeals from the district courts to the supreme court and in original proceedings brought in the supreme court.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

of the Montana Rules of Civil Procedure. Subdivision (c) refers to statutes and rules only in so far as they relate to civil proceedings, to make it clear that criminal proceedings are in no way affected by these rules.

**Advisory Committee's Note**

This rule incorporates provisions similar to those contained in Rules 85 and 86

**Appendix of Forms.****Form 1.**

NOTICE OF APPEAL TO THE SUPREME COURT OF  
THE STATE OF MONTANA FROM A JUDGMENT  
OR ORDER OF A DISTRICT COURT  
IN THE DISTRICT COURT OF THE ..... JUDICIAL DISTRICT  
OF THE STATE OF MONTANA,  
IN AND FOR THE COUNTY OF .....

A. B.		Plaintiff	} Notice of Appeal
	vs.		
C. D.		Defendant	

Notice is hereby given that C. D., defendant above-named, hereby appeals to the supreme court of the state of Montana (from the final judgment) (from the order (describing it)) entered in this action on the .....day of ....., 19.....

(S) .....

Attorney for C. D.  
(Address)



Form 2.

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO  
APPEAL IN FORMA PAUPERIS  
IN THE DISTRICT COURT OF THE ..... JUDICIAL DISTRICT  
OF THE STATE OF MONTANA,  
IN AND FOR THE COUNTY OF .....

A. B.		Plaintiff	} AFFIDAVIT IN SUPPORT OF APPLICATION TO PROCEED ON APPEAL WITHOUT PRE- PAYMENT OF COSTS
	vs.		
C. D.		Defendant	

I, ....., being first duly sworn, de-  
pose and say that I am the ..... in the above-  
entitled case; that in support of my application to proceed on appeal  
without being required to prepay fees, costs or give security therefor, I  
state that because of my poverty I am unable to pay the costs of said  
proceeding or to give security therefor; that I believe I am entitled to  
redress; and that the issues which I desire to present on appeal are the  
following:

.....  
.....

I further swear that the responses which I have made to the questions  
and instructions below relating to my ability to pay the cost of prose-  
cuting the appeal are true.

1. Are you presently employed?
  - a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
  - b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.
2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?
  - a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.
3. Do you own any cash or checking or savings account?
  - a. If the answer is yes, state the total value of the items owned.
4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
  - a. If the answer is yes, describe the property and state its approxi-  
mate value.
5. List the persons who are dependent upon you for support and state  
your relationship to those persons.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

-----  
Subscribed and Sworn to before  
me this ..... day of .....,  
19 .....

-----  
Notary Public

Let the applicant proceed without  
prepayment of costs.

-----  
District Judge

Table A. List of Statutes and Rules Superseded or Amended.

Statutes Superseded (R. C. M. 1947, sections)	R.S.C.M.* Superseded, except as applicable to criminal procedure	M.R.Civ. P.** Rule Superseded
93-5501		62(a)
93-5503		62(d)
93-5504	Rule	Amended
93-5505	I	72
93-5506	II	
93-5507	III (1st par.)	
93-5508	IV	
93-5509	VI	
93-5607	VII	
93-5608	VIII	
93-5702	IX	
93-5707	X	
93-8003	XI	
93-8004	XII	
93-8005	XIII	
93-8006	XIV	
93-8011	XV	
93-8012	XVI	
93-8014	XVII	
93-8015	XVIII	
93-8016	XIX	
93-8017	XXI	
93-8018	XXII	
93-8019	XXIII	
93-8020	XXIV	
93-8021		
93-8022		
93-8023		
93-8024		
93-8025		
Amended		
93-5708		
93-8001		
93-8002		
93-8013		
93-9905(3)		

\* Rules of the Supreme Court of Montana.

\*\* Montana Rules of Civil Procedure.



**Table B. List of Rules of Appellate Civil Procedure Superseding, in Whole or in Part, or Amending, Statutes and Rules.**

		Statutes and Rules** Superseded or Amended (R. C. M. 1947, sections)
M. R. App. Civ. P.*		
Rule		
1	.....	93-8001, 93-8002, 93-8003, 93-8017
2	.....	93-8022
3	.....	93-8019, R. S. C. M. XXIV
4	.....	93-8005, 93-8019
5	.....	93-8004
6	.....	93-8005, 93-8006, 93-8012, 93-8015, 93-8019
7	.....	93-5607, 93-8011, 93-8012, 93-8014, M. R. Civ. P. 62(a), 62(d)
8	.....	93-8013
9, 10, and 25	.....	93-5504 to 93-5509, incl., 93-5608, 93-5707, 93-8018, 93-8019, 93-8021 R. S. C. M. VII, VIII, IX, XVIII subd. 3
11	.....	93-8019, R. S. C. M. VI
12	.....	93-8020
13	.....	93-8016
14	.....	93-8023
15	.....	93-8024
16	.....	93-8025
17	.....	R. S. C. M. IV
19	.....	R. S. C. M. I
20	.....	R. S. C. M. III (1st par.)
22	.....	R. S. C. M. XI
23	.....	R. S. C. M. X
26	.....	R. S. C. M. II subd. 4, III (1st par.)
27	.....	R. S. C. M. II
29	.....	93-5702, R. S. C. M. XII
32	.....	R. S. C. M. XIX
33	.....	R. S. C. M. XVIII
34	.....	R. S. C. M. XV
35	.....	R. S. C. M. XIV, XXI, XXII
37	.....	R. S. C. M. XVII
39	.....	R. S. C. M. XIII, XVI
40	.....	R. S. C. M. XXIII
41	.....	M. R. Civ. P. 72, 93-5708, 93-9905 (3), 93-8001, 93-8002, 93-8013

\* Montana Rules of Appellate Civil Procedure are abbreviated "M. R. App. Civ. P."

\*\* Rules of the Supreme Court of Montana are abbreviated "R. S. C. M." Montana Rules of Civil Procedure are abbreviated "M. R. Civ. P."

**Table C. List of Statutes and Rules Superseded, in Whole or in Part, or Amended, by Designated Rules of Appellate Civil Procedure.**

Statutes (R. C. M. 1947, sections)	M. R. App. Civ. P. Rule
93-5504 to 93-5509, incl. ....	9, 10, 25
93-5607 .....	7
93-5608 .....	9, 10, 25
93-5702 .....	29
93-5707 .....	9, 10, 25
93-5708 .....	41
93-8001 .....	1, 41
93-8002 .....	1, 41
93-8003 .....	1
93-8004 .....	5
93-8005 .....	4, 6
93-8006 .....	6
93-8011 .....	7
93-8012 .....	6, 7
93-8013 .....	8, 41
93-8014 .....	7
93-8015 .....	6
93-8016 .....	13
93-8017 .....	1
93-8018 .....	9, 10, 25
93-8019 .....	4, 6, 9, 10, 11, 25
93-8020 .....	12
93-8021 .....	9, 10, 25
93-8022 .....	2
93-8023 .....	14
93-8024 .....	15
93-8025 .....	16
93-9905 (3) .....	41

**Rules of the Supreme  
Court of Montana**

I .....	19
II .....	26, 27
III (1st par.) .....	20, 26
IV .....	17
VI .....	11
VII .....	9, 10, 25
VIII .....	9, 10, 25
IX .....	9, 10, 25
X .....	23
XI .....	22
XII .....	29
XIII .....	39

XIV .....	35
XV .....	34
XVI .....	39
XVII .....	37
XVIII .....	9, 10, 25, 33
XIX .....	32
XXI .....	35
XXII .....	35
XXIII .....	40
XXIV .....	3

Montana Rules of  
Civil Procedure

62(a) .....	7
62(d) .....	7
72 .....	41





# REVISED CODES OF MONTANA

## VOLUME 8 1969 Cumulative Pocket Supplement

*Containing*

AMENDMENTS TO ACTS AND NEW LAWS ENACTED BY THE  
LEGISLATIVE ASSEMBLY SINCE PUBLICATION OF THE  
1947 REVISED CODES

AND

ANNOTATIONS SUPPLEMENTING THE PARENT VOLUME  
THROUGH VOLUME 447, PACIFIC  
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## NEW LAWS IN VOLUME 8

For index see pocket supplement to Replacement Volume 9

### ENACTED IN 1949

Endurance horse races prohibited, 94-35-258, 94-35-259.  
Intoxicating liquors, sale to minors, 94-35-106, 94-35-106.1.  
Slot machines prohibited, 94-2429 to 94-2432.  
State tax stamps, failure to affix or cancel, removal, counterfeiting, 94-35-260.

### ENACTED IN 1951

Political pamphlets required to contain name of publisher, 94-1475, 94-1476.  
Sodomy, when child not an accomplice, 94-4120.  
Subversive organizations, 94-4411 to 94-4427.

### ENACTED IN 1953

Altering, defacing, or removing serial numbers on farm machinery, importing, selling, 94-35-261 to 94-35-263.  
Furnishing certain articles to prisoners in state prison, 94-35-264.

### ENACTED IN 1955

Abandonment of ice boxes, 94-35-265.  
Hunting in careless or reckless manner, 94-35-269.  
Probation, Parole and Executive Clemency Act, 94-9821 to 94-9851.

### ENACTED IN 1957

Delivery of toxic grains to public warehouse, 94-35-270, 94-35-271.  
Guaranteed arrest bond certificates in lieu of cash bail, 94-8508 to 94-8510.  
Minors, possession of beer or liquor, 94-35-106.2.  
Switch blade knife, 94-35-273.  
Unlawful operation or use of aircraft, 94-35-272.

### ENACTED IN 1959

Coloration of wheat, oats, rye or barley treated with injurious substance, 94-35-271.1 to 94-35-271.3.  
False representation to induce employment as advertising agency for sale of real property, 94-1822.

### ENACTED IN 1961

Fines collected from juvenile offenders in motor vehicle cases, 94-801-2.  
Prisoners, offenses by,  
    Hostages, holding, 94-2604.  
    Weapons, possession, 94-3527.1.  
Telephones and party lines, misuse, 94-35-221.1 to 94-35-221.4.

### ENACTED IN 1963

Criminal law study commission, 94-1001-1 to 94-1001-11.  
Interstate agreement on detainers, 94-1101-1 to 94-1101-6.  
Telephone, telegraph and electric facilities, protection, 94-3211.

## NEW LAWS IN VOLUME 8 (Continued)

### ENACTED IN 1965

Credit device violations, 94-1823 to 94-1830.

Recording of conversation without knowledge of parties, 94-35-274, 94-35-275.

Stolen livestock, possession as evidence of larceny, 94-2704.1.

### ENACTED IN 1967

Accommodations, fraudulently obtaining, 94-1831.

Identification cards, false procurement, 94-2014.

Montana Code of Criminal Procedure,

Appeal by state and defendant, 95-2401 to 95-2430.

Appellate review of legal sentences, 95-2501 to 95-2504.

Arraignment, 95-1601 to 95-1608.

Arrest, 95-601 to 95-619.

Arrested person, initial appearance, 95-901, 95-902.

Bail, 95-1101 to 95-1123.

Charging an offense, 95-1501 to 95-1506.

Competency of accused, 95-501 to 95-509.

Coroner, office of, 95-801 to 95-814.

Counsel, right to, 95-1001 to 95-1006.

Defendant, arraignment of, 95-1601 to 95-1608.

Definitions, 95-201 to 95-211.

Evidence, production and suppression of, 95-1801 to 95-1806.

Execution of sentence, 95-2301 to 95-2312.

Grand Jury, 95-1401 to 95-1410.

Habeas corpus, 95-2701 to 95-2716.

Jurisdiction, 95-301 to 95-304.

Justice and police court proceedings, 95-2001 to 95-2009.

Leave to file information and time for filing information, 95-1301 to 95-1303.

Post-conviction hearing, 95-2601 to 95-2608.

Post-trial motions, 95-2101.

Preliminary examination, 95-1201 to 95-1204.

Pretrial motions, 95-1701 to 95-1710.

Rules of Criminal Procedure, adoption of, 95-2801 to 95-2806.

Scope, purpose and construction, 95-101, 95-102.

Search and seizure, 95-701 to 95-718.

Sentence and judgment, 95-2201 to 95-2216.

Trial in district court, 95-1901 to 95-1916.

Venue, 95-401 to 94-412.

Telephone misuse, 94-35-221.5, 94-35-221.6.

### ENACTED IN 1969

Double jeopardy, defense of, 94-6808.1 to 94-6808.5.

Firearms,

Purchase of, 94-3578.1, 94-3578.2.

Use by children, 94-3579.

Prisoner furlough program, 95-2217 to 95-2226.

## AMENDMENTS IN VOLUME 8

Abandonment and nonsupport, 94-301, 94-304.

Arrest by a peace officer, 95-608.

Assault in second degree, 94-602.

Bail,

Conditions of, discharge, 95-1116.

Qualifications of, 95-1113.

Board of pardons, biennial reports to governor, 94-9824.

Burglary, 94-901, 94-904.

Civil rights of convicts, 94-4720.

Concealed weapons, immigration and naturalization service officers, 94-3527.

Cruelty to animals, 94-1201.

Ditch overflowing highway, 94-3565.

Expense statements of political committees, candidates, etc., 94-1431.

## Amendments in Volume 8 (Continued)

False pretenses, 94-1805.  
Fines and forfeitures, disposition, 94-801-1.  
Traffic fines collected from juveniles, 94-801-2.  
Forfeiture of vehicles used to transport stolen livestock, 94-35-204.  
Fraudulent checks, 94-2702.  
Infamous crime against nature, 94-4120.  
Injury to trees on public lands, 94-3334.  
Judge, substitution of, 95-1709.  
Jury, formation of, 95-2005.  
Justice of the peace courts, jurisdiction of, 95-302.  
Lewd and lascivious acts upon children, 94-4106.  
Malicious injury to property, 94-3202, 94-3203.  
Nuisances, 94-1002.  
Obscene articles, 94-3601, 94-3602, 94-3604 to 94-3606.  
Privileged communications, newspapers, radio or television, 94-2807.  
Recidivists, increased punishment, 95-1506.  
State director of probation and parole, 94-9825.  
Trusts and monopolies, penalty, 94-1104.  
Verdict, conviction of lesser offense, 95-1915.  
Witnesses from without state, 94-9003.





# MONTANA REVISED CODES

## TITLE 94—CRIMES AND CRIMINAL PROCEDURE

- Chapter 3. Abandonment and neglect of wife and children, 94-301, 94-304.
6. Assaults, 94-602.
9. Burglary and housebreaking—possession of burglarious instruments and deadly weapons, 94-901, 94-904.
10. Common nuisances—maintenance in connection with selling intoxicating liquors—opium—prostitution and gambling, 94-1002.
11. Criminal conspiracy and illegal practices in restraint of trade—trusts—discriminations—pooling grain warehouses—destroying food, 94-1104.
12. Cruelty to animals, 94-1201.
14. Election frauds and offenses—Corrupt Practices Act, 94-1431, 94-1475, 94-1476.
18. False personation and cheats, 94-1805, 94-1822 to 94-1831.
20. Forgery and counterfeiting, 94-2014.
24. Gambling, 94-2429 to 94-2432.
26. Kidnaping, 94-2604.
27. Larceny and falsification of public records and jury lists, 94-2702, 94-2704.1.
28. Libel, 94-2807.
32. Malicious injuries to railroads, highways and other property, 94-3202, 94-3203, 94-3211.
33. Malicious mischief generally, 94-3334.
35. Miscellaneous offenses, 94-3527, 94-3527.1, 94-3565, 94-3578.1, 94-3578.2, 94-3579, 94-35-106 to 94-35-106.2, 94-35-204, 94-35-221.1 to 94-35-221.6, 94-35-258 to 94-35-265, 94-35-269 to 94-35-275.
36. Obscenity—literature—indecent exposure—houses of ill fame—prohibition of certain advertisements, 94-3601, 94-3602, 94-3604 to 94-3606.
41. Rape and other sexual crimes, 94-4106, 94-4120.
44. Sedition—criminal syndicalism—display of red flag—subversive organizations, 94-4411 to 94-4427.
47. Punishments—attempts and other general provisions, 94-4720.
49. Definitions—prosecution of criminal actions—jurisdiction of courts, Repealed—Section 2, Chapter 196, Laws of 1967.
56. Local jurisdiction of public offenses, Repealed—Section 2, Chapter 196, Laws of 1967.
58. The complaint, Repealed—Section 2, Chapter 196, Laws of 1967.
59. Warrant of arrest—proceedings on execution thereof, Repealed—Section 2, Chapter 196, Laws of 1967.
60. Arrests—by whom and how made—close pursuit—retaking after escape, Repealed—Section 2, Chapter 196, Laws of 1967.
61. Examination and commitment or discharge of defendant, Repealed—Section 2, Chapter 196, Laws of 1967.
62. Preliminary provisions—filing the information, Repealed—Section 2, Chapter 196, Laws of 1967.
63. The grand jury—its formation—powers and duties—finding and presenting an indictment, Repealed—Section 2, Chapter 196, Laws of 1967.
65. Arraignment of defendant, Repealed—Section 2, Chapter 196, Laws of 1967.
66. Setting aside the indictment or information, Repealed—Section 2, Chapter 196, Laws of 1967.
67. Demurrer, Repealed—Section 2, Chapter 196, Laws of 1967.
68. Pleas, 94-6808.1 to 94-6808.5.
69. Change of place of trial or judge, Repealed—Section 2, Chapter 196, Laws of 1967.
70. Mode of trial—formation of jury and calendar of issues—postponement of trial, Repealed—Section 2, Chapter 196, Laws of 1967.
71. Challenging the jury, Repealed—Section 2, Chapter 196, Laws of 1967.
74. The jury, Repealed—Section 2, Chapter 196, Laws of 1967.
75. Bills of exception, Repealed—Section 2, Chapter 196, Laws of 1967.
76. New trials, Repealed—Section 2, Chapter 196, Laws of 1967.
77. Arrest of judgment, Repealed—Section 2, Chapter 196, Laws of 1967.
78. Judgment—suspension of sentence and probation, Repealed—Section 4, Chapter 194, Laws of 1955; Section 2, Chapter 196, Laws of 1967.

80. The execution, Repealed—Section 2, Chapter 196, Laws of 1967.
81. Appeals to supreme court—when allowed—how taken—effect thereof, Repealed—Section 2, Chapter 196, Laws of 1967.
82. Dismissing appeals for irregularity—argument on appeal—judgment on appeal, Repealed—Section 2, Chapter 196, Laws of 1967.
83. In what cases defendant may be admitted to bail, Repealed—Section 2, Chapter 196, Laws of 1967.
84. Bail on being held to answer before information, Repealed—Section 2, Chapter 196, Laws of 1967.
85. Bail on indictment or information before conviction, 94-8508 to 94-8510.
86. Bail on appeal—deposit in lieu of bail, Repealed—Section 2, Chapter 196, Laws of 1967.
87. Surrender of defendant—forfeiture of bail—recommitment of defendant, Repealed—Section 2, Chapter 196, Laws of 1967.
89. Compelling attendance of witnesses—subpoenas, Repealed—Section 2, Chapter 196, Laws of 1967.
90. Witnesses from without state—how secured in criminal proceedings, 94-9003.
91. Examination of witnesses conditionally, Repealed—Section 2, Chapter 196, Laws of 1967.
94. Compromising offenses by leave of court, Repealed—Section 2, Chapter 196, Laws of 1967.
95. Dismissal of actions for want of prosecution or other reasons, Repealed—Section 2, Chapter 196, Laws of 1967.
96. Proceedings against corporations, Repealed—Section 2, Chapter 196, Laws of 1967.
97. Disposal of property stolen or embezzled, Repealed, Section 2, Chapter 196, Laws of 1967.
98. Probation, parole and clemency, 94-9821 to 94-9851.
100. Justices' and police court proceedings—appeals, Repealed—Section 2, Chapter 196, Laws of 1967.
101. The writ of habeas corpus, Repealed—Section 2, Chapter 196, Laws of 1967.
201. Coroner's inquests, Repealed—Section 2, Chapter 196, Laws of 1967.
301. Search warrants, Repealed—Section 2, Chapter 196, Laws of 1967.
601. Miscellaneous provisions respecting special proceedings of a criminal nature, Repealed—Section 2, Chapter 196, Laws of 1967.
801. Fines and forfeitures—disposal of, 94-801-1, 94-801-2.
901. Reciprocal enforcement of support, Repealed—Section 3, Chapter 208, Laws of 1961.
1001. Criminal law study commission, 94-1001-1 to 94-1001-11.
1101. Interstate agreement on detainers, 94-1101-1 to 94-1101-6.

#### CHAPTER 1—DEFINITIONS AND PRELIMINARY PROVISIONS

#### 94-101. (10710) Construction of penal statutes.

##### References

Petition of Cheadle, 143 M 327, 389 P

2d 579; Petition of Kelly, 146 M 484, 408 P 2d 478.

#### 94-102. (10711) Provisions similar to existing laws, how construed.

##### Amendment Increasing Punishment

Where the effect of the amendment of a statute is only to increase the prescribed

punishment, the unchanged portion of the statute remains in effect. *State v. Cline*, 135 M 372, 339 P 2d 657.

#### 94-105. (10714) What intent to defraud is sufficient.

##### General Intent

The effect of this section is to make any required "intent to defraud" a general, rather than a specific, intent. *State v. Cooper*, 146 M 336, 406 P 2d 691.

##### References

Cited in *State v. Harmon*, 135 M 227, 340 P 2d 128.

#### 94-107. (10716) Proceedings to impeach or remove officers, etc.

##### References

Cited in *State ex rel. Bonner v. District Court*, 122 M 464, 206 P 2d 166, 171.



**94-114. (10723) Felony and misdemeanor defined.****Concurrent Sentences**

Where defendant was convicted of a felony under the first portion of a consolidated information and of a misdemeanor under the second portion and the trial court adjudged that the sentences be served concurrently, the sentence for the felony should be served in the state prison and credit for the misdemeanor fine should be given at the same time, and

any remaining time under the misdemeanor at the end of the state prison term should be served in the county jail. *State v. Bogue*, 142 M 459, 384 P 2d 749.

**References**

Cited or applied in *State ex rel. Borberg v. District Court*, 125 M 481, 240 P 2d 854, 856.

**94-116. (10725) Punishment of misdemeanor, etc.****References**

Cited or applied in *State ex rel. Borberg*

*v. District Court*, 125 M 481, 240 P 2d 854, 856.

**94-117. (10726) To constitute crime there must be unity of act, etc.****Criminal Negligence**

Insofar as the offense of involuntary manslaughter is concerned under section 94-2507, the proof of culpability is supplied by evidence of criminal negligence. *State v. Strobel*, 130 M 442, 304 P 2d 606, 617, overruled on another point, 134 M 519, 525, 333 P 2d 1017, 1021.

It is wholly unnecessary in involuntary manslaughter cases to superimpose upon the requirement of the element of criminal negligence the further requirement that a determination must be made as to whether the act resulting in death might ordinarily be classified as malum in se or merely malum prohibitum, for, if that act is done in a manner which is criminally negligent, it thereby becomes malum in se and thereby includes the element of mens rea. *State v. Strobel*, 130 M 442, 304 P 2d 606, 617, overruled on another point, 134 M 519, 525, 333 P 2d 1017, 1021.

Under a prosecution for involuntary manslaughter, irrespective of the character of the unlawful act, whether malum in se or merely malum prohibitum, the criminality of the act resulting in death is established if that act was done negligently in such a manner as to evince a disregard for human life or an indifference to consequences. *State v. Strobel*, 130 M 442, 304 P 2d 606, 617, overruled on another point, 134 M 519, 525, 333 P 2d 1017, 1021.

**Instructions Respecting Specific Intent**

Refusal to instruct that in every crime there must exist union or joint operation of act and intent or criminal negligence as provided by statute was not error in prosecution for second degree assault under which general nonstatutory intent to do harm willfully, wrongfully and unlawfully is an element but under which specific statutory intent to do any particular kind or degree of injury to victim is not an element. *State v. Fitzpatrick*, 149 M 400, 427 P 2d 300.

Since specific intent was not necessary element of second degree assault, refusal of instruction thereon was proper even though defendant claimed that high degree of intoxication precluded formation of intent, assault statute not requiring proof of specific intent. *State v. Warrick*, — M —, 446 P 2d 916.

**Involuntary Manslaughter**

Wilful or evil intent is not an element of involuntary manslaughter. *State v. Pankow*, 134 M 519, 333 P 2d 1017, 1021.

**References**

*State v. Holdren*, 143 M 103, 387 P 2d 446.

**94-118. (10727) Intent, how manifested, and who considered, etc.****Evidence of Specific Intent**

Finding of jury that defendant was able to form specific intent to commit first degree assault as required by statute was properly inferred from evidence that, although intoxicated, defendant turned off lights inside apartment, reached into a nearby drawer and prepared revolver for action, surrendered to police, walked out of apartment under own power with hands

in air and after arrest had no difficulty recounting recent events to police. *State v. Lukus*, 149 M 45, 423 P 2d 49.

**Intent to Defraud**

Proof of intent to defraud may consist of reasonable inferences drawn from affirmatively established facts, and where defendant was sufficiently conscious at the time to recognize the fraudulent nature of

the check he was of adequate mental ability to form an intent to defraud by uttering the check knowing of its fraudulent nature. *State v. Cooper*, 146 M 336, 406 P 2d 691.

### 94-119. (10728) Drunkenness no excuse for crime, etc.

#### Cross-References

Competency of accused, mental disease or defect excluding responsibility as affirmative defense, sec. 95-503.

#### Effect of Intoxication on Confession

Confession of intoxicated defendant was voluntary and admissible in light of evidence that he was able to recite in great detail events occurring prior to and during act charged. *State v. Chappel*, 149 M 114, 423 P 2d 47.

#### Evidence of Insanity

Defendant was entitled to plead insanity as bar to conviction for first degree murder, but failed to sustain burden of proof by a preponderance of testimony, as required by statute, in view of evidence that his activities on day of shooting were normal, he was quite calm after shooting occurred and he knew right from wrong at time of shooting, according to psychiatrist. *State v. Sanders*, 149 M 166, 424 P 2d 127.

#### Intoxication

Since specific intent is not element of second degree assault, the court was correct in refusing defendant's offered instruction that jury could take degree of

#### References

*State v. Holdren*, 143 M 103, 387 P 2d 446; *Silloway v. Jorgenson*, 146 M 307, 406 P 2d 167.

intoxication into account in arriving at verdict in so far as it affected defendant's capacity for willfulness and intent. *State v. Warriek*, — M —, 446 P 2d 916.

While voluntary intoxication is generally no defense to a criminal charge, it may be a defense where a specific intent is an essential element of the crime charged. *Alden v. State*, 234 F Supp 661, 672, affirmed in 345 F 2d 530.

#### Intoxication As Affecting Degree of Crime

In murder prosecution, jury was properly instructed that if killing was done by defendant with malice aforethought, but defendant was incapable of premeditation and deliberation because of intoxication then crime was second-degree murder, and that if defendant was so intoxicated at time of killing that he was incapable of harboring malice aforethought, crime was manslaughter. *State v. Brooks*, 150 M 399, 436 P 2d 91.

#### References

Cited or applied in *State v. Quinlan*, 126 M 52, 244 P 2d 1058, 1062 (dissenting opinion); *State v. Zumwalt*, 129 M 529, 291 P 2d 257, 261.

## CHAPTER 2—PERSONS LIABLE TO PUNISHMENT— PARTIES TO CRIME

### 94-201. (10729) Who are capable of committing crimes.

#### Cross-References

Competency of accused, mental disease or defect excluding responsibility, sec. 95-501.

#### Evidence of Insanity

Defendant was entitled to plead insanity as bar to conviction for first degree murder, but failed to sustain burden of proof by preponderance of testimony, as required by statute, in view of evidence that his activities on day of shooting were normal, he was quite calm after shooting occurred and he knew right from wrong at the time of the shooting, according to psy-

chiatrist. *State v. Sanders*, 149 M 166, 424 P 2d 127.

#### Instructions

Refusal to give instruction under subd. 6 of this section was not reversible error in view of other instructions given. *State v. Allison*, 122 M 120, 199 P 2d 279, 289.

#### References

Cited or applied in *State v. Quinlan*, 126 M 52, 244 P 2d 1058, 1062 (dissenting opinion); *State v. Smith*, 126 M 124, 246 P 2d 227, 228.

### 94-204. (10732) Who are principals.

#### "Accomplice" Defined

An accomplice is one who knowingly, voluntarily, and with common intent with

the principal offender unites in the commission of a crime. *State v. Harmon*, 135 M 227, 340 P 2d 128.

**Aiding and Abetting**

While the statute defines larceny as the taking of property from the person of another yet it is sufficient to show the defendant's guilt that he aided or abetted in the commission of the crime. *State v. Maciel*, 130 M 569, 305 P 2d 335, 336.

**Conspiracy**

A coconspirator may be found guilty of a crime committed by his fellow conspirator whether the fellow conspirator is alive or dead, competent or incompetent, at the time of his trial. *State v. Alton*, 139 M 479, 365 P 2d 527, 535.

All participants in a conspiracy may be found guilty of any of the degrees of murder or one or more may be found guilty of each degree. *State v. Alton*, 139 M 479, 365 P 2d 527, 538.

All parties to a conspiracy are guilty whether their part in the conspiracy is large or small, and whether or not that part is to be carried out at a distance from the other conspirators. *State v. Alton*, 139 M 479, 365 P 2d 527, 538.

**Felony Murder Rule**

Where defendant hired two men to set fire and burn his service station, and during the course of the arson the two men were burned and subsequently died, the defendant was guilty of first degree murder under the felony murder rule since any death directly attributable to a plot to commit arson makes all the conspirators in the arson plot equally guilty of first degree murder. *State v. Morran*, 131 M 17, 306 P 2d 679.

**Injury to Perpetrator of Crime**

A bartender who worked after hours for the sole purpose of making illegal sales of liquor and signaling prostitutes as to the arrival of prospective customers was in *pari delicto* and could not recover from his employer for an injury received during such employment. *Lencioni v. Long*, 139 M 135, 361 P 2d 455.

**Instructions**

Where a verbal declaration of one co-defendant that he and the other co-defendant were partners was given in evidence, it was error for the court to refuse defendant's instruction that such verbal declaration is insufficient to establish a partnership. Although a partnership was immaterial because of this section and section 94-6423, yet the jury may have given full consideration to the declaration and found defendant guilty on the strength thereof. *State v. Keller*, 126 M 142, 246 P 2d 817, 821.

**Kidnaping**

Defendant was guilty of confining prison guard secretly against his will in violation of section 94-2602 where the evidence showed that defendant, an inmate of the state prison, walked behind prison guard with a knife, after another inmate had disarmed the guard, until the inmates had placed the guard in isolation. *State v. Frodsham*, 139 M 222, 362 P 2d 413, 419.

**Operation and Effect**

Under this section and section 94-6423, evidence was sufficient to sustain a conviction of assault in the second degree where defendant was at the scene of the crime and was admittedly a participant therein; it is not necessary to show that he actually fired any one of the guns. *State v. Simon*, 126 M 218, 247 P 2d 481, 484.

**Presence at Scene of Crime**

Even though there was no evidence placing defendant at scene of crime, he could be held as an accomplice in burglary prosecution in view of possession of stolen property and other corroborating evidence. *State v. Gray*, — M —, 447 P 2d 475.

Defendant need not have been present at scene of crime to be guilty of larceny. *State v. Gray*, — M —, 447 P 2d 475.

**References**

Cited or applied in *State v. Phillips*, 127 M 381, 264 P 2d 1009, 1015.

**CHAPTER 3—ABANDONMENT AND NEGLECT OF WIFE AND CHILDREN**

Section 94-301. Abandonment or failure to support wife—penalty for.

94-304. Desertion or abandonment of child or ward a felony—suspension of sentence, when.

**94-301. (11017) Abandonment or failure to support wife—penalty for.** Every person, having sufficient ability to provide for his wife's support, or who is able to earn the means for such wife's support, who wilfully abandons and leaves his wife in a destitute condition, or who refuses or neglects to provide such wife with necessary food, clothing, shelter or medical at-



tendance, unless in the judgment of the court or jury he is justified in abandoning her by her misconduct, shall be guilty of a misdemeanor.

**History:** En. Sec. 470, Pen. C. 1895; re-en. Sec. 8345, Rev. C. 1907; amd. Sec. 1, Ch. 77, L. 1917; re-en. Sec. 11017, R. C. M. 1921; amd. Sec. 1, Ch. 179, L. 1963. Cal. Pen. C. Sec. 270.

pendent upon him or her for care, education or support, wilfully omits, without lawful excuse, to furnish necessary food, clothing, shelter or medical attention for his or her child or children, or ward or wards; or"; and made minor changes in style and arrangement.

#### Amendment

The 1963 amendment deleted language which appeared near the beginning of the section and read, "who: 1. Having any child under the age of sixteen years, de-

#### References

Cited or applied in *State v. McBane*, 128 M 369, 275 P 2d 218, 221.

### 94-302. (11018) Orders which may be entered by the court.

#### Cross-Reference

Enforcement of support orders of other states, secs. 93-2601-41 to 93-2601-82.

#### References

Cited or applied in *State v. McBane*, 128 M 369, 275 P 2d 218, 221.

**94-304. (11020) Desertion or abandonment of child or ward a felony—suspension of sentence, when.** Any person who has a child or ward under the age of sixteen (16) years who is dependent upon him or her for care or support shall not:

(1) Desert or abandon such child or ward without providing necessary and proper shelter, food, clothing and medical care for such child or ward; or

(2) Wilfully omit, without lawful excuse, to provide necessary and proper shelter, food, clothing and medical care for such child or ward.

A person who violates this section is guilty of a felony and shall, upon conviction, be punished by imprisonment for not less than one (1) year nor more than five (5) years in the state prison. The court may suspend such sentence if the defendant shall furnish a bond in such penal sum, and with such surety or sureties as the court may fix, conditioned that he will furnish his child or ward with necessary and proper shelter, food, care, and clothing. In case of failure to comply with the conditions of such bond, the court may order such person to appear before the court and show cause why sentence should not be imposed, whereupon the court may pass sentence or may modify the order and take a new bond and further suspend sentence as may be just and proper. The judge may declare a bond forfeited and may, in his discretion, order the face amount of such bond used to support the persons deserted, abandoned or neglected.

**History:** En. Sec. 471, Pen. C. 1895; amd. Sec. 1, Ch. 6, L. 1905; re-en. Sec. 8346, Rev. C. 1907; amd. Sec. 1, Ch. 68, L. 1917; re-en. Sec. 11020, R. C. M. 1921; amd. Sec. 2, Ch. 179, L. 1963. Cal. Pen. C. Sec. 270b.

him this section making it a felony to desert and abandon children under 15 years of age, and also sections 94-301 and 94-302 which make it a misdemeanor to omit without lawful excuse to furnish necessary board, clothing, shelter or medical attention to children under the age of 16 years, the court abused its discretion in refusing to grant the defendant's motion to change his plea of guilty since there was a misunderstanding as to what the defendant pleaded guilty. *State v. McBane*, 128 M 369, 275 P 2d 218. (Dissenting opinion, 128 M 369, 275 P 2d 218, 222.)

#### Amendment

The 1963 amendment substantially rewrote this section. For previous text, see parent volume.

#### Change of Plea of Guilty

Where defendant was charged with desertion of minor children and upon arraignment the defendant indicated that he wanted to plead guilty and court read

**94-306. (11022) Cruelty to children.****Collateral References**

Failure to provide medical attention for

child as criminal negligence. 12 ALR 2d 1047.

**CHAPTER 4—ABORTION****94-401. (11023) Administering drugs, etc., with intent to, etc.****Collateral References**

Admissibility of evidence of commission of similar crimes in prosecution based on abortion. 15 ALR 2d 1080.

Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts. 16 ALR 2d 949.

**CHAPTER 6—ASSAULTS**

Section 94-602. Assault in second degree.

**94-601. (10976) Assault in the first degree defined—penalty.****Criminal Intent**

The element of felonious intent in every contested criminal case must necessarily be determined from the facts and circumstances of the particular case, this for the reason that criminal intent, being a state of mind, is rarely susceptible of direct or positive proof and therefore must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence. *State v. Maden*, 128 M 408, 276 P 2d 974, 978.

**Evidence of Intent**

Finding of jury that defendant was able to form specific intent to commit first degree assault was properly inferred from evidence that, although intoxicated, defendant turned off lights inside apartment, reached into nearby drawer and prepared revolver for action, surrendered to police, walked out of apartment under own power with hands in air and after arrest had no difficulty in recounting recent events to police. *State v. Lukus*, 149 M 45, 423 P 2d 49.

**Instructions on Intent**

In prosecution for first-degree assault, instruction dealing with intent and proof thereof was properly given since intent is essential element of crime and must be proven. *State v. Gallagher*, 151 M 501, 445 P 2d 45.

**Operation and Effect**

In a prosecution for assault in the first or second degree the prosecution had to prove by satisfactory evidence, that

when the defendant pointed a gun at a person he intended to commit a felony upon that person; instructions defining the felony must be given to the jury so that the jury can determine if the evidence showed such intended felony. *State v. Quinlan*, 126 M 52, 244 P 2d 1058, 1059 (the court was not in agreement on this however, see the dissenting opinions of two judges on pages 1060, 1063).

**Penalty**

Defendant charged with assault in first degree was properly sentenced to state prison for 18 years which was within the statutory term for the offense of which the jury found him guilty and during trial on first day of assault charge he pleaded guilty to three prior felony convictions charged in same information charging assault in first degree. *State v. McLeod*, 131 M 478, 311 P 2d 400, 408.

**Sufficiency of Information**

Amended information complying with rules of pleading was not subject to demurrer or dismissal and evidence introduced thereunder was not subject to objection. *State v. McLeod*, 131 M 478, 311 P 2d 400, 406.

**References**

Cited or applied in *State v. Smith*, 126 M 124, 246 P 2d 227, 228.

**Collateral References**

Indecent proposal to woman as criminal assault. 12 ALR 2d 971.

**94-602. (10977) Assault in second degree.** Every person who, under circumstances not amounting to the offense specified in the last section:

(1) With intent to injure unlawfully, administers to, or causes to be administered to, or taken by another, poison, or any other destructive

or noxious thing, or any drug or medicine, the use of which is dangerous to life or health; or,

(2) With intent thereby to enable or assist himself, or any other person, to commit any crime, administers to, or causes to be administered to, or taken, by another, chloroform, ether, laudanum, or any other intoxicating narcotic, or anesthetic agent; or,

(3) Wilfully or wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon; or,

(4) Wilfully and wrongfully assaults another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm; or,

(5) Assaults another with intent to commit a felony, or to prevent or resist the execution of any lawful process or mandate of any court or officer, or the lawful apprehension or detention of himself, or of any other person,

is guilty of an assault in the second degree, and is punishable by imprisonment in the state prison for not less than one nor more than six years, or by a fine not exceeding two thousand dollars, or both.

**History:** En. Sec. 401, Pen. C. 1895; re-en. Sec. 8313, Rev. C. 1907; re-en. Sec. 10977, R. C. M. 1921; amd. Sec. 1, Ch. 129, L. 1961. Cal. Pen. C. Secs. 216, 222, and 245.

#### Amendment

The 1961 amendment increased the maximum term of imprisonment from five to six years.

#### Instructions on This Section

Instructions defining the felony intended to be committed must be given to the jury in a prosecution of assault in the first or second degree so that the jury may determine if the evidence showed an intended felony. *State v. Quinlan*, 126 M 52, 244 P 2d 1058, 1059.

Refusal to instruct that in every crime there must exist union or joint operation of act and intent or criminal negligence as provided by statute was not error in prosecution for second degree assault as defined in subdivision (4) of this section which requires only general nonstatutory intent to do harm wilfully, wrongfully and unlawfully and does not require specific statutory intent to do any particular kind or degree of injury to victim. *State v. Fitzpatrick*, 149 M 400, 427 P 2d 300.

Specific intent is not a necessary element of crime of second degree assault in willful or wrongful infliction of grievous bodily harm upon another, and court properly refused instruction thereon notwithstanding statute providing that there must be unity of act and intent since latter statute is not applicable if specific intent is not an ingredient of crime charged. *State v. Warrick*, — M —, 446 P 2d 916.

Since specific intent is not an element of second degree assault in willful and

wrongful infliction of grievous bodily harm upon another, court was correct in refusing offered instruction that jury could take defendant's degree of intoxication into account in arriving at verdict in so far as it affected defendant's capacity for willfulness and intent. *State v. Warrick*, — M —, 446 P 2d 916.

#### Subd. 4

##### Operation and Effect

Evidence was insufficient to justify a conviction of second degree assault with a deadly weapon where it was disclosed that the defendant was hunting jack rabbits at the time; that he never knew the prosecuting witness prior to the day of the alleged assault; that the rifle was extremely sensitive and would fire upon being brushed against an object such as clothing or even a change in temperature might fire the gun; and that the defendant was an instructor in firearms in the army during the war and would not have missed from the distance of eight feet had he been aiming at the prosecuting witness. *State v. Smith*, 126 M 124, 246 P 2d 227, 228.

Evidence was sufficient to justify a conviction under this section when it was shown that defendant was with a group of boys who fired a barrage of shots at a house and some of the pellets hit the house; the fact that the prosecuting witness had moved to a position away from the line of fire did not prevent the attack from being an assault upon him and sustained the charge that the guns were fired toward him and in his direction. *State v. Simon*, 126 M 218, 247 P 2d 481, 482, 483, 484.



**Proof of Offense Different Than That Charged**

Where defendant was charged with assault in the second degree as defined in subd. 4, it was error to introduce evidence that the defendant in pointing the firearm was resisting a lawful arrest by the sheriff in violation of subd. 5. *State v. Storm*, 124 M 102, 220 P 2d 674, 675.

**Specific Intent**

Specific intent needs to be proved in second degree assault charges only under subdivisions 1, 2 and 5 of this section. *State v. Straight*, 136 M 255, 347 P 2d 482, 487.

**Sufficiency of Evidence**

Where evidence did not show that defendant pointed gun at sheriff after he was handed paper by deputy which purported to be a warrant, evidence was insufficient to support a conviction under either subd. 4 or 5 of this section. *State v. Storm*, 124 M 102, 220 P 2d 674, 678.

**Sufficiency of Information**

Information charging defendant with unlawfully threatening another by pointing a loaded revolver at him charged a criminal offense. *State v. Storm*, 124 M 102, 220 P 2d 674, 675.

An information charging that the defendant committed the crime of assault in the second degree by wilfully, wrongfully, unlawfully, and feloniously assaulting a human being by wounding and inflicting grievous bodily harm contrary to the form, force and effect of the statute, was sufficient to let the defendant know specifically the crime with which he was charged. *State v. Straight*, 136 M 255, 347 P 2d 482, 486.

**94-603. (10978) Assault in third degree.**

**Instructions**

It was error to refuse defendant's instructions defining assault in the third degree, and instead instructing the jury as to assault in the first and second degree but omitting any instructions defining what felony was intended to be committed by assaulting a person with a

gun. Even though, in an information charging second degree assault, it was not charged specifically that a belt was used in the assault, admission of evidence that a belt was used was not error. *State v. Straight*, 136 M 255, 347 P 2d 482, 487.

Denial of state's second application for leave to file information charging assault on ground that probable cause was not shown was an abuse of discretion where supplementary proof as to probable cause in the form of affidavits of deputy county attorney and six witnesses and copy of police report were filed, the district court, in denying first application for failure to have witnesses endorsed thereon having commented that probable cause existed. *State ex rel. McLatchy v. District Court*, 144 M 216, 395 P 2d 245, 248.

While mere recital of injuries was not medically precise or overwhelmingly persuasive, but did show that injuries had been inflicted and that doctor, who was to testify at trial, had examined the victim, there was sufficient evidence stated in the information to establish probable cause that a second degree assault had been committed. *State ex rel. Pinsoneault v. District Court*, 145 M 233, 400 P 2d 269.

Under section 94-6423 information containing single count charging the crime of second degree assault was proper where only one crime was involved, namely, second degree assault, with at least two different ways of committing that crime; one by a direct assault and the other by aiding and abetting. *State v. Zadick*, 148 M 296, 419 P 2d 749, 751.

**References**

Cited or applied in *State ex rel. Neilson v. District Court*, 128 M 445, 277 P 2d 536, 539.

gun. Since the jury had no way of knowing what felony, if any, the defendant intended to commit upon a person by pointing a gun at him, the jury should have been allowed to consider whether or not defendant was guilty of third degree assault. *State v. Quinlan*, 126 M 52, 244 P 2d 1058, 1059.

**94-605. (10980) Use of force not unlawful.**

**Subd. 3**

**Excessive Force—Preventing Trespass**

In prosecution for first degree assault, defendant who fired bullet through apartment door striking investigating police officer, who was privileged to open apartment door to limit of night latch and who announced that he was policeman, used excessive force. *State v. Lukus*, 149 M 45, 423 P 2d 49.

**Operation and Effect**

Evidence failed to justify a conviction of assault with a deadly weapon when it was shown that the defendant was merely exercising force in defense of his home, inasmuch as the prosecuting witness came to defendant's cabin in the company of another fellow who had intruded in defendant's home and lived there without defendant's permission and who the de-

defendant had to forcibly evict, and also someone had been stealing log poles from the defendant. *State v. Nickerson*, 126 M 157, 247 P 2d 188, 192, 193.

#### **Subd. 4**

##### **Intent**

Under this section, in order to convict one standing in loco parentis of assault

upon a child, it is not necessary to prove either express or implied malice or permanent injury. It is up to the jury to determine from the facts and circumstances of each individual case whether the manner of punishment is reasonable and the degree moderate. *State v. Straight*, 136 M 255, 347 P 2d 482, 490.

### **CHAPTER 7—BIGAMY AND INCEST**

#### **94-702. (11026) Exceptions.**

##### **Voidness of Former Marriage**

Under this section voidness of former marriage must have been declared by a court of competent jurisdiction; such a determination of voidness cannot be made

under section 48-111 by the person involved to avoid being charged with bigamy under this section and section 94-701. *State v. Crosby*, 148 M 307, 420 P 2d 431, 433.

#### **94-705. (11029) Incest.**

##### **Amendment of Information**

There was no substantial change in the charge where the court allowed the state to amend an information charging defendant with incest by changing "fornication" to "adultery." Whether the defendant was

married and unmarried at the time is not a material ingredient of the offense. In either event the defendant is guilty, if the intercourse charged is proved. *State v. Kuntz*, 130 M 126, 295 P 2d 707, 710.

### **CHAPTER 8—BRIBERY AND CORRUPTION**

#### **94-804. (10856) Improper attempts to influence jurors, referees, etc.**

##### **Operation and Effect**

Where the evidence discloses that the defendant conversed with a grand juror privately at the latter's home it cannot

be construed to be in the regular course of proceedings and thus within the exception to this section. *State v. Porter*, 125 M 503, 242 P 2d 984, 990.

#### **94-806. (10858) Embracery.**

##### **Operation and Effect**

After a person has been discharged as a grand juror, the crime of embracery could not be committed even though the de-

fendant thought he was influencing a grand juror. *State v. Porter*, 125 M 503, 242 P 2d 984, 987.

### **CHAPTER 9—BURGLARY AND HOUSEBREAKING—POSSESSION OF BURGLARIOUS INSTRUMENTS AND DEADLY WEAPONS**

Section 94-901. Burglary defined.

94-904. Word "enter" defined.

**94-901. (11346) Burglary defined.** Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, out-house, or other building, tent, motor vehicle and aircraft, vessel, or railroad car, with intent to commit grand or petit larceny or any felony, is guilty of burglary.

History: Ap. p. Sec. 58, p. 188, *Bannack Stat.*; re-en. Sec. 69, p. 281, *Cod. Stat.* 1871; re-en. Sec. 69, 4th Div. *Rev. Stat.* 1879; amd. Sec. 1, p. 50, L. 1885; re-en. Sec. 73, 4th Div. *Comp. Stat.* 1887; amd. Sec. 820, *Pen. C.* 1895; re-en. Sec. 8620, *Rev. C.* 1907; re-en. Sec. 11346, *R. C. M.* 1921; amd. Sec. 1, Ch. 126, L. 1949; amd.

**Sec. 1, Ch. 17, L. 1957. Cal. Pen. C. Sec. 459.**

##### **Amendments**

The 1949 amendment inserted the word "automobile" and the word "or" before "railroad car."

The 1957 amendment substituted the words "motor vehicle and aircraft" for the word "automobile."

#### Effective Date

Section 2 of Ch. 17, Laws 1957 provided the act should be in effect from and after its passage and approval. Approved February 18, 1957.

#### Aiding Another in Entry

To support a conviction of two persons for burglary, it is not essential that the entry shall be by both, but if one of them entered and was aided by the other in so doing both are guilty, since burglary may be committed by being present and aiding another in entering. *State v. Harmon*, 135 M 227, 340 P 2d 128.

#### Burglary Tools as Evidence

Burglary tools may be introduced and received into evidence only after proof is made connecting the tools with the ac-

cused or the crime and, where it does not appear from the evidence that the tools were ever in the possession or under the control of the defendant or that they were in any way connected with the alleged crime, their admission as evidence is error. *State v. Filacchione*, 136 M 238, 347 P 2d 1000.

#### Proof of Intent—Circumstantial Evidence

An express intention to commit a felony or larceny does not have to be proved, but it may be manifested by circumstances connected with perpetration of the offense without any positive testimony as to express intent. *State v. Board*, 135 M 139, 337 P 2d 924.

#### References

*State v. Allison*, 122 M 120, 199 P 2d 279, 299; *State v. Fitzpatrick*, 125 M 448, 239 P 2d 529.

### DECISIONS UNDER FORMER LAW

#### Truck

The legislature has made it clear that an automobile and truck are to be considered two distinct and separate vehicles for registration and tax purposes. It does not make sense to hold that the legislature intended, in making entry into an automobile burglary, to have intended the word "automobile" as a general term, and to include automobiles, trucks, busses and the like. Had the legislature in-

tended to use a general term, it would have used the term "motor vehicle." Certainly no interpretation should be given any word which would make an act a crime unless it is clear that the legislature intended that interpretation should be given such word. *State v. Duran*, 127 M 233, 259 P 2d 1051, 1052. (See, however, the dissenting opinion, 127 M 233, 259 P 2d 1051, 1054.)

### 94-902. (11347) Degrees of burglary.

#### Failure to Prove Time Crime Was Committed

Where the information alleges nighttime or first degree burglary it is essential that the state prove the crime occurred during the nighttime as provided in section 94-905. When the evidence is that

the crime took place sometime between 3:15 a.m. and 8:00 a.m. and that on the particular day the sun rose at 5:56 a.m. a conviction of nighttime burglary cannot stand. *State v. Fitzpatrick*, 125 M 448, 239 P 2d 529, distinguished in 135 M 139, 144, 337 P 2d 924, 927.

### 94-903. (11348) Penalty.

#### References

Cited in *State ex rel. Nelson v. Ellsworth*, 141 M 78, 375 P 2d 316, 318; Pe-

tition of *McGrath*, 143 M 397, 390 P 2d 452.

**94-904. (11349) Word "enter" defined.** The word "enter," as used in this chapter, includes the entrance of the offender into such house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, automobile, vessel, or railroad car, or the insertion therein of any part of his body, or of any instrument or weapon held in his hand, or used or intended to be used, to threaten or intimidate the inmates, or to detach or remove the property.

**History:** En. Sec. 823, Pen. C. 1895; re-en. Sec. 8623, Rev. C. 1907; re-en. Sec. 11349, R. C. M. 1921; amd. Sec. 2, Ch. 126, L. 1949.



**Amendment**

The 1949 amendment inserted the words "store, mill, barn" and the word "automobile."

**Repealing Clause**

Section 3 of Ch. 126, Laws 1949 repealed all acts and parts of acts in conflict therewith.

**Effective Date**

Section 4 of Ch. 126, Laws 1949 provided the act should be in effect from and after its passage and approval. Approved March 1, 1949.

**94-905. (11350) Nighttime defined.****Operation and Effect**

When an information charges nighttime or first degree burglary, proof that the crime occurred in the period between sunset and sunrise is essential in order to convict the defendant. *State v. Fitzpatrick*, 125 M 448, 239 P 2d 529, distin-

guished in 135 M 139, 144, 337 P 2d 924, 927.

**References**

Cited in *State v. Board*, 135 M 139, 337 P 2d 924, 927; *State v. Moran*, 142 M 423, 384 P 2d 777.

**94-909. (11354) Carrying deadly weapon with intent to assault, etc.****References**

Cited or applied in *State ex rel. Keast*

*v. District Court*, 136 M 367, 348 P 2d 135, 138.

**CHAPTER 10—COMMON NUISANCES—MAINTENANCE IN CONNECTION  
WITH SELLING INTOXICATING LIQUORS—OPIUM—  
PROSTITUTION AND GAMBLING**

Section 94-1002. Certain buildings declared nuisances.

**94-1001. (11123) Definition of "person" and "building."****Operation and Effect**

Actions for the prosecution of gambling laws may be prosecuted under either of these sections or under sections 94-2401 and 94-2404, or under each and all of such sections. *State ex rel. Replogle v. Joyland Club*, 124 M 122, 220 P 2d 988, 1000.

Fact that county attorney proceeded

under this law for abatement of gambling nuisance, rather than under sections 94-2401 and 94-2404 for criminal punishment, is not a matter of which the defendant can complain on appeal. *State ex rel. Replogle v. Joyland Club*, 124 M 122, 220 P 2d 988, 1000.

**94-1002. (11124) Certain buildings declared nuisances.** Every building or place or tract of land under one ownership used for the purpose of lewdness, assignation, or prostitution, and every building or place or tract of land under one ownership wherein or upon which acts of lewdness, assignation, or prostitution are held or occur, and any building, place or tract of land under one ownership wherein or upon which gambling or those other illegal acts prohibited by chapter 24 and chapter 30, Title 94 Revised Codes of Montana, 1947, are carried on or occurs, contrary to any of the laws of the state of Montana, or wherein any wine rooms are conducted or maintained, contrary to the laws of the state of Montana, or wherein any opium or coca leaves, their salts, derivatives, and preparations thereof are sold or given away or used contrary to the laws of the state of Montana, is a nuisance which shall be enjoined, abated, and prevented as hereinafter provided, whether the same be a public or private nuisance.

**History:** En. Sec. 2, Ch. 95, L. 1917; amd. Sec. 1, Ch. 76, L. 1921; re-en. Sec. 11124, R. C. M. 1921; amd. Sec. 1, Ch. 268, L. 1959.

**Amendment**

The 1959 amendment inserted the words "or tract of land under one ownership" the first two times it appears and substi-

tuted the words "place or tract of land under one ownership wherein or upon which gambling or those other illegal acts prohibited by chapter 24 and chapter 30, Title 94 Revised Codes of Montana, 1947, are" for the words "wherein gambling is."

#### Repealing Clause

Section 2 of Ch. 268, Laws 1959 repealed all acts or parts of acts in conflict therewith.

#### Effective Date

Section 3 of Ch. 268, Laws 1959 provided the act should be in effect from and after its passage and approval. Approved March 16, 1959.

#### Cross-Reference

See note to sec. 94-1004. State ex rel. Olsen v. 30 Club, 124 M 91, 219 P 2d 307; State ex rel. Bergland v. Bradley, 124 M 434, 225 P 2d 1024.

#### Illegal Use of Premises by Vendee

Where vendee-madam sought to void mortgage given vendor-madam on property used exclusively for prostitution, on the grounds that vendor-madam knew the property was to be used in violation of the laws and public policy of Montana,

bare knowledge of the illegal purpose was not sufficient to void the contract in the absence of more active participation on the part of the seller. Carroll v. Beardon, 142 M 40, 381 P 2d 295.

#### Permanent Injunction during Hearing

A permanent injunction against the use of defendant's premises as a house of prostitution and an order of abatement cannot be granted pursuant to this section while a motion to strike is pending and before issues have been finally joined. State ex rel. Harrison v. Baker, 135 M 180, 340 P 2d 142.

#### Punch Boards

Premises wherein punch boards are operated may be abated as a nuisance inasmuch as punch boards constitute a lottery and play at lottery is gambling. Sections 84-5701, 84-5702 (since repealed) and 94-2401 which assume to authorize the use of punch boards as trade stimulators violate § 2, Art. XIX of the Montana Constitution, which prohibits the legislature from authorizing lotteries, and therefore are invalid and do not prevent the abatement of the premises as a nuisance. State ex rel. Harrison v. Deniff, 126 M 109, 245 P 2d 140.

### 94-1003. (11125) County attorney to abate nuisance, etc.

#### Procedural Rules Applicable

A suit under the provisions of this section is a civil suit, and is governed by the same rules applicable in other injunction suits where no other statutory direction is given as to the manner in which the court shall proceed. State ex rel. Harrison v. Baker, 135 M 180, 340 P 2d 142.

#### References

Cited or applied in Chovanak v. Matthews, 120 M 520, 188 P 2d 582, 584; State ex rel. Harrison v. Deniff, 126 M 109, 245 P 2d 140.

### 94-1004. (11126) Verification of complaint—temporary injunction.

#### Law Applicable

The procedure for the abatement of a nuisance per se provided by the statute is that set forth by this law and the general procedure for the issuance of an injunction in ordinary civil cases has no application. State ex rel. Bergland v. Bradley, 124 M 434, 225 P 2d 1024.

#### Order Quashing Injunction Appealable

Where temporary injunction enjoining defendant from conducting the business constituting a nuisance as described in the complaint was quashed same day of issuance and an order issued enjoining defendant from operating "any of the games of chance described in the complaint contrary to the laws of the State of Montana," such order was appealable. State ex rel. Olsen v. 30 Club, 124 M 91, 219 P 2d 307, 309.

#### Quashing Injunction Prior to Hearing

Where complaint and affidavits showed prima facie that premises constituted a nuisance per se, it was error to quash the temporary injunction issued thereunder when defendant filed affidavit under provisions of section 93-4211, but injunction should have remained in effect until a hearing was had. State ex rel. Olsen v. 30 Club, 124 M 91, 219 P 2d 307, 309.

#### Verified Complaint

A complaint filed by a person other than the county attorney, if verified on information and belief pursuant to section 93-3702, is sufficient for the issuance of a temporary injunction. State ex rel. Bergland v. Bradley, 124 M 434, 225 P 2d 1024.

**94-1007. (11129) Order of abatement—sale of fixtures, etc.****References**

Cited or applied in State ex rel. Harrison v. Baker, 135 M 180, 340 P 2d 142, 145.

**94-1009. (11131) Owner may give bond—terms of bond, etc.****Operation and Effect**

This section did not give authority to court to order the return of the property to the owners where sheriff in executing judgment made return of no gambling equipment found notwithstanding that defendants had stipulated that gambling equipment was in their possession. State

ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1033.

**References**

Cited or applied in State ex rel. Harrison v. Deniff, 126 M 109, 245 P 2d 140, 142.

**CHAPTER 11—CRIMINAL CONSPIRACY AND ILLEGAL PRACTICES IN  
RESTRAINT OF TRADE—TRUSTS—DISCRIMINATIONS—POOLING  
GRAIN WAREHOUSES—DESTROYING FOOD**

Section 94-1104. Unlawful trusts and monopolies—penalty.

**94-1101. (10898) Criminal conspiracy defined and punishment fixed.****Liability of Coconspirator**

A coconspirator may be found guilty of a crime committed by his fellow conspirator whether the fellow conspirator is alive or dead, competent or incompetent, at the time of his trial. State v. Alton, 139 M 479, 365 P 2d 527, 535.

**References**

Cited or applied in State v. Simon, 126 M 218, 247 P 2d 481, 485.

**Collateral References**

Bill of particulars to one accused of conspiracy to overthrow government. 5 ALR 2d 496.

**94-1104. (10901) Unlawful trusts and monopolies — penalty.** Every person, corporation, stock company, or association of persons in this state, who, directly or indirectly, combine or form what is known as a trust, or make any contract with any person or persons, corporation, or stock companies, foreign or domestic, through their stockholders, directors, officers, or in any manner whatever, for the purpose of fixing the price or regulating the production of any article of commerce—the phrase “articles of commerce,” as herein employed, shall and does include not only those articles which are generally, popularly, and legally known as articles of commerce, but also gas, water, water power, electric light, and electric power, for whatever purpose used or employed—or of the product of the soil for consumption by the people, or to create or carry out any restriction in trade, to limit productions, or increase or reduce the price of merchandise or commodities, or to prevent competition in merchandise or commodities, or to fix a standard or figure whereby the price of any article of merchandise, commerce, or product, intended for sale, use, or consumption, will be in any way controlled, or to agree, directly or indirectly, to add to a bid for any contract an amount, fixed by percentage or otherwise, for the purpose of making a refund or sharing costs of bidding with any other bidder, or to return a part of any amount added to a bid by collusive agreement among bidders to any person, association, organization or corporation, or to create a monopoly in the manufacture, sale, or transportation of any such article, or to enter into an obligation by which they shall bind others or themselves not to manufacture, sell,



or transport any such articles below a common standard or figure, or by which they agree to keep such article or transportation at a fixed or graduated figure, or by which they settle the price of such article, so as to preclude unrestricted competition, is punishable by imprisonment in the county jail for a period not less than twenty-four (24) hours or more than one (1) year, or by fine not exceeding twenty-five thousand dollars (\$25,000), or both.

**History:** En. Sec. 1, Ch. 97, L. 1909; re-en. Sec. 10901, R. C. M. 1921; amd. Sec. 1, Ch. 102, L. 1967.

#### Amendments

The 1967 amendment inserted "or to agree \* \* \* organization or corporation" after "in any way controlled" and made minor changes in style.

#### Insurance Business

Since this section prohibits conspiracies in restraint of trade in the insurance busi-

ness, federal district court, because of the provisions of the McCarran Act (15 U. S. C. § 1 et seq.), would have no jurisdiction of a suit for violation of the Sherman and Clayton Acts involving the business of insurance, unless the suit fell within an exception to the McCarran Act. Professional & Business Men's Life Ins. Co. v. Bankers Life Co., 163 F Supp 274, 280.

#### References

McNussen v. Graybeal, 146 M 173, 405 P 2d 447.

## CHAPTER 12—CRUELTY TO ANIMALS

Section 94-1201. Overdriving animals.

**94-1201. (11508) Overdriving animals.** Every person who overdrives or overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or another, or deprives any animal of necessary food or drink, or shelter, in the case of household pets, or neglects or refuses to furnish it such food or drink, or shelter, in the case of household pets, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or shelter, in the case of household pets, or who willfully instigates or in any way engages in any act of cruelty to any animal, is guilty of a misdemeanor.

**History:** Ap. p. Sec. 144, p. 213, Bannack Stat.; re-en. Sec. 172, p. 309, Cod. Stat. 1871; re-en. Sec. 172, 4th Div. Rev. Stat. 1879; amd. Sec. 1, p. 2, L. 1881; re-en. Sec. 215, 4th Div. Comp. Stat. 1887; en. Sec. 1090, Pen. C. 1895; re-en. Sec. 8774, Rev. C. 1907; re-en. Sec. 11508, R. C. M.

1921; amd. Sec. 1, Ch. 131, L. 1965; Cal. Pen. C. Sec. 597.

#### Amendment

The 1965 amendment inserted "or shelter, in the case of household pets" following "food or drink" in three places.

## CHAPTER 14—ELECTION FRAUDS AND OFFENSES—CORRUPT PRACTICES ACT

Section 94-1431. Accounts of expenditures by political committees and other persons—statement.

94-1475. Political literature to contain name of officer of organization or person publishing and producing.

94-1476. Violation of preceding section a misdemeanor.

**94-1431. (10777) Accounts of expenditures by political committees and other persons—statement.** (1) Every political committee shall have a treasurer, who is a voter, and shall cause him to keep detailed accounts of all its receipts, payments, and liabilities. Similar accounts shall be kept

by every person, who in the aggregate receives or expends money or incurs liabilities to the amount of more than fifty dollars (\$50) for political purposes, and by every political agent and candidate. Such accounts shall cover all transactions in any way affecting or connected with the political canvass, campaign, nomination, or election concerned.

(2) Every person receiving or expending money or incurring liability by authority or in behalf of or to promote the success or defeat of such committee, agent, candidate, or other person or political party or organization, shall, on demand, and in any event within fourteen (14) days after such receipt, expenditure, or incurrence of liability, give such treasurer, agent, candidate, or other person on whose behalf such expense or liability was incurred a detailed verified account thereof. Every payment shall be accounted for by a receipted bill stating the particulars of expense. Every voucher, receipt, and verified account hereby required shall be a part of the accounts and files of such treasurer, agent, candidate, or other person, and shall be preserved for six (6) months after the election to which it refers.

(3) Any person not a candidate for any office or nomination who expends money or value to an amount greater than fifty dollars (\$50) in any campaign for nomination or election, to aid in the election or defeat of any candidate or candidates, or party ticket, or measure before the people, shall, within ten (10) days after the election in which said money or value was expended, file with the secretary of state in the case of a measure voted upon by the people, or of state or district offices for districts composed of one (1) or more counties, or with the county clerk for county offices, and with the city clerk, auditor, or recorder for municipal offices, a verified itemized statement of such receipts and expenditures for every sum paid in excess of five dollars (\$5), and shall at the same time deliver to the candidate or treasurer of the political organization whose success or defeat he has sought to promote, a duplicate of such statement and a copy of such receipts.

(4) The books of account of every treasurer of any political party, committee, or organization, during an election campaign, shall be open at all reasonable office hours to the inspection of the treasurer and chairman of any opposing political party or organization for the same electoral district; and his right of inspection may be enforced by writ of mandamus by any court of competent jurisdiction.

**History:** En. Sec. 12, Init. Act, Nov. 1912; re-en. Sec. 10777, R. C. M. 1921; amd. Sec. 1, Ch. 41, L. 1969.

#### **Amendments**

The 1969 amendment divided the section

into subsections, omitted the requirement of submitting vouchers for expenditures over \$5 with expense statements, inserted requirement that accounts be verified, and made minor changes in style.

### **94-1454. (10800) Political criminal libel.**

#### **Compiler's Note**

This section may be partially superseded by sec. 94-1475.

**94-1475. Political literature to contain name of officer of organization or person publishing and producing.** It shall be unlawful for any person

to publish, print, mimeograph, type or otherwise produce any dodger, bill, handbill, pamphlet or other document which is designed to aid, injure or defeat any candidate or any political party or organization or measure before the people unless it is stated therein the name of the chairman or secretary, or the names of the other officers of the political or other organization publishing, printing, mimeographing, typing or otherwise producing such dodger, bill, handbill, pamphlet or other document or the name of some voter who is responsible therefor with his residence and street address, if any, together with the name of the publisher, printer or the producer thereof with his residence and street address, if any, or his place of business.

**History:** En. Sec. 1, Ch. 74, L. 1951.

#### **Title of Act**

An act making it unlawful for any person to publish, print, mimeograph, type or otherwise produce any dodger, bill, handbill, pamphlet or other document designed to aid, injure or defeat any candidate or any political party or organization or measure before the people, unless it is stated therein the name of the chairman or secretary, or the names of the other

officers of the political or other organization producing the same, or the name of some voter who is responsible therefor with his residence and street address, if any, together with the name of the publisher, printer or other producer thereof with his residence and street address, if any, or his place of business, and providing that violation thereof shall constitute a misdemeanor, and repealing all acts and parts of acts in conflict herewith.

**94-1476. Violation of preceding section a misdemeanor.** Any person who shall violate the provisions of this act shall be guilty of a misdemeanor.

**History:** En. Sec. 2, Ch. 74, L. 1951.

#### **Collateral References**

Elections ~~C~~ 309.

29 C.J.S. Elections § 334.

#### **Repealing Clause**

Section 3 of Ch. 74, L. 1951 repealed all acts and parts of acts in conflict therewith.

### **CHAPTER 15—EMBEZZLEMENT AND OTHER OFFENSES BY PUBLIC OFFICERS**

**94-1503. (11320) "Public moneys" defined.**

#### **Cross-References**

Judgments, etc., how pleaded, sec. 94-6415.

### **CHAPTER 16—EXTORTION**

**94-1601. (11389) Extortion defined.**

#### **Cross-References**

Extortion by telephone, sec. 94-35-221.5.

### **CHAPTER 17—FALSIFYING EVIDENCE**

**94-1705. (10895) Preventing or dissuading witness from attending.**

#### **Secreting Witness**

Accused's attempt to hide state's witness and to intimidate her could have been

grounds for prosecution under this statute. State v. Crockett, 148 M 402, 421 P 2d 722.



## CHAPTER 18—FALSE PERSONATION AND CHEATS

- Section 94-1805. Obtaining money, property or services by false pretenses.  
 94-1822. Inducing engagement as an advertising agency for sale of real property by misrepresentation of fact concerning services—penalty.  
 94-1823. Unlawful to obtain credit, goods, or service by false use of credit device.  
 94-1824. Unlawful to obtain communication service without intention to pay.  
 94-1825. Theft or unlawful retention of credit device.  
 94-1826. Unlawful possession of counterfeit or stolen credit device.  
 94-1827. Notice may be in person or in writing.  
 94-1828. Use of false device as evidence of knowledge of falsity.  
 94-1829. Credit device violation as misdemeanor or felony.  
 94-1830. Communications originating or terminating in state.  
 94-1831. Obtaining accommodations with intent to defraud.

**94-1805. (11410) Obtaining money, property or services by false pretenses.** Every person who knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property, including evidence of indebtedness, or who knowingly and designedly obtains the service of another by false or fraudulent representation or pretenses, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently receives services or gets into possession of money or property, is punishable in the same manner and to the same extent as for larceny of the money or the value of the property or services so obtained.

**History:** En. Sec. 933, Pen. C. 1895; re-en. Sec. 8683, Rev. C. 1907; amd. Sec. 1, Ch. 60, L. 1921; re-en. Sec. 11410, R. C. M. 1921; amd. Sec. 1, Ch. 130, L. 1959. Cal. Pen. C. Sec. 532.

**Amendment**

The 1959 amendment inserted the words "or who knowingly and designedly obtains the service of another by false or fraudulent representation or pretenses"; inserted the words "receives services or" and substituted the words "the value of the property or services" for the word "property."

**Application**

A defendant charged under section 94-1806 with obtaining property by means of a confidence game cannot be convicted on evidence which shows that the defendant obtained such property "by false or fraudulent representation or pretenses" under this section because such crimes are separate and distinct offenses. *State v. Allen*, 128 M 306, 275 P 2d 200, 201. (Dissenting opinions, 128 M 306, 275 P 2d 200, 205, 206.)

**Check Payable to Defendant's Wife**

Money received in form of check payable to defendant's wife was money received by defendant in light of evidence that family was living together, that money was used for household support of family and that defendant's wife acted in secretarial capacity in defendant's business

operations; fact that defendant had not received check made out to him personally did not mean that element of crime of obtaining money by false pretenses had not been established. *State v. Lagerquist*, — M —, 445 P 2d 910.

**Complaint in Justice Court**

Use of term "feloniously" in complaint in justice court charging defendant with offense of obtaining money by false pretenses was not reversible error where complaint specifically stated that offense charged was misdemeanor. *Petition of Brown*, 150 M 483, 436 P 2d 693.

**Evidence of an Offense Not Charged in the Information**

When a county officer is charged with collecting illegal fees, by presenting a claim under the name of another to the county for work which was within his duties as county surveyor it was prejudicial error for the court to admit evidence of another claim submitted by the county surveyor to the county which offense was not charged in the information (*Justices Bottomly and Angstman dissenting*). *State v. Hale*, 126 M 326, 249 P 2d 495, 496.

**Information**

Where a statute uses general or generic words in defining the offense the information or indictment bottomed upon that statute must specify the particular facts which constitute the offense. *State v. Hale*,

129 M 449, 291 P 2d 229, 232, distinguished in 135 M 449, 453, 340 P 2d 157, 160, overruled on another point, 142 M 459, 462, 384 P 2d 749. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236.)

An information may be drawn consistent with this section which is not vulnerable to the objection that it is bad for duplicity for charging an offense under section 94-3908 (presenting fraudulent claim to a county). *State v. Hale*, 129 M 449, 291 P 2d 229, 234, overruled on another point, 142 M 459, 462, 384 P 2d 749. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236.)

Information which avers only that the defendant made a "false" or "fraudulent" representation is not sufficient. It must expressly allege the facts which made the stated pretense false. *State v. Hale*, 129 M 449, 291 P 2d 229, 231, overruled on another point, 142 M 459, 462, 384 P 2d 749. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236.)

To characterize a representation as "false" or "fraudulent" does not suffice to state the offense. The particulars in which the representations relied upon are false must appear from facts directly and positively set out. *State v. Hale*, 129 M 449, 291 P 2d 229, 232, overruled on another point, 142 M 459, 462, 384 P 2d 749. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236.)

#### Lesser Included Offenses

Crimes under Packaged Commodities Offered for Sale Act (90-601 et seq., since repealed) and under False Weights and Measures Act (94-1901 et seq.), both misdemeanors, were not lesser and included offenses of felony of obtaining money by false pretenses since misdemeanor statutes require "sale" while felony statute does not; in order for offense to be lesser and included within another offense which is greater, it is necessary that greater offense include every element of lesser offense plus other elements; although conduct might

also have been chargeable under misdemeanor statutes, defendant was properly charged with felony of obtaining money or property by false pretenses since state has discretionary power to choose under which law it will charge a defendant and fact that there is an area in which two statutes overlap in prohibiting same act does not mean that defendant can only be prosecuted under the statute providing the lesser penalty. *State v. Lagerquist*, — M —, 445 P 2d 910.

#### Operation and Effect

When a county officer is charged with collecting illegal fees by presenting a claim under the name of another to the county for work which was within his duties as county surveyor, the public policy of this state under section 94-5516 is that, as a matter of defense, the county officer is entitled to offer evidence of his good faith or honest mistake and the value received by the county. *State v. Hale*, 126 M 326, 249 P 2d 495, 496.

#### Sufficiency of Evidence

Evidence that defendant exchanged bank draft in amount of \$800 for victim's car when defendant had only \$300 in bank was sufficient to sustain conviction for obtaining property by false pretenses even though victim never transferred automobile title to defendant. *State v. Love*, 151 M 190, 440 P 2d 275.

#### References

Cited or applied in *State v. Keller*, 126 M 142, 246 P 2d 817, 821.

#### Collateral References

Obtaining payment by debtor on valid indebtedness by false representation as criminal false pretenses. 20 ALR 2d 1266.

False representations as to income, profits, or productivity of property as fraud. 27 ALR 2d 14.

### 94-1806. (11411) Confidence games.

#### Application

Where evidence disclosed that all the defendant did, to induce the complaining witness to give him the ring, was, after she had broached the subject of oil wells, to say, in effect that he had an oil well in Louisiana from which he received \$800 a month income, and that he would cut her in for \$200 of that income. The jury could assume such statements were false, since, according to the complaining witness, neither the first \$200 due July 15th, nor any other was ever paid to her. Defendant should have been prosecuted under section 94-1805 "obtaining money or property by false pretenses," not under

this section "confidence games." *State v. Allen*, 128 M 306, 275 P 2d 200, 205. (Dissenting opinions, 128 M 306, 275 P 2d 200, 205, 206.)

#### Confidence or Bunco Game

It is a crime to obtain or attempt to obtain money by the use of a confidence game. *State v. Hale*, 134 M 131, 328 P 2d 930, 934.

#### Construction of Statute

The element of confidence must be present in order to maintain an action under this section. *State v. Hale*, 134 M 131, 328 P 2d 930, 934.



The confidence games described in this section are those whereby an elaborate scheme is developed to play upon the credulity or sympathy or some other trait of the victim. *State v. Hale*, 134 M 131, 328 P 2d 930, 934.

#### Operation and Effect

A defendant charged under this section with obtaining property by means of a confidence or bunco game cannot be convicted on evidence which shows that defendant obtained such property "by false

or fraudulent representation or pretenses" under section 94-1805, because such crimes are separate and distinct offenses. *State v. Allen*, 128 M 306, 275 P 2d 200, 201. (Dissenting opinions, 128 M 306, 275 P 2d 200, 205, 206.)

#### Separate and Distinct Crime

This statute covers a separate and distinct crime from that covered by section 94-2406. *State v. Hale*, 134 M 131, 328 P 2d 930, 934.

**94-1822. Inducing engagement as an advertising agency for sale of real property by misrepresentation of fact concerning services—penalty.** Any person engaged or purporting to be engaged as an advertising agency for real property who accepts or solicits money or other considerations for himself or for any other person, in connection with the execution by an owner of real property of any contract whereby such owner authorizes such person to serve as an advertising agency for the sale of such property, and who for the purpose of inducing the owner of such property to enter into such a contract makes or procures the making of any oral or written representation of fact with respect to the nature or extent of the services to be rendered for or on behalf of such owner by any such person under such contract, with reasonable ground for belief that such representation is not true, or who refrains from disclosing to such owner, any matter of fact pertinent to the nature or extent of the services to be rendered for or on behalf of such owner by any such person under such contract is guilty of a felony and shall be imprisoned for not less than one (1) year nor more than five (5) years.

**History:** En. Sec. 1, Ch. 125, L. 1959.

#### Title of Act

An act declaring that the acceptance or solicitation of money or other considerations in connection with any contract for the advertising of real property by misrepresentation or by failing to disclose facts pertinent to such contract is a felony and prescribing a penalty; containing a repealing clause.

#### Repealing Clause

Section 2 of Ch. 125, Laws 1959 repealed all acts and parts of acts in conflict therewith.

#### Cross-Reference

Real Estate License Act to be construed as supplemental to this section, sec. 66-1946.

**94-1823. Unlawful to obtain credit, goods, or service by false use of credit device.** It shall be unlawful for any person knowingly to obtain or attempt to obtain credit, or to purchase or attempt to purchase any goods, property or services, by the use of any false, fictitious, counterfeit or expired credit card, telephone number, credit number or other credit device, or by the use of any credit card, telephone number, credit number or other credit device of another without the authority of the person to whom such card, number or device was issued, or by the use of any credit card, telephone number, credit number or other credit device in any case where such card, number or device has been revoked and notice of revocation has been given to the person to whom issued.

**History:** En. Sec. 1, Ch. 185, L. 1965.

#### Title of Act

An act making it unlawful to obtain



or attempt to obtain goods, property or credit cards or other false or fraudulent services by false or fraudulent use of means, and providing penalties therefor.

**94-1824. Unlawful to obtain communication service without intention to pay.** It shall be unlawful for any person to obtain or attempt to obtain, by the use of any fraudulent scheme, device [,] means or method, telephone or telegraph service or the transmission of a message, signal or other communication by telephone or telegraph, or over telephone or telegraph facilities with intent to avoid payment of charges therefor.

**History:** En. Sec. 2, Ch. 185, L. 1965.

**94-1825. Theft or unlawful retention of credit device.** It shall be unlawful for any person to steal, take or remove a credit card or credit device from the person or possession of the person to whom issued, or, to retain or secrete a credit card or credit device without the consent of the person to whom issued, with the intent of using, delivering, circulating or selling or causing said card or device to be used, delivered, circulated or sold without the consent of the person to whom issued.

**History:** En. Sec. 3, Ch. 185, L. 1965.

**94-1826. Unlawful possession of counterfeit or stolen credit device.** It shall be unlawful for any person to have in his possession or under his control or to receive from another person any forged, altered, counterfeited, fictitious or stolen credit card or credit device with the intent to use, deliver, circulate or sell the same, or to permit or cause to procure the same to be used, delivered, circulated or sold, knowing the same to be forged, altered, counterfeited, fictitious or stolen.

**History:** En. Sec. 4, Ch. 185, L. 1965.

**94-1827. Notice may be in person or in writing.** The word "notice" as used in section 1 [94-1823] of this act shall be construed to include either notice given in person or notice given in writing to the person to whom the number, card or device was issued.

**History:** En. Sec. 5, Ch. 185, L. 1965.

**94-1828. Use of false device as evidence of knowledge of falsity.** The presentation or use of a false, fictitious, counterfeit, expired, unauthorized or revoked credit card, telephone number, credit number or other credit device for the purpose of obtaining credit or the privilege of making a deferred payment for the article or service purchased shall be evidence of knowledge that the said credit device is false, fictitious, counterfeit, expired, or its use is unauthorized or revoked.

**History:** En. Sec. 6, Ch. 185, L. 1965.

**94-1829. Credit device violation as misdemeanor or felony.** Any person who violates any provision of sections 1, 2, 3 or 4 [94-1823, 94-1824, 94-1825 or 94-1826] of this act shall be guilty of a misdemeanor, punishable as provided by law therefor; provided, however, that if the value of the goods or services obtained through a violation of the provisions of section 1 or 2 [94-1823 or 94-1824] of this act amounts to the sum of fifty dollars (\$50)

or more, or if the value of the goods or services obtained through a series of violations of section 1 or 2 [94-1823 or 94-1824] of this act committed within a period not exceeding six (6) months amounts in the aggregate to the sum of \$50.00 or more, any such violation or violations shall constitute a felony and shall be punishable as provided by law therefor.

**History:** En. Sec. 7, Ch. 185, L. 1965.

**94-1830. Communications originating or terminating in state.** Sections 1 and 2 [94-1823 and 94-1824] of this act shall apply when the telephone or telegraph service or message, signal or other communications by telephone or telegraph or over telephone or telegraph facilities either originates or terminates, or both originates and terminates in this state.

**History:** En. Sec. 8, Ch. 185, L. 1965.

**94-1831. Obtaining accommodations with intent to defraud.** (1) Any person who, with intent to defraud, obtains food, lodging or other accommodations at any hotel, apartment house, inn, rooming or boarding house, tourists' campground, mobile home park, motel, hospital, restaurant or cafe, or who, after having obtained such food, lodging or other accommodations at any such place, surreptitiously removes his baggage and clothing from the place, without first paying or tendering payment for the food, lodging or other accommodations, is guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment not exceeding three (3) months or by a fine not exceeding one hundred dollars (\$100), or both.

(2) Proof of any of the following facts is prima facie evidence of the fraudulent intent referred to in subsection (1) of this act:

(a) Lodging, food or other accommodations were obtained by false pretense or by false or fictitious show or pretense of any baggage or other property.

(b) The person failed or refused to pay for the food, lodging or other accommodations upon demand.

(c) The person made, drew and gave in payment for the food, lodging or other accommodations any check or draft on which payment was refused.

(d) The person departed without paying or offering to pay for the food, lodging or other accommodations.

(e) The person surreptitiously removed or attempted to remove his baggage.

**History:** En. Sec. 1, Ch. 135, L. 1967.

#### **Title of Act**

An act making it unlawful for any person to obtain, with intent to defraud, food, lodging or other similar accommodations; enumerating circumstances which constitute prima facie evidence of intent

to defraud; and repealing section 94-3550, R. C. M. 1947.

#### **Repealing Clause**

Section 2 of Ch. 135, Laws 1967 read "Section 94-3550, R. C. M. 1947, is repealed."

CHAPTER 19—FALSE WEIGHTS AND MEASURES

**94-1902. (11429) Using false weights or measures.**

**False Pretenses**

Crimes under Packaged Commodities Offered for Sale Act (90-601 et seq., since repealed) and under False Weights and Measures Act (94-1901 et seq.), both misdemeanors, were not lesser and included offenses of felony of obtaining money by false pretenses since misdemeanor statutes require "sale" while felony statute does not; in order for offense to be lesser and included within another offense which is greater, it is necessary that greater offense include every element of lesser offense plus

other elements; although defendant's conduct might have been chargeable under misdemeanor statutes, charge of obtaining money or property by false pretenses, a felony, was nonetheless proper since state has discretionary power to choose under which law it will charge a defendant and fact that there is an area in which two statutes overlap in prohibiting same act does not mean that defendant can only be prosecuted under the statute providing the lesser penalty. *State v. Lagerquist*, — M —, 445 P 2d 910.

CHAPTER 20—FORGERY AND COUNTERFEITING

Section 94-2014. Production of false identification documents.

**94-2001. (11355) Forgery of wills, conveyances, etc.**

**Cross-Reference**

State tax stamps, counterfeiting, sec. 94-35-260.

of forgery. *State v. Phillips*, 127 M 381, 264 P 2d 1009, 1011.

**Passing of Auditor's Warrant**

**Act Committed by Indian on Indian Reservation**

State court was without jurisdiction to try an Indian for forgery of a check where the Indian attempted to cash the check on a store located within the boundaries of an Indian Reservation. The defendant is still a ward of the federal government and is still under the exclusive jurisdiction of the federal government for all acts and crimes defined and made punishable by the laws of Congress, when committed within the exterior boundaries of an Indian reservation. *State ex rel. Bokas v. District Court*, 128 M 37, 270 P 2d 396.

The statute when speaking of indorsements while not specifically mentioning auditors' warrants does cover "orders." The indorsement of an auditor's warrant amounts to the indorsement of an order within the meaning of the statute. *State v. Phillips*, 127 M 381, 264 P 2d 1009, 1011.

**Substantial Evidence**

Where it was shown at trial that defendant did not know checks paid to him for fixing car were forged, combined evidence was not substantial to overcome the presumption of innocence in proving that defendant had a fraudulent intent at the time he cashed the checks. *State v. Phillips*, 147 M 334, 412 P 2d 205.

**Essential Elements**

The essential elements of forgery are a false making of an instrument in writing, a fraudulent intent, and a writing which, if genuine, apparently might be of legal efficacy or the foundation of legal liability. *State v. Cooper*, 146 M 336, 406 P 2d 691; *State v. Phillips*, 147 M 334, 412 P 2d 205.

**General Intent**

The intent required under this section, as controlled by section 94-105, has to be a general intent only. *State v. Cooper*, 146 M 336, 406 P 2d 691.

**Non-negotiable Instruments**

The fact that a warrant is non-negotiable does not affect the question as to whether one who passes it when containing a known forged indorsement is guilty

**Testimony of Person Forging Indorsement as Corroboration**

The testimony of the person who forged the indorsement on a warrant and who was not implicated in the matter of passing or uttering the instrument is corroborating evidence to the testimony of an accomplice of the defendant charged with uttering the forged instrument, since the person who forged the indorsement is not an accomplice to the defendant who uttered the instrument as the making of the instrument and the uttering of it are two separate crimes although they both constitute forgery. *State v. Phillips*, 127 M 381, 264 P 2d 1009, 1014. (See, however, the dissenting opinions in 127 M 381, 264 P 2d 1009, 1016, 1018.)



**Unnecessary for Instrument to Create Civil Liability**

It is not necessary that the forged instrument should create civil liability before it can be held to be forgery. *State v. Phillips*, 127 M 381, 264 P 2d 1009, 1011.

**Uttering Forged Instrument**

"Uttering" a forged instrument consists in offering to another the forged instru-

ment with knowledge of the falsity of the writing and with intent to defraud. *State v. Cooper*, 146 M 336, 406 P 2d 691.

One possessed of fraudulent intent who either writes a forged instrument, or who knowingly utters a forged instrument, each act being separate and distinct from the other, or who commits both acts, is guilty of forgery. *State v. Cooper*, 146 M 336, 406 P 2d 691.

**94-2004. (11358) Punishment of forgery.****References**

Cited in *State v. Brown*, 136 M 382, 351

P 2d 219, 222; *State v. Cooper*, 146 M 336, 406 P 2d 691.

**94-2006. (11360) Possessing or receiving forged or counterfeit bills, etc.****References**

Cited or applied in *State v. Rother*, 130

M 357, 303 P 2d 393 at 406 (dissenting opinion).

**94-2007. (11361) Making, passing or uttering fictitious bills, etc.****Jurisdiction of Offense**

An enrolled member of an Indian tribe was subject to prosecution in state court for forgery where check was obtained from Indian agency office on reservation but was cashed in a town outside the boundaries of the reservation. *Petition of Fox*, 141 M 189, 376 P 2d 726, 727.

The crime of forgery is committed in the place where the false, forged or counterfeit check is passed as true and genuine and the origin of the check has no bearing upon the crime. *Petition of Fox*, 141 M 189, 376 P 2d 726.

**Passing False Check**

The crime of forgery encompasses the passing of a check as true and genuine when in fact it is false, forged or counterfeit. *Petition of Fox*, 141 M 189, 376 P 2d 726.

**Questions for Jury**

Where defendant was charged with the crime of uttering and delivering a fictitious check, the intent to defraud and defendant's knowledge of the fictitious character of the check were questions for the jury. *State v. Johnston*, 140 M 111, 367 P 2d 891, 893.

**Restitution**

It is no defense under this section that defendant has made restitution. *State v. Johnston*, 140 M 111, 367 P 2d 891, 893.

**References**

Cited or applied in *State v. Rother*, 130 M 357, 303 P 2d 393 at 406 (dissenting opinion); *State v. Heiser*, 146 M 413, 407 P 2d 370.

**94-2008. (11362) Counterfeiting coin, bullion, etc.****References**

Cited or applied in *State v. Rother*, 130

M 357, 303 P 2d 393 at 406 (dissenting opinion).

**94-2010. (11364) Possessing or receiving counterfeit coin, bullion, etc.****References**

Cited or applied in *State v. Rother*, 130

M 357, 303 P 2d 393 at 406 (dissenting opinion).

**94-2012. (11366) Counterfeiting railroad tickets, etc.****References**

Cited or applied in *State v. Rother*, 130

M 357, 303 P 2d 393 at 406 (dissenting opinion).

**94-2014. Production of false identification documents.** Any person who knowingly procures or assists in the production, procurement, or

distribution of any document falsely designating the age or identity of any person shall be guilty of a misdemeanor.

**History:** En. Sec. 1, Ch. 169, L. 1967.

**Title of Act**

An act specifying a penalty if a person

knowingly procures or assists in the production, procurement, or distribution of any document falsely designating the age or identity of any person.

## CHAPTER 23—FRAUDS IN MANAGEMENT OF CORPORATIONS

### 94-2317. (11454) Same.

**Compiler's Notes**

Sections 15-1701 to 15-1708, referred to

in this section in the parent volume, were repealed by Sec. 143, Ch. 300, Laws 1967.

## CHAPTER 24—GAMBLING

Section 94-2429. Slot machines—possession unlawful.

94-2430. Slot machine defined.

94-2431. Person or persons defined.

94-2432. Penalty for possession or permitting use of slot machine.

### 94-2401. (11159) Gambling games prohibited—penalty, etc.

**Compiler's Note**

That part of this section which relates to slot machines is probably superseded by secs. 94-2429 to 94-2432.

**Cross-Reference**

See note to sec. 94-2403. State v. Israel, 124 M 152, 220 P 2d 1003, 1011.

**Constitutionality**

This act and sections 84-5701, 84-5702 (since repealed) authorizing and licensing so-called trade stimulators is void and invalid as violative of § 2, Art. XIX of the Montana Constitution, which prohibits the legislature from authorizing lotteries. State ex rel. Harrison v. Deniff, 126 M 109, 245 P 2d 140, 141, 142.

**Construction of Amendment**

The 1937 amendment to this section which added the licensing provisions did not affect section 94-2404. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 996.

**Prosecution of Gambling Laws**

Actions for violation of the gambling laws may be prosecuted under either this section and section 94-2404 or under section 94-1001 et seq., the abatement law, or under each and all of such sections. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 1000.

**Religious, Fraternal and Charitable Organizations**

Religious, fraternal and charitable organizations and private homes are by

section 94-2403 exempt from the payment of license fees but are not exempt from the provisions of this act which existed prior to the 1937 amendment. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 996; State v. Israel, 124 M 152, 220 P 2d 1003, 1011.

**Slot Machines**

Slot machines are not included among the enumerated "hickey" games nor among the "trade stimulators" from which the ban was lifted by the 1937 amendment known as the "Hickey Law." State v. Israel, 124 M 152, 220 P 2d 1003, 1010; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032.

Information charging defendant with the operation of slot machines was not subject to demurrer as not charging an offense. State v. Israel, 124 M 152, 220 P 2d 1003, 1009.

This section, banning the possession of slot machines, has not been repealed by sections 84-3601 to 84-3610 (since repealed). State v. Engle, 124 M 175, 220 P 2d 1015, 1016; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032.

The ban against slot machines was not lifted by sections 84-5701 and 84-5702 (since repealed). State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032.

The operation of all slot machines is prohibited to all persons without exception. State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032.

**References**

Cited or applied in *State v. Read*, 124 M 184, 220 P 2d 1020; *State v. Tursich*, 127 M 504, 267 P 2d 641, 642; *State v. Porter*, 130 M 299, 300 P 2d 952.

**Collateral References**

Entrapment to commit offense with respect to gambling or lotteries. 31 ALR 2d 1212.

**94-2403. Organizations excluded from act.****Construction**

The words "this act" in this section mean the licensing provisions of section 94-2401 which were added by the 1937 Act but not the remainder of such section which was in existence prior to such 1937 amendment. *State ex rel. Replogle v. Joyland Club*, 124 M 122, 220 P 2d 988, 996.

**Slot Machines**

There is nothing in this law that makes it lawful for any person or any religious, fraternal or charitable organization, or any private home to run, conduct or keep any slot machine within the state of Montana. *State v. Israel*, 124 M 152, 220 P 2d 1003, 1011.

**94-2404. (11160) Possession of gambling implements prohibited.****Cross-Reference**

See note to sec. 94-2401. *State ex rel. Replogle v. Joyland Club*, 124 M 122, 220 P 2d 988, 1000.

**Effect of Other Laws**

This section was not affected by the 1937 amendment to section 94-2401. *State ex rel. Replogle v. Joyland Club*, 124 M 122, 220 P 2d 988, 996; *State ex rel. Olsen v. Crown Cigar Store*, 124 M 310, 220 P 2d 1029, 1032.

This section, banning the possession of slot machines, has not been repealed by sections 84-3601 to 84-3610 (since repealed). *State v. Engle*, 124 M 175, 220 P 2d 1015, 1016; *State ex rel. Olsen v. Crown Cigar Store*, 124 M 310, 220 P 2d 1029, 1032.

**References**

Cited or applied in *State v. Read*, 124 M 184, 220 P 2d 1020.

**94-2406. (11162) Brace and bunco games prohibited.****Confidence or Bunco Game**

Any game which is by this statute outlawed, may be a confidence or bunco game, for the design and conduct of those who use it gives it its character under this statute. *State v. Hale*, 134 M 131, 328 P 2d 930, 936.

**Penalty**

The penalty of violating this statute is imposed upon every person who uses or deals with any game commonly known as a confidence game or bunco, as well as one who wins. *State v. Hale*, 134 M 131, 328 P 2d 930, 933.

**Gambling Devices**

The games described in this section are purporting gambling devices so contrived, although masked as legitimate operations, to bilk the victim of his wager by manipulation. These games do not depend upon the active or passive emotions of the victim. *State v. Hale*, 134 M 131, 328 P 2d 930, 934.

**Purpose of Statute**

This statute is aimed at person who uses or deals with a confidence game, or bunco game, and not so much against the inanimate paraphernalia so used. *State v. Hale*, 134 M 131, 328 P 2d 930, 936.

**"Morocco"**

Defendant who used and dealt with game of "Morocco," a confidence game and bunco game, to win money from his victim was properly convicted of the crime prohibited by this section. *State v. Hale*, 134 M 131, 328 P 2d 930, 934, 935.

**Separate and Distinct Crime**

This statute covers a separate and distinct crime from that covered by section 94-1806. *State v. Hale*, 134 M 131, 328 P 2d 930, 934.

**Use of Confidence Game**

It is a crime to use or deal with a confidence game or bunco. *State v. Hale*, 134 M 131, 328 P 2d 930, 934.

**94-2409. (11165) Maintaining gambling apparatus a nuisance.****Operation and Effect**

Any article, machine or apparatus maintained or kept in violation of any of the provisions of sections 94-2401 or 94-2404 is a public nuisance. *State ex rel. Olsen v.*

*Crown Cigar Store*, 124 M 310, 220 P 2d 1029, 1032.

**Slot Machines**

The using, operating, keeping, and main-



taining for use, of slot machines constitutes a nuisance. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988;

State v. Israel, 124 M 152, 220 P 2d 1003, 1011; State ex rel. Brown v. Buffalo Rapids Club, 124 M 172, 220 P 2d 1014.

#### **94-2410. (11166) Duty of public officer to seize gambling implements, etc.**

##### **Decree Requiring Sale Amended**

Decree requiring sheriff to sell seized slot machines was amended on appeal to require the sheriff to destroy such machines. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 1001.

##### **References**

Cited or applied in State v. Israel, 124 M 152, 220 P 2d 1003, 1011.

##### **Collateral References**

Forfeiture of property used in connection with gaming before trial of individual offender. 3 ALR 2d 751.

#### **94-2411. (11167) Duty of magistrate to retain gambling implement, etc.**

##### **Return of Machines Erroneous**

It was error for district court to order slot machines and other gambling equipment returned to defendant on an ex parte proceeding before the disposition of the

case and the order is void ab initio. State v. Israel, 124 M 152, 220 P 2d 1003, 1009.

##### **References**

Cited or applied in State v. Engle, 124 M 175, 220 P 2d 1015, 1017.

#### **94-2412. (11167.1) Disposal of moneys confiscated, etc.**

##### **Cross-Reference**

See note to sec. 94-2411. State v. Israel, 124 M 152, 220 P 2d 1003, 1009.

##### **References**

Cited or applied in State v. Engle, 124 M 175, 220 P 2d 1015, 1017.

#### **94-2413. (11168) Authority to break and enter buildings where games, etc.**

##### **References**

Cited or applied in State v. Israel, 124 M 152, 220 P 2d 1003, 1012.

#### **94-2414. (11169) Duty of public officer to make complaint.**

##### **References**

Cited in State v. Israel, 124 M 152, 220 P 2d 1003, 1012.

#### **94-2416. (11171) Officers neglecting duty subject to forfeiture of office.**

##### **References**

Cited in State v. Israel, 124 M 152, 220 P 2d 1003, 1012.

#### **94-2417. (11172) Receiving money to protect offenders prohibited.**

##### **References**

Cited in State v. Israel, 124 M 152, 220 P 2d 1003, 1012.

#### **94-2418. (11173) Losses at gambling may be recovered in civil action.**

##### **Collateral References**

Assignment of, or succession to, stat-

utory right of action for recovery of money lost at gambling. 18 ALR 2d 999.

#### **94-2419. (11174) Action may be brought by any dependent person.**

##### **References**

Cited or applied in Miller v. Emerson, 120 M 380, 186 P 2d 220.

**94-2423. (11178) Immunity of witnesses.****Privilege or Immunity Must Be Claimed**

Even though it be assumed that the provisions of this section were broad enough to include testimony before a grand jury it would have no application where defendant failed to claim either privilege or immunity when called before the grand jury. *State v. Saginaw*, 124 M 225, 220 P 2d 1021, 1023, distinguished in 130 M 299, 301, 300 P 2d 952, 953.

**Testimony before Grand Jury**

The words "grand jury" should not be read into this section which gives im-

munity from prosecution to persons testifying before a "court or magistrate." *State v. Saginaw*, 124 M 225, 220 P 2d 1021, 1023.

Defendant cannot, because of testimony before grand jury, be immune from prosecution for offense charged in information filed by county attorney weeks before impanelment of a grand jury. *State v. Saginaw*, 124 M 225, 220 P 2d 1021, 1023; *State v. McRae*, 124 M 238, 220 P 2d 1025, 1027, distinguished in 130 M 299, 301, 300 P 2d 952, 953.

**94-2425. (11180) Repealed.****Repeal**

This section (Sec. 1, Ch. 20, L. 1909; Sec. 1, Ch. 92, L. 1909; Sec. 1, Ch. 55, L.

1915; Sec. 1, Ch. 103, L. 1929), relating to racing bets, was repealed by Sec. 15, Ch. 196, Laws 1965.

**94-2429. Slot machines—possession unlawful.** From and after the passage and approval of this act, it shall be a misdemeanor and punishable, as hereinafter provided, for any person to use, possess, operate, keep or maintain for use or operation or otherwise, anywhere within the state of Montana, any slot machine of any sort or kind whatsoever.

**History:** En. Sec. 1, Ch. 197, L. 1949.

**Title of Act**

An act prohibiting the licensing, use, operation, keeping or maintenance of slot machines within the state of Montana; defining certain terms used in this act; providing penalties for the violation of this act and repealing all acts and parts of

acts in conflict herewith; providing for a referendum on this act; and providing for local option elections in counties on the question of the licensing and operation of slot machines and specifying the procedure for holding said election.

**Collateral References**

Gaming 79(1).

38 C.J.S. Gaming § 99.

**94-2430. Slot machine defined.** A slot machine is hereby defined as a machine operated by inserting a coin, token, chip or trade check therein by the player and from the play of which he obtains, or may obtain, money, checks, chips or tokens redeemable in money. Merchandise vending machines where the element of chance does not enter into their operation are not within the provisions of this act.

**History:** En. Sec. 2, Ch. 197, L. 1949.

**94-2431. Person or persons defined.** In addition to their ordinary meaning, the word "person" or "persons," as used in this act, shall include both natural and artificial persons and all partnerships, corporations, associations, clubs, fraternal orders and societies, including religious, fraternal and charitable organizations.

**History:** En. Sec. 3, Ch. 197, L. 1949.

**94-2432. Penalty for possession or permitting use of slot machine.** Any person, partnership, club, society, fraternal order, corporation, co-operative association or any other person, individual or organization who violates

any of the provisions of this act, or who permits the use of any slot machine, as herein defined, on any place or premises owned, occupied or controlled by him or it, shall be guilty of a misdemeanor and shall be punishable by a fine of not less than one hundred dollars (\$100.00), nor more than five hundred dollars (\$500.00), or by imprisonment in the county jail for not less than thirty (30) days nor more than six (6) months, or by both such fine and imprisonment.

**History:** En. Sec. 4, Ch. 197, L. 1949.

#### Repealing Clause—Effective Date

Section 5 of Ch. 197, L. 1949 read, "All acts and parts of acts in conflict herewith, particularly all laws of this state and all ordinances of cities and towns relating to the issuance of licenses for the operation of slot machines, are hereby repealed and this act shall take effect and be in force and effect on and after the 31st day of December, 1950, as to sections 1 to 6, inclusive, provided a majority of the votes cast on this issue are against the operation of slot machines, and if a majority of the votes so cast are

for the operation of slot machines, the act shall be in effect on said date as to sections 8 to 15, inclusive." At the general election in November, 1950, the majority of votes was against the operation of slot machines. Sections 7 to 16 of Ch. 197, L. 1949 are therefore omitted.

#### Separability of Provisions

Section 6 of Ch. 197, L. 1949 read, "If any part of this act shall be declared by any court of competent jurisdiction to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this act."

### CHAPTER 25—HOMICIDE

#### 94-2501. (10953) Murder defined.

##### Conspiracy

A coconspirator may be found guilty of a crime committed by his fellow conspirator whether the fellow conspirator is alive or dead, competent or incompetent, at the time of his trial. *State v. Alton*, 139 M 479, 365 P 2d 527, 535.

All participants in a conspiracy may be found guilty of any of the degrees of murder or one or more may be found guilty

of each degree. *State v. Alton*, 139 M 479, 365 P 2d 527, 538.

##### References

Cited or applied in *State v. London*, 131 M 410, 310 P 2d 571.

##### Collateral References

Homicide in commission of felony where the killing was the act of one not a participant in the felony. 12 ALR 2d 210.

#### 94-2502. (10954) Malice defined—express or implied.

##### Operation and Effect

It is not necessary to show pre-existing malice against the deceased and malice may be shown directly or may be inferred from a lack of provocation. *State v. London*, 131 M 410, 310 P 2d 571, 582.

Malice may be express or implied and on proof of homicide by the defendant, malice is presumed, but the presumption does not exist in the presence of evidence tending to show that the act amounts only to man-

slaughter. *State v. Rivers*, 133 M 129, 320 P 2d 1004, 1006.

##### References

Cited or applied in *State v. Dillon*, 125 M 24, 230 P 2d 764, 767.

##### Collateral References

Inference of malice or intent to kill where killing is by blow without weapon. 22 ALR 2d 854.

#### 94-2503. (10955) Degrees of murder.

##### Felony-murder Rule

Where the evidence disclosed that the defendant hired two men to set fire and burn his service station, and during the course of the arson the two men were burned and subsequently died, the defendant was guilty of first degree murder under the felony murder rule since any death directly attributable to a plot to commit

arson makes all the conspirators in the arson plot equally guilty of first degree murder. *State v. Morran*, 131 M 17, 306 P 2d 679.

Under felony-murder rule, both parties were guilty of murder in first degree where evidence clearly showed that both had kidnapped and robbed victim even though evidence did not clearly show which of



two shot and killed victim. *State v. Corliss*, 150 M 40, 430 P 2d 632.

Information reciting commission of robbery and alleging that in perpetration of robbery, defendant killed deceased charged murder in first degree as against defendant's contention that information charged him with two separate and distinct crimes, that of robbery and premeditated murder. In re Petition of Dixon, 149 M 412, 430 P 2d 642.

#### First and Second Degrees Distinguished

In murder prosecution, jury was properly instructed that if it found that killing was unlawfully done by defendant with deliberation, premeditation and malice aforethought, defendant was guilty of murder in first degree but if it believed that killing was unlawfully done with malice aforethought, although not deliberate and premeditated, or that defendant

was incapable of premeditation and deliberation because of intoxication at time of killing, then crime was second-degree murder. *State v. Brooks*, 150 M 399, 436 P 2d 91.

#### Guilty of Lesser Offense

Where defendant was charged with murder in the second degree it was permissible for the jury to find him guilty of involuntary manslaughter. *State v. Allison*, 122 M 120, 199 P 2d 279, 288.

#### References

Cited or applied in *State v. Dillon*, 125 M 24, 230 P 2d 764, 767; *State v. London*, 131 M 410, 310 P 2d 571.

#### Collateral References

Homicide: causing one, by threats or fright, to leap or fall to his death. 25 ALR 2d 1186.

### 94-2505. (10957) Punishment for murder.

#### Commutation of Sentence

Inmate of state prison, who along with his codefendant had been sentenced to life imprisonment on plea of guilty to first degree murder, was not entitled to release from custody because his codefendant had been released from prison after commutation of his sentence by the governor. *Goff v. State*, 139 M 641, 367 P 2d 557, 558.

#### Operation and Effect

Where there is evidence sustaining finding by trial court of murder in the first degree supreme court will not interfere

with trial court's determination and the sentence of death. *State v. Palen*, 120 M 434, 186 P 2d 223, 224.

#### Sentence for Second-Degree Murder

Second-degree murder sentence of forty years in state prison imposed by trial judge, was not unduly harsh and unreasonable and was authorized by statute. *State v. Brooks*, 150 M 399, 436 P 2d 91.

#### References

*Andres v. United States*, 333 U S 740, 92 L Ed 1055, 68 S Ct 880; *Brown v. State*, 202 F Supp 29, 30.

### 94-2507. (10959) Manslaughter—voluntary and involuntary.

#### Subd. 2

#### Acts of Omission

Omission to perform an act required by law can be the basis for manslaughter. Hence, where evidence disclosed that a child, 5 months old, died due to starvation, and that his weight at death was only 5 pounds 14 ounces which was but ten ounces over his birth weight, and that the father and mother had the means with which to care for the child, the evidence would be sufficient to support the conviction of the parents for manslaughter. *State v. Bischoert*, 131 M 152, 308 P 2d 969.

The failure to obtain medical aid for one who is owed a duty is a sufficient degree of negligence as to constitute involuntary manslaughter provided death results from the failure to act. *State v. Mally*, 139 M 599, 366 P 2d 868, 872.

#### Burden of Proof

The state in prosecuting for manslaughter because of the failure to provide med-

ical aid is not required as an element of their proof to show the ability on behalf of the defendant to furnish such aid. If a defendant could not obtain aid either through normal procedure or the poor laws, this is a matter for his defense. *State v. Mally*, 139 M 599, 366 P 2d 868, 872.

#### Criminal Negligence

Insofar as the offense of involuntary manslaughter is concerned, the proof of culpability is supplied by evidence of criminal negligence. *State v. Strobel*, 130 M 442, 304 P 2d 606, 617, overruled on another point, 134 M 519, 525, 333 P 2d 1017, 1021.

It is wholly unnecessary in involuntary manslaughter cases to superimpose upon the requirement of the element of criminal negligence the further requirement that a determination must be made as to whether the act resulting in death might ordinarily be classified as *malum in se* or merely *malum prohibitum*, for, if the act is

done in a manner which is criminally negligent, it thereby becomes *malum in se* and thereby includes the element of *mens rea*. State v. Strobel, 130 M 442, 304 P 2d 606, 617, overruled on another point, 134 M 519, 525, 333 P 2d 1017, 1021.

Wilful or evil intent is not an element of involuntary manslaughter. State v. Pankow, 134 M 519, 333 P 2d 1017, 1021.

#### Driving While Intoxicated

Defendant was properly convicted of involuntary manslaughter since driving automobile on public highway while intoxicated is an "unlawful act" within meaning of statute, notwithstanding contention that since defendant was a juvenile and "delinquent child" within meaning of Juvenile Act, he could only be punished civilly for his acts. State v. Medicine Bull, — M —, 445 P 2d 916.

#### Instructions

Where judge instructed the jury in the language of the statute thereby giving the jury the definitions of both voluntary and involuntary manslaughter, defendant could not complain on ground there was no evidence of voluntary manslaughter in the case where the jury found him guilty of involuntary manslaughter. State v. Allison, 122 M 120, 199 P 2d 279, 289.

Where defendant was charged with second degree murder but the court withdrew the murder charge from the jury and presented the question of the guilt or innocence of the defendant for the crime of manslaughter, an instruction charging the jury that the state must prove the "intent" alleged in the information could properly have been modified to apply to the crime of manslaughter, however, conviction will not be set aside where it appears that no prejudice resulted. State v. Allison, 122 M 120, 199 P 2d 279, 291.

Where evidence showed that defendant was drunk and that he drove his automobile at a high rate of speed into the rear of another automobile going the same direction, causing it to catch fire and killing the occupants, the contention of defendant that he could not remember the events which transpired at that time did not establish an accident and instruction on responsibility for deaths caused by accident was not necessary. State v. Souhrada, 122 M 377, 204 P 2d 792, 796.

In prosecution for involuntary manslaughter the issue is one of criminal negligence rather than intent and giving of instruction that "intent is not an element of involuntary manslaughter" was not erroneous. State v. Souhrada, 122 M 377, 204 P 2d 792, 797.

Since the word "feloniously" is not necessary in the information it was not

necessary that the word "feloniously" be defined by the court's instructions and court's erroneous definition could not have been prejudicial particularly where other instructions clearly advised the jury of the elements of the crime. State v. Souhrada, 122 M 377, 204 P 2d 792, 797.

Where the court instructed the jury that in order to find the defendant guilty it must find that the defendant committed an unlawful act, not amounting to a felony, and that the unlawful act was the proximate cause of the injury and death; and then in a later instruction defined criminal negligence as such that amounts to a wanton, flagrant, or reckless disregard of consequences or wilful indifference of the safety or rights of others, the instructions taken as a whole are correct. For while the former may, standing alone, be inaccurate or even erroneous, yet as qualified and explained by other portions of the charge, *in par materia*, it fully and fairly submits the case to the jury. State v. Bosch, 125 M 566, 242 P 2d 477, 480.

#### Intent

A wilful or evil intent is not a requirement of involuntary manslaughter. State v. Pankow, 134 M 519, 333 P 2d 1017, 1021.

#### Murder and Manslaughter Distinguished

In murder prosecution, jury was properly instructed that if killing was unlawfully done by defendant without malice or if he was so intoxicated at time of killing that he was incapable of harboring malice aforethought, then crime was manslaughter. State v. Brooks, 150 M 399, 436 P 2d 91.

#### Operation and Effect

This section is a recognition of the frailty of human nature, and has as its purpose to reduce a homicide committed under the circumstances therein contemplated to the grade of manslaughter. State v. Messerly, 126 M 62, 244 P 2d 1054, 1056.

#### Photographs in Evidence

In a prosecution of defendant for failure to provide food to an infant child which resulted in the child's death, it was error to admit into evidence photographs of the body of the child which showed ghastly and gruesome looking sores or scars alleged to have been caused by dermatitis. The charge was for failure to provide food and not for the failure to provide medical care and such photographs in no way went to the proof of starvation. Their purpose could only arouse the human feelings of the jury without aiding them in further understanding the crime charged. State v. Bischert, 131 M 152, 308 P 2d 969, 973.

**Sufficiency of Evidence**

Where defendant had invited another person to stay or "bunk" with him for the night, and thereafter, while in his tavern, shot through the screen and door of his bedroom striking such person who was on the other side of the door, jury was justified in returning a verdict of guilty of involuntary manslaughter. *State v. Allison*, 122 M 120, 199 P 2d 279, 289.

Defendant who deliberately drove his car around curve at a speed which he must have known was dangerous to human lives, those of himself and his passengers was properly convicted of involuntary manslaughter. *State v. Pankow*, 134 M 519, 333 P 2d 1017, 1019.

In order to convict a person for manslaughter because of failure to provide medical aid it must appear from the evidence that the defendant's failure to obtain medical aid was the proximate cause of death. *State v. Mally*, 139 M 599, 366 P 2d 868, 872.

Evidence of intoxication, based on testimony of arresting officer that defendant was glassy eyed, had smell of alcohol on his breath and had physical appearance indicating intoxication, and on testimony of

companion of defendant that defendant had been drinking when they met and that while together, defendant had seven or eight beers, and on testimony of witness at scene of accident that defendant was unstable, could not walk very well and was very clumsy, was sufficient evidence to support verdict of involuntary manslaughter notwithstanding defendant's evidence that he had been knocked unconscious which resulted in his clumsy and awkward physical condition and that faulty mechanical condition of his pickup truck was proximate cause of decedent's death. *State v. Medicine Bull*, — M —, 445 P 2d 916.

**Sufficiency of Information**

Information for manslaughter against driver of death car was sufficient where it was in the prescribed form, complied with rules of pleading, and met the tests provided by section 94-6412. *State v. Haley*, 132 M 366, 318 P 2d 1084, 1085.

**Verdict of Manslaughter on Charge of Murder**

Where defendant was charged with murder in the second degree it was permissible for the jury to find him guilty of involuntary manslaughter. *State v. Allison*, 122 M 120, 199 P 2d 279, 288.

**94-2510. (10962) Proof of corpus delicti.****References**

Cited or applied in *State v. Storm*, 127 M 414, 265 P 2d 971, 974 (concurring opinion);

*State v. Campbell*, 146 M 251, 405 P 2d 978.

**94-2511. (10963) Excusable homicide.****Instructions**

Refusal to give instruction under this section was not reversible error in view of other instructions given. *State v. Allison*, 122 M 120, 199 P 2d 279, 289.

**Collateral References**

Homicide in commission of felony where the killing was the act of one not a participant in the felony. 12 ALR 2d 210.

**94-2512. (10964) Justifiable homicide by public officers.****Collateral References**

Homicide in commission of felony where

the killing was the act of one not a participant in the felony. 12 ALR 2d 210.

**94-2513. (10965) Justifiable homicide by other persons.****Self-Defense**

If homicide is to be justified by self-defense, there must be evidence that party doing killing acted under influence of reasonable fear that someone was going to be murdered or seriously injured; court thus properly refused defendant's instruction relative to self-defense where there was no evidence whatever that defendant acted under reasonable apprehension of death or great bodily harm and where wit-

nesses for state gave no indication that defendant acted in fear nor did defendant himself claim that he acted under any fear of harm. *State v. Brooks*, 150 M 399, 436 P 2d 91.

**Collateral References**

Homicide in commission of felony where the killing was the act of one not a participant in the felony. 12 ALR 2d 210.



**94-2514. (10966) Bare fear not to justify killing.****Self-Defense**

If homicide is to be justified by self-defense, there must be evidence that party doing killing acted under influence of reasonable fear that someone was going to be murdered or seriously injured; court thus properly refused defendant's instruction relative to self-defense where there was no

evidence whatever that the defendant acted under reasonable apprehension of death or great bodily harm and where witnesses for state gave no indication that defendant acted in fear nor did defendant himself claim that he acted under any fear of harm. *State v. Brooks*, 150 M 399, 436 P 2d 91.

**CHAPTER 26—KIDNAPING****Section 94-2604. Prisoner holding hostage.****94-2601. (10970.1) Kidnaping—penalty—place of trial.****Collateral References**

Seizure or detention for purpose of committing rape, robbery, or similar of-

fense as constituting separate crime of kidnaping. 17 ALR 2d 1003.

**94-2602. (10970.2) Kidnaping with intent to send person, etc.****Question for Jury**

Where defendant is charged with kidnaping with intent to secretly confine a prison guard it was a question for the jury whether defendant was acting under duress or coercion because of threats made to him by other convicts participating in riot. *State v. Walker*, 139 M 276, 362 P 2d 548, 550.

prison guard with a knife, after another inmate had disarmed the guard, until the inmates had placed the guard in isolation. *State v. Frodsham*, 139 M 222, 362 P 2d 413, 419.

On the trial of defendant charged with kidnaping with intent to secretly confine a prison guard a showing of actual physical violence or threat of personal injury are not required to prove the force necessary to establish the crime. *State v. Walker*, 139 M 276, 362 P 2d 548, 550.

**Sufficiency of Charge**

Charge of "kidnaping with intent to secretly confine" contained in information clearly charged violation of this statute. *State v. Corliss*, 150 M 40, 430 P 2d 632.

**Sufficiency of Evidence**

Defendant was guilty of confining prison guard secretly against his will where the evidence showed that defendant, an inmate of the state prison, walked behind

**Sufficiency of Information**

An information under this section is sufficient if it contains a statement of facts constituting the offense charged in ordinary and concise language so as to enable a person of common understanding to know what was intended. *State v. Randall*, 137 M 534, 353 P 2d 1054, 1056.

**94-2604. Prisoner holding hostage.** Every person committed to the Montana state prison, who, while at such state prison or while being conveyed to or from the Montana state prison, or while at a state prison farm or ranch, or while being conveyed to or from any such place, or while under the custody of prison officials, officers or employees, or while escaping or attempting to escape therefrom, holds as hostage any person within the state prison or who, unlawfully, by force or threat of force holds any person or persons against their will shall be guilty of a felony and shall be imprisoned in the state prison for a term not less than ten (10) years, such term of imprisonment to commence from the time he would have otherwise been released from said prison.

**History:** En. Sec. 1, Ch. 128, L. 1961.

**Title of Act**

An act prohibiting persons committed to

the state prison from holding hostages or from unlawfully holding persons against their will and fixing the penalty therefor; and providing for an effective date.

**Effective Date**

Section 2 of Ch. 128, Laws 1961 provided the act should be in effect from and after

its passage and approval. Approved March 2, 1961.

## CHAPTER 27—LARCENY AND FALSIFICATION OF PUBLIC RECORDS AND JURY LISTS

Section 94-2702. Uttering fraudulent checks or drafts—evidence.

94-2704.1. Possession of stolen livestock as evidence of larceny.

### 94-2701. (11368) Larceny defined.

**Agency**

Where defendant was sole owner of corporate collection agency which contracted with other corporations to collect debts owed to them, defendant was an agent of the other corporations and was properly charged under that portion of this section covering embezzlement when he did not pay over agreed portions of debts which he collected on behalf of other corporation. *State v. Holdren*, 143 M 103, 387 P 2d 446.

**Civil Liability**

In action based upon indemnity bond issued by defendant to indemnify plaintiff against loss from fraud or dishonesty of its station agent, allegation in complaint that the agent while in possession of money and property belonging to plaintiff, had wrongfully and dishonestly appropriated plaintiff's products and cash money, sufficiently stated a cause of action on which to predicate civil liability. *Waite v. Standard Accident Ins. Co.*, 132 M 220, 315 P 2d 989, 992.

**Harmless Error**

On the trial of defendant charged with committing larceny under this section by "taking" property, introduction of evidence by the state to prove that defendant committed larceny by "secreting" property, also provided for in the same section, was not prejudicial error where conviction was on a charge made with evidence which would also support conviction on a charge not made. *State v. Rindal*, 146 M 64, 404 P 2d 327.

**Instructions**

Conviction under this section requires proof of specific intent and an instruction that "when an unlawful act is shown to have been deliberately committed for the

purpose of injuring another, it is presumed to have been committed with a malicious and guilty intent. The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him" was erroneous. *State v. Garney*, 122 M 491, 207 P 2d 506, distinguished in 135 M 139, 147, 337 P 2d 924, 929.

**Larceny by Indians on Indian Territory**

A state district court was without jurisdiction to convict an Indian of larceny which occurred on Indian territory since under Acts of Congress (U. S. C. Tit. 18, §§ 1153, 3242) such an offense is within the exclusive jurisdiction of the United States. *State v. Pepion*, 125 M 13, 230 P 2d 961.

**Proof of Intent**

The intent required may be found from the facts and circumstances surrounding the transaction, but the mere existence of an unpaid debt does not demonstrate any intent fraudulently to appropriate the property. *State v. Smith*, 135 M 18, 334 P 2d 1099, 1102.

**Sufficiency of Information**

An information charging grand larceny by defendant, laid in the terms of this section is sufficient without particularity, so long as it enables the defendant to prepare a defense. *State v. Fairburn*, 135 M 449, 340 P 2d 157.

An information which charges the offense of larceny by a selling agent in the language of this section is sufficient and not vulnerable to a general demurrer; there is no requirement that the agency be detailed, and, as between owners, the amount of money stolen from each need not be particularized. *State v. Fairburn*, 135 M 449, 340 P 2d 157.

### 94-2702. (11369) Uttering fraudulent checks or drafts—evidence.

Any person who for himself or as the agent or representative of another or as an officer of a corporation, wilfully, with intent to defraud shall make or draw or utter or deliver, or cause to be made, drawn, uttered or delivered, any check, draft or order for the payment of money upon any bank or depository, or person, or firm, or corporation, knowing at the time

of such making, drawing, uttering or delivery that the maker or drawer has no funds or insufficient funds in or credit with such bank or depositary, or person, or firm, or corporation, for the payment of such check, draft, or order in full upon its presentation, although no express representation is made with the reference thereto, shall upon conviction be punished as follows: If there are no funds in or credit with such bank or depositary, or person, or firm, or corporation, for the payment of any part of such check, draft or order, upon presentation, then in that case the person convicted shall be punished by imprisonment in the state prison not exceeding five (5) years, or by a fine not exceeding five thousand dollars (\$5,000.00) or by both such fine and imprisonment; if such check, draft or order be for a sum of twenty-five dollars (\$25.00) or less, and there are some but not sufficient funds in or credit with such bank, or depositary, or person, or firm, or corporation, for the payment of such check, draft or order in full, then in that case the person so convicted shall be punished by imprisonment in the county jail not exceeding six (6) months, or by a fine not exceeding three hundred dollars (\$300.00) or by both such fine and imprisonment; if such check, draft or order be for a sum greater than twenty-five dollars (\$25.00) and there are some but not sufficient funds in or credit with such bank, or depositary, or person, or firm, or corporation, for the payment of such check, draft or order in full upon its presentation, then in that case the person so convicted shall be punished by imprisonment in the state prison not exceeding five (5) years, or by a fine not exceeding five thousand dollars (\$5,000.00) or by both such fine and imprisonment. As against the maker or drawer thereof, the making, drawing, uttering or delivering of such check, draft or order as aforesaid shall be prima facie evidence of intent to defraud and of knowledge of no funds or insufficient funds, as the case may be, in or credit with such bank, or depositary, or person, or firm, or corporation, for the payment of such check, draft or order in full upon its presentation, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, within five (5) days after receiving notice that such check, draft, or order has not been paid by the drawee. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank, depositary, person, firm or corporation, for the payment of such check, draft or order.

**History:** En. Sec. 881, Pen. C. 1895; re-en. Sec. 8643, Rev. C. 1907; amd. Sec. 1, Ch. 63, L. 1919; re-en. Sec. 11369, R. C. M. 1921; amd. Sec. 1, Ch. 135, L. 1957. Cal. Pen. C. Sec. 476a.

#### **Amendment**

The 1957 amendment made numerous changes in this section. For section prior to amendment see parent volume.

#### **Repealing Clause**

Section 2 of Ch. 135, Laws 1957, repealed all acts and parts of acts in conflict therewith.

#### **Evidence of Intent**

In prosecution for uttering and deliver-

ing a fraudulent check evidence was properly received as to other checks drawn on prior occasions on banks in which defendant had no account as such testimony tended to show defendant's intent to defraud. *State v. Tully*, 148 M 166, 418 P 2d 549, 550.

#### **Operation and Effect**

Held, that where a person was convicted under this section, the proper procedure for review of errors was by appeal under the statutes and not by seeking at a later date the common-law writ of *coram nobis*. Were it shown that the defendant's case was exigent, as for example, that although innocent of any crime he was nevertheless arbitrarily sentenced and wrongfully im-



prisoned under that sentence, and if then the existing remedies by appeal as prescribed by our statutes and as well the usual writs to which this court customarily turns to prevent an injustice were found in truth inadequate, the court would not hesitate to design a further remedial writ so that the court could meet the emergency and attain the ends of justice, otherwise

denied. *State v. Zumwalt*, 129 M 529, 291 P 2d 257, 260. (Dissenting opinion, 129 M 529, 291 P 2d 257, 262 based on the opinion that the defendant was innocent of the crime charged and arbitrarily sentenced.)

#### References

*Petition of Spangler*, 146 M 344, 406 P 2d 686.

### 94-2704. (11371) Grand larceny defined.

#### Aiding and Abetting

While the statute defines larceny as the taking of property from the person of another yet it is sufficient to show defendant's guilt that he aided or abetted in the commission of the crime under section 94-6423 because all persons concerned in the commission of a crime are principals under section 94-204. *State v. Maciel*, 130 M 569, 305 P 2d 335, 336.

#### Disposal of Stolen Property

If the crime of larceny has been completed, i. e., the taking and carrying away of the property has come to an end, then anyone subsequently assisting the thieves in the disposal of the stolen property would not be guilty of larceny. *State v. Guay*, 138 M 362, 357 P 2d 19, 22.

#### Effect of Ownership Not Proven as Alleged

Where the information alleges the ownership of the property, such allegation must be proven; proof of a brand only is not sufficient proof of the ownership of an animal bearing such brand. *State v. Elmore*, 126 M 232, 247 P 2d 488, 492.

#### Felonious Nature of Crime

Crime denominated by this statute is a felony. *Gransberry v. State*, 149 M 158, 423 P 2d 853.

#### Larceny by Bailee

Where defendant charged with grand larceny by bailee did not deny that he received a check from the complaining witness, but his defense was that it was a loan instead of a payment for an automobile, evidence as to whether the check was a loan or payment for the automobile was admissible over objection that it permitted a witness to vary a written instrument by parol testimony. *State v. Ahl*, 140 M 305, 371 P 2d 7, 9.

Defendant, who admitted title to automobile in the complaining witness and that he accepted and took custody of a check, and agreed that the money was to pay for the automobile, but failed to deliver the automobile, requiring the com-

plaining witness to again pay for it, violated his trust as bailee by appropriating the money to his own use and was guilty of grand larceny by bailee. *State v. Ahl*, 140 M 305, 371 P 2d 7, 10.

#### Multi-Count Information

Information in five counts, three of which alleged larceny of more than one cow, did not violate "former jeopardy" provision of constitution since each count states separate offense and since grand larceny statute makes theft of each separate animal a separate and distinct offense and since statute providing for joinder of offenses permits information to charge more than one offense in separate counts. *State v. Johnson*, 149 M 173, 424 P 2d 728.

#### Operation and Effect

Conviction for larceny cannot be sustained where the evidence connecting the defendant with the hide and asportation of a live steer amounts to no more than suspicion and conjecture. *State v. Elmore*, 126 M 232, 247 P 2d 488, 492.

It is grand larceny to take money from the person of another with a felonious intent no matter what the amount is that is taken. *State v. Peschon*, 131 M 330, 310 P 2d 591, 595.

Conviction of defendant of grand larceny of an automobile was reversed where the actual taking and asportation of the car in question was not proven. *State v. Fairbanks*, 140 M 243, 370 P 2d 497, 499. (Dissenting opinions, 140 M 243, 370 P 2d 497, 500.)

#### Transporting of Stolen Property

Where one joins with a person, or persons in committing the crime of larceny and assists in the transporting and disposition of property which he knows to be stolen, he may be convicted of larceny. This is true even though the one assisting in the transporting and disposing of the stolen property was not in any manner connected with the initial taking of the property. *State v. Guay*, 138 M 362, 357 P 2d 19, 22.

**94-2704.1. Possession of stolen livestock as evidence of larceny.** The possession, claim of ownership or control over recently stolen livestock

shall be deemed prima facie evidence of guilt of larceny of that livestock unless this presumption is rebutted or contradicted by other credible evidence.

**History:** En. Sec. 1, Ch. 202, L. 1965.

#### **Title of Act**

An act to provide a reputable [sic] presumption that possession of recently stolen livestock shall be deemed prima facie evidence of guilt of larceny.

#### **Repealing Clause**

Section 2 of Ch. 202, Laws 1965 repealed all acts and parts of act in conflict therewith.

### **94-2706. (11373) Punishment of grand larceny.**

#### **References**

In re Williams' Petition, 145 M 45, 399 P 2d 732.

### **DECISIONS UNDER FORMER LAW**

#### **Plea of Guilty**

Defendant's plea of "guilty" to information charging him with grand larceny rendered him subject to a sentence of "not less than one nor more than fourteen years" imprisonment, depending upon the view taken by the trial judge of the evidence to be presented to him, in open court, showing circumstances either in aggravation or mitigation of punishment. Kuhl v. District Court, 139 M 536, 366 P 2d 347, 351.

The extent of defendant's punishment on plea of guilty to grand larceny should have been determined by the exercise of a sound discretion on the part of the trial judge after the circumstances had

been "presented by the testimony of witnesses examined in open court" specifically provided for in sections 94-7813 and 94-7814 (since repealed). Kuhl v. District Court, 139 M 536, 366 P 2d 347, 351.

The sentence of a defendant, who pleaded guilty to grand larceny, to four years in the state prison was reduced to one year by the supreme court where trial court passed sentence upon receipt of private reports without allowing defendant or his counsel to learn of the representations in the reports and a hearing to present evidence to refute such representations as provided in sections 94-7813 and 94-7814 (since repealed). Kuhl v. District Court, 139 M 536, 366 P 2d 347, 365.

### **94-2717. (11384) Claim of title, ground of defense.**

#### **Evidence of Intent**

Where a selling agent is charged with larceny and sets up the defense of appropriating a customer's check under claim of right as a commission, testimony of clergyman concerning conversation had be-

tween himself and accused as to prior statements made by owner to agent, is inadmissible as hearsay since it is a self-serving declaration. State v. Fairburn, 135 M 449, 340 P 2d 157.

### **94-2721. (11388) Receiver of stolen property.**

#### **Essential Elements of Crime**

Proof that the defendant knew the property was stolen is an essential element of the crime. The evidence is not sufficient where the state relies on a bill of sale which describes "3 cow hides red no brand" and in fact the hides had brands and cattle was missing from the brand owners, while the defendant proves that when he received the hides they were bundled up and so stiffly frozen that they could not be examined to see if they had brands. State v. Gilbert, 126 M 171, 246 P 2d 814, 815.

#### **Operation and Effect**

Conviction for receiving stolen goods cannot be sustained where the informa-

tion charged that the defendant received a deepfreeze knowing the same to have been stolen from the true owner, Missoula County, while the facts were that the defendant was the county surveyor and he ordered a deepfreeze from a company and charged it to the county. Since the acts of the surveyor were unlawful, the county never purchased the freezer and never had it in its possession and at no time had title to the deepfreeze; therefore, Missoula County was never the owner from whom it was stolen as charged in the information. State v. Bourdeau, 126 M 266, 246 P 2d 1037, 1038.

#### **Sufficiency of Information**

It is not necessary to allege ownership,

or that ownership is unknown, where the information otherwise describes the stolen goods with sufficient accuracy to apprise the defendant to prepare his defense and to protect him from double jeopardy. *State v. Peters*, 146 M 188, 405 P 2d 642.

#### References

*Kuhl v. District Court*, 139 M 536, 366 P 2d 347, 348.

### CHAPTER 28—LIBEL

Section 94-2807. Publishing a true report of public proceedings privileged.

**94-2807. (10995) Publishing a true report of public proceedings privileged.** No reporter, editor, or proprietor of any newspaper, nor any owner, licensee, or operator of a visual or sound radio broadcasting station or network of stations, nor any agent or employee of any such owner, licensee, or operator, is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice in making such report, which is not implied from the mere fact of publication or broadcast.

**History:** En. Sec. 436, Pen. C. 1895; re-en. Sec. 8331, Rev. C. 1907; re-en. Sec. 10995, R. C. M. 1921; amd. Sec. 1, Ch. 13, L. 1951. Cal. Pen. C. Sec. 254.

#### Amendment

The 1951 amendment inserted the words "nor any owner, licensee, or operator of a visual or sound radio broadcasting station or network of stations, not any agent or employee of any such owner, licensee, or operator," and "or broadcast."

#### Repealing Clause

Section 2 of Ch. 13, L. 1951 repealed all acts and parts of acts in conflict therewith.

#### Effective Date

Section 3 of Ch. 13, L. 1951 provided the act should be in effect from and after its passage and approval. Approved February 2, 1951.

### CHAPTER 29—LEGISLATURE—OFFENSES AGAINST

**94-2906. (10839) Receiving bribes by members of the legislative, etc.**

#### References

Cited in *United States v. Johnson*, 215 F Supp 300, 306.

### CHAPTER 30—LOTTERIES

**94-3001. (11149) Lottery defined.**

#### Amendment of Constitution

Proposed initiative measure No. 63, which would legalize lotteries and repeal sections 94-3001 to 94-3011, could not be considered as an amendment to the Montana constitution where it did not comply with sections 8 or 9, article XIX, which set forth the manner of constitutional amendment. *State ex rel. Steen v. Murray*, 144 M 61, 394 P 2d 761, 764.

#### Initiative Measure Unconstitutional

Proposed initiative measure No. 63, which would legalize lotteries and repeal sections 94-3001 to 94-3011, is unconstitutional.

*State ex rel. Steen v. Murray*, 144 M 61, 394 P 2d 761, 763, 764.

#### Numbers Games

A numbers game, whether called Chinese lottery, "The Crown Game," "The Crown punchboard game" or any other game is a lottery. *State ex rel. Olsen v. Crown Cigar Store*, 124 M 310, 220 P 2d 1029, 1032.

#### Punch Boards

Punch boards constitute a lottery. *State ex rel. Harrison v. Deniff*, 126 M 109, 245 P 2d 140, 141.

In an action for violation of this sec-



tion it was no defense that the defendant had offered to pay for the operation of such punch boards in accordance with Ch. 201, Laws 1951, which purports to license trade stimulators such as punch boards since it is not competent for the legislature to authorize lotteries in view of Const. Art. 19, sec. 2 and the case of State ex rel. Harrison v. Deniff. State v. Tursich, 127 M 504, 267 P 2d 641, 642.

#### Slot Machines

The operation of a slot machine is a lottery and banned by the criminal laws of this state. State v. Marek, 124 M 178, 220 P 2d 1017, 1019; State v. Read, 124 M 184, 220 P 2d 1020; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032.

#### Valuable Consideration

Where one is required to make an outlay of money in order to participate in a scheme whereby an award is made by chance, the participant pays valuable consideration for the chance to participate, notwithstanding the fact he may also receive merchandise at the same time that the outlay is made. State v. Cox, 136 M 507, 349 P 2d 104. (State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 132 P 2d 689, distinguished.)

#### References

Cited in State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 1000.

### 94-3003. (11150) Punishment for drawing lottery.

#### Cross-Reference

See note to sec. 94-3001. State v. Marek, 124 M 178, 220 P 2d 1017, 1019.

#### Collateral References

Entrapment to commit offense with respect to gambling or lotteries. 31 ALR 2d 1212.

### 94-3011. (11158) Punishment.

#### Cross-Reference

See note to sec. 94-3001. State v. Marek, 124 M 178, 220 P 2d 1017, 1019.

## CHAPTER 32—MALICIOUS INJURIES TO RAILROADS, HIGHWAYS AND OTHER PROPERTY

Section 94-3202. Injuries to milestones, guideposts, trees.

94-3203. Tampering with telegraph, telephone and electric systems—penalty.

94-3211. Removal, injury or destruction of telephone, telegraph and electric facilities—penalty.

### 94-3201. (11464) Repealed.

#### Repeal

This section (Sec. 1031, Pen. C. 1895), relating to injuries to highways and

bridges, was repealed by Sec. 12-109, Ch 197, Laws 1965, effective December 31, 1966. See sec. 32-4402.

**94-3202. (11465) Injuries to milestones, guideposts, trees.** (1) Every person who maliciously removes or injures any mileboard, post, or stone, or guidepost or any inscription on such, erected on any highway, is guilty of a misdemeanor.

(2) Every person who maliciously injures or destroys any shade or ornamental tree on any highway is guilty of a misdemeanor.

**History:** En. Sec. 1032, Pen. C. 1895; re-en. Sec. 8737, Rev. C. 1907; re-en. Sec. 11465, R. C. M. 1921; amd. Sec. 12-107, Ch. 197, L. 1965. Cal. Pen. C. Sec. 590.

#### Amendment

The 1965 amendment designated the previous text as subsection (1); made a minor change therein; and added subsection (2).

**94-3203. (11466) Tampering with telegraph, telephone and electric systems—penalty.** Any person who maliciously and wilfully taps, or makes any connection with any telegraph or telephone line, wire, cable, or instru-

ment, or electric power line, wire or cable belonging to another, or maliciously and wilfully reads, takes or copies any messages, communication or report intended for another passing over any such telegraph or telephone line, wire, or cable, in this state, or who wilfully and maliciously prevents, obstructs or delays by any means or contrivance whatsoever the sending, transmission, conveyance or delivery in this state of any message, communication or report by or through any telegraph or telephone line, wire or cable or who uses any apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned, or who aids, agrees with, employs or conspires with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than three hundred dollars (\$300.00) nor more than one thousand dollars (\$1,000.00) or imprisonment in the county jail not exceeding one year, or both, in the discretion of the court. And it shall be unlawful for any person who, for nonpayment of dues, tolls, or other good and sufficient reasons, has been disconnected from service with any telephone, telegraph or electric light or power system in this state to connect or allow himself to be connected with any such company lines without direct and express permission from the official authorized to permit such reconnection. Any person or persons who shall violate or cause to be violated this provision shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100.00) or imprisonment in the county jail for ten days, or both, in the discretion of the court.

**History:** En. Sec. 1033, Pen. C. 1895; re-en. Sec. 8738, Rev. C. 1907; re-en. Sec. 11466, R. C. M. 1921; re-en. Sec. 1, Ch. 66, L. 1929; amd. Sec. 2, Ch. 174, L. 1963. Cal. Pen. C. Sec. 591.

#### Amendment

The 1963 amendment deleted the words "displaces, removes, injures, destroys or obstructs any telegraph, telephone or electric light line, wire, cable, pole or conduit belonging to another, or the material or property appurtenant thereto, or maliciously and wilfully cuts, breaks" which followed "wilfully and maliciously" in the first clause of the section; and inserted "or electric power line, wire or cable" after

"telephone line, wire, cable, or instrument" near the beginning of the section.

#### Repealing Clauses

Section 3 of Ch. 174, Laws 1963 read "Section 94-3209 of the Revised Codes of Montana, 1947, is hereby repealed."

Section 4 of Ch. 174, Laws 1963 repealed all acts and parts of acts in conflict therewith.

#### Effective Date

Section 5 of Ch. 174, Laws 1963 provided the act should be in effect from and after its passage and approval. Approved March 5, 1963.

### 94-3209. (11473) Repealed.

#### Repeal

This section (Sec. 1, Ch. 71, L. 1903), relating to interference with electric lines

or apparatus, was repealed by Sec. 3, Ch. 174, Laws 1963.

**94-3211. Removal, injury or destruction of telephone, telegraph and electric facilities—penalty.** Any person who wilfully and maliciously displaces, removes, injures or destroys any public telephone instrument or any part thereof or any equipment or facilities associated therewith, or who enters or breaks into any coin box associated therewith, or who wilfully and maliciously cuts, breaks, displaces, removes, injures or destroys any

microwave facilities or any telegraph or telephone line, wire, cable, pole or conduit or an electric power line, cable, transformer, pole or conduit or facilities associated therewith belonging to another or the material or property appurtenant thereto is guilty of a felony and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars (\$1,000.00) or by imprisonment in the state prison for not more than five (5) years, or by both such fine and imprisonment.

**History:** En. 94-3211 by Sec. 1, Ch. 174, L. 1963.

#### Title of Act

An act to amend Chapter 32 of Title 94 of the Revised Codes of Montana, 1947, relating to crimes involving malicious injuries to railroads, highways and other property, by adding thereto a new section to be numbered 94-3211, making it a felony for any person to wilfully and maliciously displace, remove, injure or destroy any public telephone instrument or part thereof or equipment or facilities associated therewith, or to enter or break into any coin box associated therewith, or to wilfully and maliciously cut, break, displace, remove, injure or destroy any microwave facilities or any telegraph or telephone line, wire, cable, pole or conduit or electric power line, cable, pole, conduit or

facilities associated therewith belonging to another or the material or property appurtenant thereto, and providing a penalty therefor, and by amending section 94-3203 of the Revised Codes of Montana, 1947, making it a misdemeanor to tamper with telegraph, telephone and electric systems, by deleting therefrom so much thereof as makes it a misdemeanor for any person to wilfully and maliciously displace, remove, injure, destroy or obstruct any telegraph, telephone or electric light line, wire, cable, pole or conduit belonging to another, or the material or property appurtenant thereto, and providing it shall be a misdemeanor to wilfully or maliciously tamper with electric power lines; repealing section 94-3209 of the Revised Codes of Montana, 1947; repealing all acts and parts of acts in conflict herewith; and providing an effective date.

### CHAPTER 33—MALICIOUS MISCHIEF GENERALLY

Section 94-3334. Injury to trees on public lands.

#### 94-3305. (11478) Use of automobiles without consent of owners, etc.

##### Sentence As Determining Felonious Nature of Violation

Whether act proscribed by this statute is felony or misdemeanor is not determined until sentence is imposed. *Gransberry v. State*, 149 M 158, 423 P 2d 853.

##### References

Cited or applied in the dissenting opinion in *State v. Quinlan*, 126 M 52, 244 P 2d 1058, 1061; *United States v. Brickles*, 177 F Supp 944, 947.

**94-3334. (11507) Injury to trees on public lands.** Every person who commits a trespass on or any injury to any state lands or the improvements thereon, or who, without the proper authority, cuts, fells, girdles, injures or destroys any trees or timber upon any of the school, university or other state lands, or removes or attempts to remove the same, or knowingly purchases or receives such trees or timber, or advises the removal thereof, is guilty of a misdemeanor, and is also liable to the state for three (3) times the value of said trees or timber, or lumber into which the same are converted.

All fines collected and all moneys recovered by virtue of this section must be paid into the trust fund if the lands involved are held in trust either through deed or grant or be paid to the funds of the state departments administering such lands where lands not held in trust are involved.

**History:** Ap. p. Sec. 1, p. 256, L. 1891; 8773, Rev. C. 1907; re-en. Sec. 11507, R. C. en. Sec. 1076, Pen. C. 1895; re-en. Sec. M. 1921; amd. Sec. 1, Ch. 221, L. 1955.



**Amendment**

The 1955 amendment substituted that part of the second paragraph beginning

with the words "trust fund \* \* \*" for "school fund of the state."

**CHAPTER 35—MISCELLANEOUS OFFENSES**

- Section 94-3527. Same—who excepted from act.  
 94-3527.1. Possession of weapon by prisoner.  
 94-3565. Ditch overflowing on highway.  
 94-3578.1. When Montana residents may purchase rifles or shotguns in contiguous states.  
 94-3578.2. When residents of contiguous state may purchase rifles or shotguns in Montana.  
 94-3579. Firearms—use of by children under the age of fourteen years prohibited.  
 94-35-106. Intoxicating liquors—penalty for giving or selling to any person under the age of twenty-one years.  
 94-35-106.1. Jurisdiction of offenses.  
 94-35-106.2. Possession of beer or liquor by minor—misdemeanor.  
 94-35-204. Stolen livestock—seizure and confiscating of vehicle used to transport.  
 94-35-221.1. Failure to relinquish party line or telephone for emergency call—penalty.  
 94-35-221.2. Lack of knowledge as defense—emergency as defense.  
 94-35-221.3. False pretext of emergency—penalty.  
 94-35-221.4. Printing of act in directories.  
 94-35-221.5. Abuse, harassment or extortion by telephone—evidence of intent—venue of offenses—penalty.  
 94-35-221.6. False statements to harass by telephone—venue of offenses.  
 94-35-258. Endurance races of horses prohibited.  
 94-35-259. Penalty for running endurance horse race.  
 94-35-260. State tax stamps—failure to affix or cancel—removal—penalty—counterfeiting tax stamp or insignia of Montana or other state—penalty.  
 94-35-261. Importing or selling farm machinery with altered, defaced or removed serial number.  
 94-35-262. Altering, defacing or removing serial number on farm machinery.  
 94-35-263. Penalty.  
 94-35-264. Furnishing certain articles to and receiving articles from prisoners in state prison—receiving such articles by prisoners—felony.  
 94-35-265. Abandoning or permitting abandoned icebox in dangerous condition—penalty.  
 94-35-269. Hunting in careless or reckless manner—failure to assist person injured or wounded—misdemeanor.  
 94-35-270. Delivery of grain containing toxic chemicals to public warehouses.  
 94-35-271. Penalty for violation.  
 94-35-271.1. Coloration of wheat, oats, rye or barley treated with injurious or toxic substances.  
 94-35-271.2. Sale or offering for sale product in violation of act prohibited.  
 94-35-271.3. Violation constitutes misdemeanor.  
 94-35-272. Unlawful operation, use, interference, or tampering of aircraft—penalty.  
 94-35-273. Switch blade knives—possession, selling, using, giving, or offering for sale—penalty—collectors.  
 94-35-274. Recording of conversation without knowledge of parties prohibited.  
 94-35-275. Public officials and public meetings exempt—warning of recording.

**94-3506. (10921) Arrests, seizure or levy upon property, etc.****Collateral References**

False imprisonment: liability of pri-

vate citizen for false arrest by officer.  
 21 ALR 2d 643.

**94-3509. (10940) Attorneys forbidden to defend prosecutions, etc.****Improper Representation**

Where prisoner was represented in a second case by court-appointed counsel who had formerly prosecuted him while serving as county attorney in a case resulting in the prior conviction with which

he was charged in the second case, the error, if any, should have been raised in the district court by a writ of error coram nobis and not by habeas corpus proceeding in the supreme court. *Butler v. State*, 139 M 437, 365 P 2d 822, 823.

**94-3513. (11296) Repealed.****Repeal**

This section (Sec. 752, Pen. C. 1895), relating to boxing and wrestling matches,

was repealed by Sec. 4, Ch. 171, Laws 1953.

**94-3525. (11302) Carrying certain concealed weapons in cities, etc.****Collateral References**

Forfeiture of weapon unlawfully carried,

before trial of individual offender. 3 ALR 2d 752.

**94-3527. (11304) Same—who excepted from act.** The preceding sections shall not apply to:

1 to 15. \* \* \* [Same as parent volume.]

16. United States immigration and naturalization service officers.

**History:** En. Sec. 3, Ch. 74, L. 1919; re-en. Sec. 11304, R. C. M. 1921; amd. Sec. 1, Ch. 63, L. 1969.

**References**

Cited or applied in *State v. Nickerson*, 126 M 157, 247 P 2d 188, 192.

**Amendments**

The 1969 amendment added item (16).

**94-3527.1. Possession of weapon by prisoner.** Every prisoner committed to the Montana state prison, who, while at such state prison, or while being conveyed to or from the Montana state prison, or while at a state prison farm or ranch, or while being conveyed to or from any such place, or while under the custody of prison officials, officers or employees, possesses or carries upon his person or has under his custody or control without lawful authority, a dirk, dagger, pistol, revolver, sling-shot, sword-cane, billy, knuckles made of any metal or hard substance, knife, razor, not including a safety razor, or other deadly weapon, is guilty of a felony and shall be punishable by imprisonment in the state prison for a term not less than five (5) years nor more than fifteen (15) years. Such term of imprisonment to commence from the time he would have otherwise been released from said prison.

**History:** En. Sec. 1, Ch. 131, L. 1961.

**Effective Date**

Section 2 of Ch. 131, Laws 1961 provided the act should be in effect from and after its passage and approval. Approved March 2, 1961.

**Title of Act**

An act relating to deadly weapons; prohibiting the carrying or possession of deadly weapons by persons committed to the Montana state prison and fixing the penalty therefor; and providing for an effective date.

**94-3540. (10944) Criminal contempt.****Collateral References**

Contempt for disobedience of orders in criminal matters where beyond court's jurisdiction. 12 ALR 2d 1059.

Right of witness to refuse to answer,

on the ground of self-incrimination, as to membership in or connection with party, society, or similar organization or group. 19 ALR 2d 388.

**94-3550. (11579) Repealed.****Repeal**

This section (Sec. 2514, Civ. C. 1895; re-en. Sec. 8835, Rev. C. 1907; re-en. Sec. 11531, R. C. M. 1921; amd. Sec. 12-108, Ch. 197, L. 1965), relating to the penalty for defraud-

ing inn- and hotel-keepers, was repealed by Sec. 2, Ch. 135, Laws 1967. For new law, see sec. 94-1831.

**94-3565. (11531) Ditch overflowing on highway.** Every person who owns, constructs or uses a ditch or flume, and allows the water therein to flow onto a public highway, or in or upon the property of another, is punishable by a fine not exceeding one hundred dollars (\$100).

**History:** En. Sec. 1162, Pen. C. 1895; re-en. Sec. 8835, Rev. C. 1907; re-en. Sec. 11531, R. C. M. 1921; amd. Sec. 12-108, Ch. 197, L. 1965.

**Amendment**

The 1965 amendment inserted "constructs or uses" after "owns"; and substituted "flow onto" for "overflow the side and run into" before "a public highway."

**Repealing Clause**

Section 12-109 of Ch. 197, Laws 1965 read: "Sections 16-1004.1, 16-1118, 16-1127, 16-1128, 16-2009, 16-2201, 16-2202, 16-2203, 16-2204, 16-3311, 16-3312, 32-102, 32-103, 32-104, 32-105, 32-106, 32-107, 32-201, 32-202, 32-203, 32-204, 32-205, 32-206, 32-207, 32-208, 32-302, 32-303, 32-304, 32-305, 32-306, 32-307, 32-308, 32-309, 32-310, 32-311, 32-312, 32-313, 32-314, 32-316, 32-401, 32-402, 32-403, 32-404, 32-405, 32-406, 32-407, 32-408, 32-409, 32-410, 32-411, 32-412, 32-413, 32-415, 32-416, 32-501, 32-502, 32-503, 32-504, 32-505, 32-506, 32-507, 32-509, 32-510, 32-511, 32-512, 32-513, 32-514, 32-515, 32-516, 32-517, 32-518, 32-519, 32-520, 32-521, 32-522, 32-523, 32-524, 32-525, 32-526, 32-601, 32-602, 32-701, 32-702, 32-703, 32-704, 32-705, 32-706, 32-707, 32-708, 32-709, 32-710, 32-711, 32-713, 32-714, 32-715, 32-901, 32-902, 32-903, 32-904, 32-905, 32-1002, 32-1003, 32-1004, 32-1005, 32-1006, 32-1007, 32-1008, 32-1009, 32-1010, 32-1012, 32-1013, 32-1014, 32-1016, 32-1301, 32-1601, 32-1602,

32-1603, 32-1604, 32-1604.1, 32-1605, 32-1606, 32-1606.1, 32-1607, 32-1608, 32-1609, 32-1610, 32-1613, 32-1614, 32-1615, 32-1615.1, 32-1615.2, 32-1615.3, 32-1616, 32-1617, 32-1618, 32-1620, 32-1622, 32-1623, 32-1624, 32-1625, 32-1626, 32-1801, 32-1802, 32-1803, 32-1804, 32-1901, 32-1902, 32-1903, 32-1904, 32-1905, 32-1906, 32-1907, 32-1908, 32-1909, 32-1910, 32-1911, 32-1912, 32-1913, 32-1914, 32-1915, 32-2001, 32-2002, 32-2003, 32-2004, 32-2005, 32-2006, 32-2007, 32-2008, 32-2009, 32-2009.1, 32-2010, 53-615, 53-615.1, 53-616, 53-617, 53-618, 53-619, 53-621, 53-622, 53-623, 53-628, 53-629, 53-630, 53-631, 53-634, 53-635, 53-636, 53-637, 53-638, 53-639, 53-643, 84-1812(1), 84-1812(2), 84-1815, 84-1817, 89-821, 89-822, 94-3201, R. C. M. 1947, are repealed."

**Separability Clause**

Section 12-110 of Ch. 197, Laws 1965 read "It is the intent of the legislative assembly that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

**Effective Date**

Section 12-111 of Ch. 197, Laws 1965 read "This act shall be effective on December 31, 1966."

**94-3573. (11567) Repealed.****Repeal**

This section (Sec. 1, Ch. 66, L. 1907), relating to the showing of motion pictures

depicting crimes, was repealed by Sec. 1, Ch. 52, Laws 1959, effective February 26, 1959.

**94-3576. (10988) False imprisonment, definition and punishment.****Failure to Take Person Promptly before Magistrate**

In an action for false imprisonment brought by plaintiff against a sheriff and the surety on his official bond based on unnecessary delay in taking plaintiff be-

fore a magistrate, it was necessary that the plaintiff prove that a magistrate was available on the particular day when the false imprisonment allegedly occurred. *Rounds v. Bucher*, 137 M 39, 349 P 2d 1026.

**94-3578.1. When Montana residents may purchase rifles or shotguns in contiguous states.** Residents of Montana may purchase any rifle or



rifles and shotgun or shotguns in a state contiguous to Montana, provided that such residents conform to the applicable provisions of the federal Gun Control Act of 1968, and regulations thereunder, as administered by the United States secretary of the treasury, and provided further, that such residents conform to the provisions of law applicable to such purchase in Montana and in the state in which the purchase is made.

**History:** En. Sec. 1, Ch. 87, L. 1969.

**Title of Act**

An act to allow residents of Montana to purchase any rifle or rifles and shotgun or shotguns in a state contiguous to Mon-

tana and to allow residents of contiguous states to purchase any rifle or rifles and shotgun or shotguns in Montana, provided that such persons conform to the federal Gun Control Act of 1968 and applicable state laws.

**94-3578.2. When residents of contiguous state may purchase rifles or shotguns in Montana.** Residents of a state contiguous to Montana may purchase any rifle or rifles and shotgun or shotguns in Montana, provided that such residents conform to the applicable provisions of the federal Gun Control Act of 1968, and regulations thereunder, as administered by the United States secretary of the treasury, and provided further that such residents conform to the provisions of law applicable to such purchase in Montana and in the state in which such persons reside.

**History:** En. Sec. 2, Ch. 87, L. 1969.

**Effective Date**

Section 3 of Ch. 87, Laws 1969 pro-

vided the act should be in effect from and after its passage and approval. Approved February 24, 1969.

**94-3579. (11565) Firearms—use of by children under the age of fourteen years prohibited.** It shall be unlawful for any parent, guardian, or other person, having the charge or custody of any minor child under the age of fourteen years, to permit such minor child to carry or use any firearms of any description, loaded with powder and lead, in public, except when such child is in the company of such parent or guardian or under the supervision of a qualified firearms safety instructor, who has been duly authorized by such parent or guardian.

**History:** En. Sec. 1, Ch. 111, L. 1907; Sec. 8879, Rev. C. 1907; re-en. Sec. 11565, R. C. M. 1921; amd. Sec. 1, Ch. 139, L. 1963.

**Amendment**

The 1963 amendment added "or under the supervision of a qualified firearms safety instructor, who has been duly au-

thorized by such parent or guardian" at the end of the section.

**Effective Date**

Section 2 of Ch. 139, Laws 1963 provided the act should be in effect from and after its passage and approval. Approved March 2, 1963.

**94-35-102, 94-35-103. (11314, 11259) Repealed.**

**Repeal**

These sections (Sec. 1, Ch. 84, Laws 1903 and Sec. 696, Pen. C. 1895), relating

to the prohibition against Indians carrying firearms while off the reservation, were repealed by Sec. 1, Ch. 12, Laws 1953.

**94-35-106. Intoxicating liquors—penalty for giving or selling to any person under the age of twenty-one years.** Any person who shall sell, give away or dispose of intoxicating liquor to any persons under the age of twenty-one (21) years, shall for the first offense be subject to punishment not exceeding five hundred dollars (\$500.00) fine or by imprisonment not to

exceed six (6) months in the county jail, or both such fine and imprisonment, and upon conviction for the second and subsequent offenses he shall be subject to punishment by fine of not less than five hundred dollars (\$500.00) nor more than two thousand dollars (\$2,000.00) or by imprisonment in the state penitentiary for not less than one (1) year nor more than five (5) years, or by both such fine and imprisonment. Nothing herein contained shall prevent the furnishing of intoxicating liquor to a person under twenty-one (21) years of age upon any physician's prescription where authorized by the laws of this state or the United States, nor the furnishing of wine for sacramental purposes.

**History:** En. Sec. 1, Ch. 143, L. 1949.

#### Compiler's Note

The section appearing in the parent volume (Sec. 1, Ch. 122, Laws 1927 as amended Sec. 1, Ch. 124, Laws 1941 and appearing in Revised Codes 1935 as Sec. 11048.1) was held to have been impliedly repealed by Ch. 105, Laws 1933 in *State v. Holt*, 121 M 459, 194 P 2d 651, and was specifically repealed by Sec. 3, Ch. 143, Laws 1949, and therefore the law set out above (Sec. 1, Ch. 143, Laws 1949) covering the same subject-matter has been given the same section number.

#### Title of Act

An act preventing the selling or giving away of intoxicating liquor to persons under twenty-one (21) years of age; providing penalties therefor; and repealing Section 11048.1 as amended by Chapter 124 of the Laws of the Twenty-seventh Legislative Assembly of the State of Montana, 1941, and all other acts and parts of acts in conflict herewith.

#### Alcoholic Content of Beer

It is not necessary that the information or the evidence show the alcoholic content of the beer in order to obtain a conviction. *State v. Winter*, 129 M 207, 285 P 2d 149, 156.

#### Construction

Under the above statute the selling to a minor is an offense without regard to whether the defendant had a license to sell or not. *State v. Winter*, 129 M 207, 285 P 2d 149, 155.

#### Entrapment

Defense of entrapment would not be available to a bar owner in a prosecution for selling liquor to a minor where it was shown that the public officers had given

a minor money and sent him into the bar to purchase the liquor in order to obtain evidence. *State v. Parr*, 129 M 175, 283 P 2d 1086, 55 ALR 2d 1313. (Dissenting opinion, 129 M 175, 283 P 2d 1086, 1090.)

#### Operation and Effect

Misrepresentation of age by a minor is not a defense and a seller of intoxicating beverages must know the age of the purchaser and whatever false representations are made or precautions taken are immaterial where, in fact, the purchaser is under the age of twenty-one. *State v. Paskvan*, 131 M 316, 309 P 1019, 1021.

The purchaser under the age of twenty-one is not an accomplice to the seller. The purchaser has committed a crime too, but his is knowingly misrepresenting his qualifications for the purpose of obtaining liquor under section 4-413 the penalty for which is found in section 4-439. *State v. Paskvan*, 131 M 316, 309 P 2d 1019, 1020.

#### Proof of Offense

Corpus delicti may be proved by evidence that the defendant poured minor a drink from a bottle marked "Vodka." *State v. Moore*, 138 M 379, 357 P 2d 346, 348.

#### Validity

This section was not impliedly repealed by section 4-330 as amended by chapter 166, Laws of 1951. *State v. Winter*, 129 M 207, 285 P 2d 149, 156.

#### References

Cited or applied in *State v. Wild*, 130 M 476, 305 P 2d 325, 327.

#### Collateral References

Right to hearing before revocation or suspension of liquor license. 35 ALR 2d 1067.

**94-35-106.1. Jurisdiction of offenses.** In cases of prosecution for first offenses under this act, the justice courts and district courts of the state of Montana shall have concurrent original jurisdiction. In all other cases the district courts of the state of Montana shall have exclusive original jurisdiction for violation of the provisions of this act.

**History:** En. Sec. 2, Ch. 143, L. 1949.

**Repealing Clause**

Section 3 of Ch. 143, Laws 1949 repealed section 11048.1, Revised Codes 1935, as amended by chapter 124, Laws 1941 and all other acts or parts of acts in conflict therewith.

**Validity**

This section was not repealed by implication by the amendment of section 4-413 by Ch. 71, Laws 1953. *State v. Wild*, 130 M 476, 305 P 2d 325, 328.

Any amendment of this section by Ch. 71, Laws 1953 (4-413) is governed by the

provisions of section 43-510 which provides that "where a section or a part of a statute is amended, it is not to be considered as having been repealed and re-enacted but the portions which are not altered are to be considered as having been the law from the time when they were enacted." *State v. Wild*, 130 M 476, 305 P 2d 325, 328.

There is nothing in Ch. 71, Laws 1953 (4-413) which conflicts with the provisions of this section. *State v. Wild*, 130 M 476, 305 P 2d 325, 328.

**References**

Cited or applied in *State v. Winter*, 129 M 207, 285 P 2d 149, 155.

**94-35-106.2. Possession of beer or liquor by minor—misdemeanor.**

Any person who shall not have reached the age of twenty-one (21) years and who shall have in his or her possession beer or liquor, shall be guilty of a misdemeanor.

**History:** En. Sec. 1, Ch. 125, L. 1957.

**Title of Act**

An act prohibiting the possession of beer

and liquor by persons under the age of twenty-one (21) years; providing a penalty.

**94-35-107. (11048.2) "Intoxicating liquor" defined.**

**Vodka**

While this section does not use the word vodka it does make any beverage containing more than one-half of one per cent of alcohol an intoxicating liquor and the

court may take judicial notice of the commonly accepted and generally understood definition of the word "vodka" under section 93-501-1. *State v. Wild*, 130 M 476, 305 P 2d 325, 334.

**94-35-122. (10948) Maliciously procuring warrant.**

**References**

Cited in *Wolf v. Colorado*, 338 U S 30, 93 L Ed 1782, 69 S Ct 1359.

**94-35-123. (3202.1) Repealed.**

**Repeal**

Section 94-35-123 (Sec. 1, Ch. 22, L. 1923; Sec. 1, Ch. 53, L. 1957), making it

unlawful to dispense the mescal button, was repealed by Sec. 14, Ch. 314, Laws 1969.

**94-35-143. (10952) Oppression and injury by an officer.**

**References**

Cited in *Wolf v. Colorado*, 338 U S 30, 93 L Ed 1782, 69 S Ct 1359.

**94-35-148. (11045) Repealed.**

**Repeal**

Section 94-35-148 (Sec. 1, p. 65, L. 1881; Sec. 538, Pen. C. 1895), relating to

the keeping of or resorting to place where opium is used or sold, was repealed by Sec. 14, Ch. 314, Laws 1969.

**94-35-152. (11572) Repealed.**

**Repeal**

This section (Sec. 1, Ch. 32, L. 1911), relating to labeling of prison-made goods,

was repealed by Sec. 101, Ch. 199, Laws 1965.



**94-35-152.1 to 94-35-152.18. Repealed.****Repeal**

These sections (Secs. 1 to 18, Ch. 162, L. 1953; Sec. 229, Ch. 147, L. 1963), re-

lating to prison industries, were repealed by Sec. 101, Ch. 199, Laws 1965.

**94-35-153 to 94-35-162. (11573 to 11573.9) Repealed.****Repeal**

These sections (Sec. 2, Ch. 32, Laws 1911; Secs. 1 to 9, Ch. 172, Laws 1933; amd. Sec. 1, Ch. 9, Ex. L. 1933), relating

to prison-made goods, were repealed by Sec. 19, Ch. 162, Laws 1953 effective March 3, 1953.

**94-35-167. (11231) Public nuisances defined.****References**

Cited or applied in State ex rel. Harrison v. Deniff, 126 M 109, 245 P 2d 140.

**94-35-169. (10928) Public officers—resisting in the discharge, etc.****Unlawful Arrest**

In action for damages for unlawful arrest which occurred after store manager handed plaintiff's check to officer and plaintiff seized check from officer's hand, arrest

could not be justified as for violation of this section since plaintiff had right to possession of the check. *Harrer v. Montgomery Ward & Co.*, 124 M 295, 221 P 2d 428, 435.

**94-35-176. (11254) Repealed.****Repeal**

Section 94-35-176 (Sec. 691, Pen. C. 1895), prohibiting placement or running

of freight car in rear of passenger cars in making up or running a train, was repealed by Sec. 1, Ch. 39, Laws 1969.

**94-35-199. (11239) Repealed.****Repeal**

Section 94-35-199 (Sec. 680, Pen. C. 1895), stating penalty for unlawful sale

of certain narcotics, was repealed by Sec. 14, Ch. 314, Laws 1969.

**94-35-204. (11552.1) Stolen livestock—seizure and confiscating of vehicle used to transport.** The use of any vehicle for the transportation of any stolen mule, horse, mare, colt, foal, filly, sheep, lamb, cow, calf, heifer, steer, bull, hogs, poultry, or the products of either thereof, shall be unlawful and such vehicle shall be forfeited to and confiscated by the state. Any such vehicle found in such use, or upon probable cause believed to be devoted wholly or in part to such use, shall be seized and held and, upon conviction in a proceeding in the name of the state of Montana against such vehicle, or against such vehicle and the owner, before any district court or judge thereof, shall be confiscated and sold; provided that such vehicle shall not be confiscated, or subject to forfeiture, if the same be a stolen vehicle at the time it is used for such unlawful transportation and the owner thereof is not in collusion with the party or parties guilty of the theft.

**History:** En. Sec. 1, Ch. 80, L. 1931; amd. Sec. 1, Ch. 132, L. 1963.

**Amendment**

The 1963 amendment substituted "mule, horse, mare, colt, foal, filly, sheep, lamb" for "sheep" in the first sentence.

**94-35-206. (11552.3) Same—service of process.****Compiler's Notes**

Sections 93-3007 to 93-3015, referred to in this section in the parent volume, have

been repealed and superseded. Sections 93-3007, and 93-3013 to 93-3015 were repealed by Sec. 84, Ch. 13, Laws 1961; sec-

tions 93-3009 and 93-3010 were repealed by Sec. 2, Ch. 189, Laws 1963; sections 93-3008, 93-3011 and 93-3012 were super-

sed by M. R. Civ. P., Rule 4D, as amended by Sup. Ct. Ord. 10750.

#### **94-35-216. (11039) Sunday—certain activities on, forbidden.**

##### **Collateral References**

Construction of statute or ordinance

prohibiting or regulating sports and games on Sunday. 24 ALR 2d 813.

**94-35-221.1. Failure to relinquish party line or telephone for emergency call—penalty.** Any person who fails to relinquish a telephone party line or a public pay telephone after he has been requested to do so to permit another to place an emergency call to a fire department or police department, or for medical or spiritual aid or ambulance service, is punishable by imprisonment for not more than ten (10) days or by a fine of not more than twenty-five dollars (\$25.00) or by both such imprisonment and such fine.

**History:** En. Sec. 1, Ch. 206, L. 1961.

##### **Title of Act**

An act relating to use of telephones, to provide a penalty for failure to relin-

quish a party line or public pay telephone in an emergency; and to provide a penalty for false representation of an emergency in order to use a party line or public pay telephone.

**94-35-221.2. Lack of knowledge as defense—emergency as defense.** It is a defense to prosecution under section 1 [94-35-221.1] of this act that the accused did not know or did not have reason to know of the emergency in question, or that the accused was himself using the telephone party line or public pay telephone for such an emergency call.

**History:** En. Sec. 2, Ch. 206, L. 1961.

**94-35-221.3. False pretext of emergency—penalty.** Any person who requests another to relinquish a telephone party line or a public pay telephone on the pretext that he must place an emergency call, knowing such pretext to be false, is punishable by imprisonment for not more than ten (10) days or by a fine of not more than twenty-five dollars (\$25.00) or by both such imprisonment and such fine.

**History:** En. Sec. 3, Ch. 206, L. 1961.

**94-35-221.4. Printing of act in directories.** Every telephone company doing business in this state shall print a copy of sections 1, 2 and 3 [94-35-221.1 to 94-35-221.3] of this act in each telephone directory published by it after the effective date of this act.

**History:** En. Sec. 4, Ch. 206, L. 1961.

**94-35-221.5. Abuse, harassment or extortion by telephone—evidence of intent—venue of offenses—penalty.** (1) It is unlawful for any person, with intent to terrify, intimidate, threaten, harass, annoy or offend, to telephone another and use any obscene, lewd or profane language or suggest any lewd or lascivious act, or threaten to inflict injury or physical harm to the person or property of any person. It is also unlawful to use a telephone to attempt to extort money or other thing of value from any person, or to disturb by repeated anonymous telephone calls the

peace, quiet or right of privacy of any person at the place where the telephone call or calls were received.

(2) The use of obscene, lewd or profane language or the making of a threat or lewd or lascivious suggestion shall be prima facie evidence of intent to terrify, intimidate, threaten, harass, annoy or offend.

(3) Any offense committed by use of a telephone in the manner set forth in this section shall be deemed to have been committed at either the place where the telephone call or calls originated or at the place where the telephone call or calls were received, and when an offense under this section is committed by making a telephone call or calls in one county which is or are received in another county, the jurisdiction is in either county.

(4) Any violation of this section shall be punishable by a fine not exceeding five hundred dollars (\$500), or by imprisonment in the county jail not exceeding six (6) months, or by imprisonment in the state prison not exceeding five (5) years.

**History:** En. Sec. 1, Ch. 25, L. 1967.

**Title of Act**

An act making it a criminal offense to use a telephone either to terrify, intimidate, threaten, harass, annoy or offend another by the use of obscene, lewd or profane language or the suggestion of a lewd or lascivious act or by threat of injury to

person or property, or to attempt to extort money or property from another, or to disturb another by repeated anonymous calls, and providing penalties therefor; providing for prosecution of such offenses at either the place where the telephone call or calls originated or where they were received; and repealing all acts and parts of acts in conflict therewith.

**94-35-221.6. False statements to harass by telephone—venue of offenses.** Every person who telephones another and knowingly makes any false statements concerning injury, death, disfigurement, indecent conduct or criminal conduct of the person telephoned or any member of his family with intent to terrify, intimidate, harass or annoy the called person is guilty of a misdemeanor. Any offense by use of a telephone as herein set out may be deemed to have been committed at the place at which the telephone call or calls were made or at the place where the telephone call or calls were received.

**History:** En. Sec. 2, Ch. 25, L. 1967.

all acts and parts of acts in conflict therewith.

**Repealing Clause**

Section 3 of Ch. 25, Laws 1967 repealed

**94-35-258. Endurance races of horses prohibited.** It shall be unlawful for any person, firm, corporation, association or organization within the state of Montana to sponsor, promote, conduct, or participate in sponsoring, promoting or conducting any horse race, commonly known as an endurance race, for a distance of more than two (2) miles.

**History:** En. Sec. 1, Ch. 27, L. 1949.

more than two miles; providing a penalty; and repealing all acts in conflict.

**Title of Act**

An act prohibiting endurance races of

**Collateral References**

Animals—40.

3 C.J.S. Animals § 70.

**94-35-259. Penalty for running endurance horse race.** Any person, firm, corporation, association, or organization violating any of the provisions of



this act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than two hundred fifty dollars (\$250.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail of not less than ninety [90] days or more than one [1] year.

**History:** En. Sec. 2, Ch. 27, L. 1949.

all acts and parts of acts in conflict therewith.

**Repealing Clause**

Section 3 of Ch. 27, Laws 1949 repealed

**Collateral References**

Animals 41.

3 C.J.S. Animals § 75.

**94-35-260. State tax stamps—failure to affix or cancel—removal—penalty—counterfeiting tax stamp or insignia of Montana or other state—penalty.** (a) Every person required by law to affix any tax stamp or insignia of the state of Montana, to or upon any article to evidence the payment of a tax or license thereon, who shall fail, neglect or refuse to affix such stamp or insignia thereto, or to affix it in the proper place, or to cancel it, in the manner and as required by law, or as required by rules and regulations of the state board of equalization of this state when charged with administering any act relating thereto, or who shall wilfully remove any such affixed stamp or insignia from any such article and affix it to another such article required by law to be so stamped or marked, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not less than thirty (30) days, nor more than six (6) months, or by a fine of not less than one hundred dollars (\$100.00), nor more than three hundred dollars (\$300.00), or by both such fine and imprisonment.

(b) Every person without authority of law, who shall wilfully make, print, manufacture, counterfeit, or attempt to make, print, manufacture or counterfeit any such stamp or insignia of the state of Montana or of any other state, or who shall, without authority of law, have in his possession any such counterfeit stamp or insignia, die, equipment or material for the making, printing, manufacturing or counterfeiting of any such stamp or insignia, or who shall be concerned therewith, is guilty of a felony and shall be punished by imprisonment in the state prison not less than one (1) year, nor more than five (5) years, or by a fine of not less than one thousand dollars (\$1,000.00), nor more than five thousand dollars (\$5,000.00), or by both such fine and imprisonment.

**History:** En. Sec. 1, Ch. 43, L. 1949.

**Title of Act**

An act relating to tax stamps or insignia of the state of Montana; providing penalty for counterfeiting any such stamp or insignia, or having possession thereof, or being concerned therewith; prescribing penalty for re-using any such stamp or insignia, and for failure or refusal to properly affix any such stamp or insignia, or to properly cancel any such stamp.

**Repealing Clause**

Section 2 of Ch. 43, Laws 1949 repealed all acts or parts of acts in conflict therewith.

**Effective Date**

Section 3 of Ch. 43, Laws 1949 provided the act should be in effect from and after its passage and approval. Approved February 23, 1949.

**Collateral References**

Counterfeiting 6; Licenses 40.

20 C.J.S. Counterfeiting § 9; 53 C.J.S. Licenses § 66.

**94-35-261. Importing or selling farm machinery with altered, defaced or removed serial number.** No person, firm or corporation shall import, or

cause to be imported into the state of Montana any tractor, forage blower, combine, thresher, forage harvester, hay baler, power mower or any other item of heavy farm machinery on which the serial numbers have been destroyed, removed, altered, covered or defaced; nor transport, sell, offer for sale or otherwise dispose of any such farm implements or machinery within the state of Montana knowing the same to have been imported in violation of this act.

**History:** En. Sec. 1, Ch. 167, L. 1953.

#### **Title of Act**

An act prohibiting the importation into Montana of farm implements or machinery on which the serial numbers have been destroyed, removed, altered, covered or defaced; prohibiting the destruction, removal, alteration, covering or defacing

of the serial numbers on farm implements or machinery; prohibiting the transportation or offering for sale, selling or otherwise disposing of farm implements or machinery knowing the same to have been imported into Montana in violation of this act and providing penalties for the violating hereof.

**94-35-262. Altering, defacing or removing serial number on farm machinery.** No person, firm, association or corporation shall destroy, remove, alter, cover, or deface the manufacturer's serial numbers from any tractor, forage blower, combine, thresher, forage harvester, hay baler, power mower or any other item of heavy farm machinery having such numbers.

**History:** En. Sec. 2, Ch. 167, L. 1953.

**94-35-263. Penalty.** Any wilful violation of any of the provisions of this act shall constitute a misdemeanor.

**History:** En. Sec. 3, Ch. 167, L. 1953.

**94-35-264. Furnishing certain articles to and receiving articles from prisoners in state prison—receiving such articles by prisoners—felony.** (1) A person may not furnish or attempt to furnish to an inmate of the state prison, nor may an inmate receive or attempt to receive any of the following items without the consent of the warden:

(a) Any liquid containing one-half of one per cent ( $\frac{1}{2}$  of 1%) or more of alcohol by volume which is fit for use for a beverage.

(b) Knives, razors, drugs, narcotics, guns, ammunition, ropes, ladders, money or clothing other than that issued at the prison.

(2) A person, including a member of the correctional staff, may not receive or attempt to receive from an inmate, for his own use or for transmittal to another inmate or some one outside the prison, any money, merchandise, or messages.

(3) A person who violates this section is punishable upon conviction, by imprisonment in the state prison for a term not exceeding ten (10) years, or a fine not exceeding ten thousand dollars (\$10,000), or both.

**History:** En. Sec. 1, Ch. 177, L. 1953; amd. Sec. 77, Ch. 199, L. 1965.

#### **Title of Act**

An act providing that any person who without the consent of the warden, shall furnish or attempt to furnish, or aid or assist in furnishing to any prisoner confined in the state prison, any alcohol,

brandy, whiskey, rum, gin, beer, ale, porter, wine, spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one-half ( $\frac{1}{2}$ ) of one per centum (1%) or more of alcohol by volume which are fit for use for beverage purposes, knives, razors, drugs, narcotics, guns, am-

munition, ropes, ladders, clothing, or money to such prisoner, or any prisoner who, without the consent of the warden, shall receive, attempt to receive, or aid or assist in receiving or attempting to receive any of such things, shall be deemed guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for a term not exceeding ten (10) years, or a fine not exceeding ten thousand dollars (\$10,000), or both.

#### Amendment

The 1965 amendment divided this section into numbered subsections and lettered paragraphs; inserted new provisions in subsection (2); and made numerous

minor changes in phraseology and punctuation.

#### Repealing Clause

Section 2 of Ch. 177, Laws 1953 repealed all acts and parts of acts in conflict therewith.

#### Effective Date

Section 3 of Ch. 177, Laws 1953 provided the act should be in effect upon its passage and approval. Approved March 4, 1953.

#### Collateral References

Prisons  $\Rightarrow$  17½.

72 C.J.S. Prisons § 22.

**94-35-265. Abandoning or permitting abandoned icebox in dangerous condition—penalty.** Any person, firm or corporation abandoning or discarding in any place accessible to children any refrigerator, icebox or ice chest, of a capacity of one and one-half cubic feet or more, which has an attached lid or door which may be opened or fastened shut by means of an attached latch, or who, being the owner, lessee, or manager of such place, knowingly permits such abandoned or discarded refrigerator, icebox or ice chest to remain in such condition, shall be deemed negligent as a matter of law and shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than fifty dollars (\$50.00), or imprisoned not more than thirty (30) days, or both.

**History:** En. Sec. 1, Ch. 126, L. 1955.

#### Title of Act

An act providing penalties for abandoning or discarding refrigerators, iceboxes or ice chests with attached doors or lids in places accessible to children; providing persons knowingly permitting such con-

ditions to exist to be negligent in addition to penalties and containing a repealing clause.

#### Repealing Clause

Section 2 of Ch. 126, Laws 1955 repealed all acts and parts of acts in conflict therewith.

#### 94-35-266 to 94-35-268. Repealed.

##### Repeal

These sections (Secs. 1-3, Ch. 139, L. 1955; Sec. 1, Ch. 15, L. 1957), relating to

life saving equipment on boats, were repealed by Sec. 20, Ch. 285, Laws 1959, effective March 18, 1959.

**94-35-269. Hunting in careless or reckless manner—failure to assist person injured or wounded—misdemeanor.** Any person who, in the act of pursuing, taking or killing game animals or game birds, shall act in a careless or reckless manner, or with wanton disregard of human life or property, or who knowingly fails to give all reasonable assistance to any person whom he has injured or wounded, shall, upon conviction thereof, be deemed guilty of a misdemeanor, and upon conviction thereof, be punished as provided by law.

**History:** En. Sec. 1, Ch. 189, L. 1955.

#### Title of Act

An act providing for the prosecution of

careless, reckless and negligent hunters, and for imposing of penalties upon conviction thereof.

**94-35-270. Delivery of grain containing toxic chemicals to public warehouses.** It shall be unlawful for any person, firm, corporation or associa-



tion, to deliver to any public warehouse, any grain in bulk, if such grain contains toxic chemicals, providing such person, firm, corporation or association knew, or upon the exercise of reasonable diligence, could have known of the presence of toxic chemicals in the grain.

**History:** En. Sec. 1, Ch. 9, L. 1957.

**Title of Act**

An act making it unlawful to deliver to any public warehouse any grain in bulk containing toxic chemicals if the person, firm, corporation or association delivering

such grain knew, or by the exercise of reasonable diligence, could have known, of the presence of such toxic chemicals; providing that such delivery shall constitute a misdemeanor and providing penalties therefor; and repealing all acts and parts of acts in conflict herewith.

**94-35-271. Penalty for violation.** Any person, firm, corporation or association violating the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars (\$500.00) and not less than two hundred fifty dollars (\$250.00) or be imprisoned for not more than six (6) months and not less than thirty (30) days, or both.

**History:** En. Sec. 2, Ch. 9, L. 1957.

**Repealing Clause**

Section 3 of Ch. 9, Laws 1957 repealed all acts and parts of acts in conflict therewith.

**94-35-271.1. Coloration of wheat, oats, rye or barley treated with injurious or toxic substances.** Any wheat, oats, rye or barley treated with any injurious or toxic substance or chemical shall at the same time be colored or dyed a color contrasting with the natural color of such wheat, oats, rye or barley, so that the treated wheat, oats, rye or barley is readily identifiable as having been treated with an injurious or toxic substance or chemical.

**History:** En. Sec. 1, Ch. 80, L. 1959.

**Title of Act**

An act to provide for the coloration of wheat, oats, rye or barley when being

treated with an injurious or toxic substance or chemical, providing a penalty; and repealing all acts or parts of acts in conflict herewith.

**94-35-271.2. Sale or offering for sale product in violation of act prohibited.** No person, firm, corporation or association shall sell or offer for sale, any wheat, oats, rye or barley which has been treated with any injurious or toxic substance or chemical unless the wheat, oats, rye or barley has been colored or dyed a color contrasting with the natural color of the wheat, oats, rye or barley. This act shall not apply to the treatment of any wheat, oats, rye or barley which solely is for the killing of insects which might be present therein. Provided, however, that if such treatment uses any injurious or toxic substance for the killing of insects, then such grain must be colored or dyed as hereinabove provided if offered for sale.

**History:** En. Sec. 2, Ch. 80, L. 1959.

**94-35-271.3. Violation constitutes misdemeanor.** Any person, firm, corporation or association violating any of the provisions of this act shall be guilty of a misdemeanor.

**History:** En. Sec. 3, Ch. 80, L. 1959.

all acts and parts of acts in conflict therewith.

**Repealing Clause**

Section 4 of Ch. 80, Laws 1959 repealed

**94-35-272. Unlawful operation, use, interference, or tampering of aircraft—penalty.** Every person who shall wilfully operate or use any aircraft without the consent of the owner, or who shall wilfully interfere or tamper with any aircraft without the consent of the owner, or who shall wilfully put into operation the engine of any aircraft without the consent of the owner, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not more than six (6) months or by a fine of not more than five hundred dollars (\$500.00) or by both such fine and imprisonment.

**History:** En. Sec. 1, Ch. 83, L. 1957.

**Title of Act**

An act making it a misdemeanor for any person to wilfully use or operate any aircraft, or wilfully interfere or tamper with any aircraft, or wilfully put into operation the engine of any aircraft, with-

out the consent of the owner; providing a penalty for such offense; and containing a repealing clause.

**Repealing Clause**

Section 2 of Ch. 83, Laws 1957 repealed all acts and parts of acts in conflict therewith.

**94-35-273. Switch blade knives—possession, selling, using, giving, or offering for sale—penalty—collectors.** Every person who carries or bears upon his person or who carries or bears within or on any motor vehicle or other means of conveyance owned or operated by him or who owns, possesses, uses, stores, gives away, sells or offers for sale, a switch blade knife shall be punished by a fine not exceeding five hundred dollars (\$500.00) or by imprisonment in the county jail for a period not exceeding six (6) months or by both such fine and imprisonment; provided, that a bona fide collector, whose collection is registered with the sheriff of the county in which said collection is located, is hereby exempted from the provisions of this act. For the purpose of this section a switch blade knife is defined as any knife which has a blade one and one-half (1½) inches long or longer, which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife.

**History:** En. Sec. 1, Ch. 243, L. 1957.

**Title of Act**

An act making it a criminal offense for any person to own, possess, carry, sell or display a switch blade knife, defining a switch blade knife, making it a criminal offense and providing a punishment therefor; providing for the effective date of said act and repealing all acts and parts of acts in conflict therewith.

**Repealing Clause**

Section 2 of Ch. 243, Laws 1957 repealed all acts and parts of acts in conflict therewith.

**Effective Date**

Section 3 of Ch. 243, Laws 1957 provided the act should be in effect from and after its passage and approval. Approved March 13, 1957.

**94-35-274. Recording of conversation without knowledge of parties prohibited.** It shall be unlawful to record or cause to be recorded by use of any hidden electronic or mechanical device which reproduces a human conversation without the knowledge of all parties to the conversation. Violation hereof shall constitute a misdemeanor.

**History:** En. Sec. 1, Ch. 228, L. 1965.

**Title of Act**

An act making the transcription or recording of human conversation without the knowledge of the parties thereto a

misdemeanor; and excepting public officials and employees when in the performance of official duty; and persons speaking at public meetings or given warning of any such recording.

**94-35-275. Public officials and public meetings exempt—warning of recording.** Section 1 [94-35-274] of this act shall not apply to duly elected or appointed public officials or employees when such transcription or recording is done in the performance of official duty; and persons speaking at public meetings or given warning of such recording.

**History:** En. Sec. 2, Ch. 228, L. 1965.

CHAPTER 36—OBSCENITY—LITERATURE—INDECENT EXPOSURE  
—HOUSES OF ILL FAME—PROHIBITION OF CERTAIN  
ADVERTISEMENTS

- Section 94-3601. Obscene literature.  
94-3602. Penalty.  
94-3604. Seizure of indecent articles authorized.  
94-3605. Their character to be summarily determined.  
94-3606. Their destruction.

**94-3601. (11134) Obscene literature.** (1) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material, that the subject matter is designed for a specially susceptible audience, predominant appeal shall be judged with reference to such audience. If the subject matter is directed to minors under 18 years of age, predominant appeal shall be judged with reference to such class of minors.

"Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation of any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment machines or materials.

"Person" means any individual, partnership, firm, association, corporation, or other legal entity.

"Distribute" means to transfer possession of, whether with or without consideration.

"Knowingly" means having knowledge of the character and content of the subject matter or failure to exercise reasonable inspection which would disclose the content and character of the same.

(2) It is unlawful for any person to knowingly: send or cause to be sent, or bring or cause to be brought, into this state for sale or distribution, or in this state prepare, publish, print, exhibit, distribute, or offer to distribute, any obscene matter.

(3) It is unlawful for any person to knowingly: send or cause to be sent, or exhibit or distribute or offer to distribute any obscene matter to a minor under 18 years of age, while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age.

(4) It is unlawful for any person, while in possession of such facts that he should reasonably know that a person is a minor under 18 years of age, to hire, employ or use such minor to do or assist in doing any of the acts described in the foregoing paragraphs.



(5) It is unlawful for a person to write or create advertising or solicit anyone to publish such advertising or otherwise promote the sale or distribution of matter represented or held out by him to be obscene.

(6) No person shall, as a condition to a sale or delivery for resale of any publication not above described or not within the purview of the foregoing section, require that the purchaser or consignee receive for resale or redistribution any other publication or article whatsoever within or reasonably believed by such purchaser or consignee to be within the purview of the foregoing paragraph.

(7) The prohibitions and penalties imposed hereby shall not extend to publications within any constitutional guarantee of freedom of the press or freedom of religious worship, nor to publications privileged for medical instruction, privileged as official law enforcement bulletins or publications, nor to publications or reproductions of bona fide works of literature and the fine arts.

(8) In any criminal action brought under the foregoing sections, both the people and the defendant shall have the right to trial by jury on the issue of obscenity.

(9) The jury, or the court, if a jury trial is waived, shall render a general verdict, and must also render a special verdict as to whether the matter named in the charge is obscene. The special verdict or findings on the issue of obscenity may be: "We find the ..... (title or description of matter) to be obscene." Or: "We find the ..... (title or description of matter) not to be obscene," as they find each item is or is not obscene.

**History:** En. Secs. 1, 2, p. 255, L. 1891; amd. Sec. 560, Pen. C. 1895; re-en. Sec. 8391, Rev. C. 1907; re-en. Sec. 11134, R. C. M. 1921; amd. Sec. 1, Ch. 214, L. 1955; amd. Sec. 1, Ch. 276, L. 1967.

#### Amendments

The 1955 amendment completely rewrote this section. For section prior to amendment see parent volume.

The 1967 amendment completely rewrote this section. Prior to amendment, it read, "(1) It is unlawful for any person to sell, lend, give away, distribute, resell, or redistribute, show, or have in his possession with intent to sell, give away, distribute, resell, or redistribute, or to show or advertise or otherwise offer for loan, gift, or distribution, to any minor child, under the age of eighteen (18) years, any book, pamphlet, magazine, newspaper, lewd picture, story paper, so-called comic book, or other printed, mimeographed or published matter, devoted to the publication or principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of lust or crime, or portraying sexually indecent conduct or subject matter, or portraying the planning or committing of deeds of crime, violence, horror, brutality, immorality or vice. It shall be unlawful to exhibit upon any street or highway, or in any place within

the view of any minor child under the age of eighteen (18) years, or to hire, use, employ, or permit such child to sell or give away or in any manner distribute any such book, pamphlet, magazine, lewd picture, newspaper, story paper, so-called comic book or publication or other printed, mimeographed, or published matter above described. (2) The prohibitions and penalties imposed hereby shall not extend to publications within any constitutional guarantee of freedom of the press or freedom of religious worship, nor to publications privileged for medical instruction, privileged as official law enforcement bulletins or publications, nor to publications or reproductions of bona fide works of literature and the fine arts. (3) No person shall, as a condition to a sale or delivery for resale of any publication not above-described or not within the purview of the foregoing section, require that the purchaser or consignee receive for resale or redistribution any other publication or article whatsoever within or reasonably believed by such purchaser or consignee to be within the purview of the foregoing section."

#### Constitutionality

Justice Frankfurter in his dissenting opinion in the *Winters Case* considered this to be one of the statutes throughout

the country that would fall under the majority decision in that case as "void for vagueness." *Winters v. New York*, 333 U S 523, 92 L Ed 853, 68 S Ct 674.

**94-3602. (11135) Penalty.** (1) Every person who violates section 94-3601 (2) is punishable by fine of not more than one hundred dollars (\$100.00) plus five dollars (\$5.00) for each additional unit of material coming within the provisions of this chapter, which is involved in the provisions of this chapter, which is involved in the offense, not to exceed one thousand dollars (\$1,000) or by imprisonment for not more than 30 days. If such person has previously been convicted of a violation of this section, he is punishable by fine of not more than five hundred dollars (\$500.00) plus five dollars (\$5.00) for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed twenty-five hundred dollars (\$2,500.00), or by imprisonment for not more than one year, or by both such fine and such imprisonment.

(2) Every person who violates sections 94-3601 (3), (4) or (5) is punishable by fine of not more than one hundred dollars (\$100.00) or by imprisonment for not more than 30 days, or by both such fine and such imprisonment. If such person has been previously convicted of a violation of either of these sections, he is punishable by imprisonment in the state prison not exceeding two years.

(3) Every person who violates section 94-3601 (6) is punishable by fine of not more than one hundred dollars (\$100.00) or by imprisonment for not more than 30 days, or by both such fine and imprisonment. For a second and subsequent offense he shall be punished by a fine of not more than five hundred dollars (\$500.00), or by imprisonment for not more than one year, or by both such fine and imprisonment.

**History:** En. Sec. 561, Pen. C. 1895; re-en. Sec. 8392, Rev. C. 1907; re-en. Sec. 11135, R. C. M. 1921; amd. Sec. 2, Ch. 214, L. 1955; amd. Sec. 2, Ch. 276, L. 1967.

#### Amendments

The 1955 amendment added the proviso clause.

The 1967 amendment completely rewrote this section. Prior to amendment, it read, "(1) Every person violating any of the provisions of the next preceding section is guilty of a misdemeanor, and provided further that upon the second and each subsequent conviction thereunder, a jail sentence is mandatory."

#### Separability Clause

Section 3 of Ch. 214, Laws 1955 read "If any clause, sentence, paragraph, section, subdivision or part of this act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, inoperative or unconstitutional, such decision shall not affect, impair or invalidate the remaining portions of this act, but shall be confined in its operation to the clause, sentence, paragraph, section, subdivision or part directly adjudged to be invalid, inoperative or unconstitutional."

#### Repealing Clause

Section 4 of Ch. 214, Laws 1955 repealed all acts or parts of acts in conflict therewith.

**94-3604. (11137) Seizure of indecent articles authorized.** Every person who is authorized or enjoined to arrest any person for a violation of section 94-3601 (2) or (3), is equally authorized and enjoined to seize any obscene matter found in possession, or under the control of the person so arrested, and to deliver the same to the district court.

**History:** En. Sec. 563, Pen. C. 1895; 11137, R. C. M. 1921; amd. Sec. 1, Ch. 230, re-en. Sec. 8394, Rev. C. 1907; re-en. Sec. L. 1965. Cal. Pen. C. Sec. 312.

**Amendment**

The 1965 amendment substituted the reference to section 94-3601(2) and (3) for a reference to subdivision 3 of section 94-3603; substituted "obscene matter" for

"obscene or indecent writing, paper, book, picture, print, or figure"; and substituted "the district court" for "the magistrate before whom the person so arrested, is required to be taken."

**94-3605. (11138) Their character to be summarily determined.** If the seizure be controverted, the district court to whom any obscene matter is delivered pursuant to the foregoing section or to the return of a search warrant must, within ten (10) days after service of the motion for restoration proceed to take testimony in relation thereto. A decision as to whether there is a probable cause to believe the seized material to be obscene shall be rendered by the court within two (2) days of the conclusion of the restoration proceedings.

**History:** En. Sec. 564, Pen. C. 1895; re-en. Sec. 8395, Rev. C. 1907; re-en. Sec. 11138, R. C. M. 1921; amd. Sec. 2, Ch. 230, L. 1965. Cal. Pen. C. Sec. 313.

**Amendment**

The 1965 amendment completely rewrote this section. For previous text, see parent volume.

**94-3606. (11139) Their destruction.** Upon the conviction of the accused, such county attorney must cause any obscene matter, in respect whereof the accused stands convicted and which remains in the possession or under the control of such county attorney, to be destroyed.

**History:** En. Sec. 565, Pen. C. 1895; re-en. Sec. 8396, Rev. C. 1907; re-en. Sec. 11139, R. C. M. 1921; amd. Sec. 3, Ch. 230, L. 1965. Cal. Pen. C. Sec. 314.

**Amendment**

The 1965 amendment substituted "obscene matter" for "writing, paper, book, picture, print or figure."

**94-3608. (11141) Keeping disorderly houses.****Illegal Use of Premises by Vendee**

Where the vendee-madam sought to void mortgage given vendor-madam on property used exclusively for prostitution, on the grounds that vendor-madam knew the property was to be used in violation of

the laws and public policy of Montana, bare knowledge of the illegal purpose was not sufficient to void the contract in the absence of more active participation on the part of the seller. *Carroll v. Beardon*, 142 M 40, 381 P 2d 295.

**CHAPTER 38—PERJURY—SUBORNATION OF PERJURY****94-3801. (10878) Perjury defined.****Venue**

Where prosecution for perjury is founded upon a false affidavit which was notarized in Lake County and delivered to Lewis and Clark County, apparently by mail, by virtue of section 94-3809, the crime was completed when the affidavit left the defendant with the requisite intent. If upon having the affidavit nota-

rized the defendant then gave it to some other person to mail or mailed it himself, then the crime was committed and the proper county for venue was Lake County and not Lewis and Clark County. *State v. Rother*, 130 M 357, 303 P 2d 393. (Dissenting opinions, 130 M 357, 303 P 2d 393, at 397 and 409.)

**94-3802. (10879) Oath defined.****References**

Cited or applied in *State v. Rother*, 130 M 357, 303 P 2d 393, 395.

**94-3806. (10883) Irregularity in administering oath.****References**

Cited or applied in *State v. Rother*, 130

M 357, 303 P 2d 393, 394; (Dissenting opinion, 130 M 357, 303 P 2d 393 at 410.)



**94-3808. (10885) Knowledge of materiality of testimony not necessary.****References**Cited or applied in *State v. Rother*, 130

M 357, 303 P 2d 393 at 410 (dissenting opinion).

**94-3809. (10886) Making depositions, etc., when deemed complete.****Crime—When Complete**

Under this section the crime of perjury is complete when the instrument is delivered by the accused to "any other person, with the intent that it be uttered or published as true." *State v. Rother*, 130 M 357, 303 P 2d 393, 395. (Dissenting opinions, 130 M 357, 303 P 2d 393 at 397, 409.)

**Venue**

Where prosecution for perjury is founded upon a false affidavit which was notarized in Lake County and delivered to

Lewis and Clark County, apparently by mail, by virtue of this section the crime was completed when the affidavit left the defendant with the requisite intent. If upon having the affidavit notarized the defendant then gave it to some other person to mail or mailed it himself, then the crime was committed and the proper county for venue was Lake County and not Lewis and Clark County. *State v. Rother*, 130 M 357, 303 P 2d 393. (Dissenting opinions, 130 M 357, 303 P 2d 393 at 397, 409.)

**94-3811. (10888) Punishment of perjury.****References**Cited or applied in *State v. Rother*, 130

M 357, 303 P 2d 393 at 410 (dissenting opinion).

## CHAPTER 39—PUBLIC OFFICERS—OFFENSES BY

**94-3908. (10828) Presenting fraudulent bills or claims for allowance, etc.****Operation and Effect**

An information may be drawn consistent with section 94-1805 (obtaining money under false pretenses) which is not vulnerable to the objection that it is bad for duplicity for charging an offense under

this section. *State v. Hale*, 129 M 449, 291 P 2d 229, 234. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236), distinguished in 135 M 449, 453, 340 P 2d 157, 160, overruled on another point in 142 M 459, 462, 384 P 2d 749.

**94-3918. (10923) Confessions obtained by duress, etc.****Confession Not Used in Proceedings**

Where defendant's confession to murder was not introduced before the court at any stage in the proceedings, he was not allowed to withdraw his plea of guilty on the grounds that the confession was obtained from him illegally. *Petition of Pine*, 143 M 453, 391 P 2d 690.

signed a confession to murder charge, the administration of the sedative did not make the confession ipso facto inadmissible and the determining question was whether at the time of the confession it was made voluntarily and of his free will. *State v. Noble*, 142 M 284, 384 P 2d 504.

**References**

*Dryman v. State*, 139 M 141, 361 P 2d 959.

**Drugs**

Where a sedative was given to a wounded defendant about an hour before he

**94-3920. (10925) Importing persons to discharge duties, etc.****Operation and Effect**

This section did not change the common-law rule respecting a sheriff's liability

in damages. *Annala v. McLeod*, 122 M 498, 206 P 2d 811, 815.

# CHAPTER 41—RAPE AND OTHER SEXUAL CRIMES

Section 94-4106. Lewd and lascivious acts upon children.

94-4120. Child under age of sixteen cannot be accomplice.

## 94-4101. (11000) Rape defined.

### Evidence of Other Offenses

Where defendant was charged with attempted rape upon a female child under the age of 18 years, the admission of a transcribed statement in the form of questions by the county attorney and answers by the defendant showing that defendant had been warned about going out with girls under 18 and could have been charged with rape of a girl other than the prosecutrix, was prejudicial, was not waived by defendant's introduction of evidence to meet that of the state, and was of such nature that it could not be cured. *State v. Tiedemann*, 139 M 237, 362 P 2d 529, 532, distinguished in 144 M 401, 405, 396 P 2d 821.

### Federal Law as to Indians

In the prosecution of an Indian for the crime of rape committed upon a 13-year-old female Indian on a reservation, an information which failed to charge that force had been employed or that consent of the victim was lacking failed to state an offense under the federal law which adopted the state law definition of rape. *United States v. Rider*, 282 F 2d 476.

Where an Indian was charged with rape of an Indian girl under eighteen on a reservation, the indictment failed to state an offense under the federal statute (18 U. S. C. § 1153), providing that an Indian who commits rape as defined by state law shall be imprisoned at the discretion of the court, because "rape" does not include "carnal knowledge" as rape is defined in this section, and because the federal law distinguishes between rape and carnal knowledge. *United States v. Red Wolf*, 172 F Supp 168.

## 94-4102. (11001) When physical ability must be proved.

### Partial Repeal

Laws 1943, Ch. 227 (10-601 et seq.), and the amendments thereof have repealed by implication this section and section 94-4101, insofar as they conflict with the substance and intent thereof and district

### Partial Repeal

Since this section is repealed by implication by Laws of 1943, Ch. 227 (10-601 et seq.), and the amendments thereof, insofar as it is in conflict with the substance and intent thereof, district criminal court was prohibited from trying child under the age of 16 years charged with rape. He was solely under the exclusive jurisdiction of the juvenile court. *State ex rel. Dahl v. District Court*, 134 M 395, 333 P 2d 495, 497, 499.

### Statutory Rape

Any man who accomplishes an act of sexual intercourse with a female under the age of 18 years, when such female is not his wife, is guilty of the crime of statutory rape. The corpus delicti is sufficiently proved by the testimony of the prosecutrix that she had sexual intercourse with the accused at the time and place set forth in the information. *State v. Reid*, 127 M 552, 267 P 2d 986, 991.

### References

Cited in *State v. Lawrence*, 122 M 277, 201 P 2d 756; *State v. Sauter*, 125 M 109, 232 P 2d 731, 734.

### Collateral References

Bill of particulars to one accused of rape. 5 ALR 2d 559.

Inclusion or exclusion of day of birth in computing age of prosecutrix. 5 ALR 2d 1153.

Exclusion of women from juries in prosecutions for rape. 9 ALR 2d 661.

criminal court was prohibited from trying child under the age of 16 years charged with rape. He was solely under the exclusive jurisdiction of the juvenile court. *State ex rel. Dahl v. District Court*, 134 M 395, 333 P 2d 495, 497, 499.

**94-4106. (11005) Lewd and lascivious acts upon children.** Any person over the age of eighteen (18) years, who shall wilfully and lewdly commit any lewd and lascivious act, other than the acts constituting other crimes provided in sections 94-4101 to 94-4108, upon or with the body or any part or member thereof, of a child under the age of sixteen (16) years, with the intent of arousing, appealing to, or gratifying the lust or passions

or sexual desires of such person, or of such child, shall be guilty of a felony, and shall be imprisoned in the state prison not exceeding twenty-five (25) years.

**History:** En. Sec. 1, Ch. 59, L. 1913; re-en. Sec. 11005, R. C. M. 1921; amd. Sec. 1, Ch. 70, L. 1935; amd. Sec. 1, Ch. 57, L. 1959.

#### **Amendment**

The 1959 amendment raised the penalty in this section from five years to twenty-five years.

#### **Age as Defense**

The portion of this section giving an exemption to prosecution to a person under the age of eighteen years is a matter of defense, and negation thereof is not a necessary part of the information. *State v. Davis*, 141 M 197, 376 P 2d 727, 729.

#### **Evidence of Similar Acts**

Where alleged lewd and lascivious acts upon the person of a minor child below the age of 16 years were committed on or about March 19, 1955, it was improper to permit state to show similar acts to those charged as having been committed on August 4, 1951, and in June 1951 in the State of California because of the remoteness in time. *State v. Nicks*, 134 M 341, 332 P 2d 904, 905, 77 ALR 2d 836.

#### **Information Held Sufficient**

An information under this section was sufficient although it did not allege the age of the defendant. *State v. Davis*, 141 M 197, 376 P 2d 727, 729.

#### **Subsequent Offense**

A defendant convicted of a lewd and lascivious act upon a child under this section was properly sentenced to a term of not less than 10 years on a subsequent offense, pursuant to subd. 1 of section 94-4713, where the jury found that he had previously been convicted of lewd and lascivious acts upon a child. In re *Davis' Petition*, 139 M 622, 365 P 2d 948, 949.

#### **Sufficiency of Evidence**

Where medical testimony pertaining to defendant's antisocial nature and difficulty in controlling his sexual impulses may have established the defendant as a sexual deviate who should be confined for the protection of society, but was not sufficient to prove intent to commit a lewd and lascivious act upon a child, it was reversible error to convict the defendant of the felony. *State v. Green*, 143 M 234, 388 P 2d 362.

### **94-4109. (11008) Importation and exportation of females, etc.**

#### **Constitutionality**

This section (94-4109) is void since Congress has legislated upon this matter in the Mann Act (U. S. C. Tit. 18, §§ 2421-

2424). This section then, being in contravention of a valid law of the United States, is wholly void. *Ex Parte Anderson*, 125 M 331, 238 P 2d 910, 911, 912.

### **94-4110. (11009) Procuring women to reside in houses of prostitution, etc.**

#### **Sufficiency of Evidence**

Evidence that defendant obtained and paid rent on prostitute's apartment, forced her to stay there, procured for her

and took all money was sufficient for conviction under statute. *State v. Crockett*, 148 M 402, 421 P 2d 722.

### **94-4114. (11013) Receiving money for procuring women, etc.**

#### **Sufficiency of Evidence**

Evidence that defendant cashed check given to prostitute by male brought to her by defendant who coerced her to prosti-

tute for him was sufficient to support conviction. *State v. Crockett*, 148 M 402, 421 P 2d 722.

### **94-4118. (11030) Crime against nature.**

#### **Penetration by Mouth**

The infamous crime against nature may be committed by penetration of the mouth.

(following *State v. Hoyt Guerin*, 51 M 250, 152 P 747.) *State v. Dietz*, 135 M 496, 343 P 2d 539, 541.



**Where Accomplice's Testimony Insufficiently Corroborated**

Where the corroborating evidence to the testimony of the accomplice showed that accomplice slept with the defendant and stayed overnight at defendant's house on several occasions, such evidence was insufficient to sustain the conviction as it

does nothing more than show opportunity on the part of defendant to have committed the crime. *State v. Gangner*, 130 M 533, 305 P 2d 338.

**References**

Cited or applied in *State v. Searle*, 125 M 467, 239 P 2d 995, 996; *State v. Shambo*, 133 M 305, 322 P 2d 657.

**94-4119. (11031) Penetration sufficient to complete the crime.**

**Operation and Effect**

There must be penetration before a person can be convicted of the infamous

crime against nature. *State v. Shambo*, 133 M 305, 322 P 2d 657, 658.

**94-4120. Child under age of sixteen cannot be accomplice.** No child under the age of sixteen (16) years can be an accomplice to the commission or attempted commission of the infamous crime against nature.

**History:** En. Sec. 1, Ch. 68, L. 1951; amd. Sec. 1, Ch. 145, L. 1957.

and inserted the words "or attempted commission."

**Title of Act**

An act declaring a child under the age of fourteen years incapable of being an accomplice to the infamous crime against nature.

**Repealing Clauses**

Section 2 of Ch. 68, Laws 1951 and Sec. 2 of Ch. 145, Laws 1957 repealed all acts and parts of acts in conflict therewith.

**Amendment**

The 1957 amendment substituted "sixteen (16) years" for "fourteen (14) years"

**Effective Date**

Section 3 of Ch. 68, L. 1951 provided the act should be in effect from and after its passage and approval. Approved February 23, 1951.

CHAPTER 42—RESCUES AND ESCAPES

**94-4202. (10865) Retaking goods from custody of officer.**

**Unlawful Arrest**

In action for damages for unlawful arrest which occurred after store manager handed plaintiff's check to officer and plaintiff seized check from officer's hand, arrest

could not be justified as for violation of this section since officer did not have check in his possession under any process of law. *Harrer v. Montgomery Ward & Co.*, 124 M 295, 221 P 2d 428, 435.

**94-4203. (10866) Escapes from state prison—punishment.**

**Consecutive Sentence**

An escape sentence runs consecutively and not concurrently with the original sentence. *State ex rel. Herman v. Powell*, 139 M 583, 367 P 2d 553, 557.

**Parole**

The granting of a parole to an escape sentence by virtue of the wording of this section did not result in a discharge of the original sentence. *State ex rel. Herman v. Powell*, 139 M 583, 367 P 2d 553, 557.

This section does not deal with paroles and therefore, does not stand for the proposition that an inmate, who has escaped from prison, must serve his entire original sentence in prison plus his escape sentence upon apprehension before being considered for parole. *State ex rel. Her-*

*man v. Powell*, 139 M 583, 367 P 2d 553, 557.

The word "discharge" as used in this section does not mean "release on parole." *State ex rel. Herman v. Powell*, 139 M 583, 367 P 2d 553, 557.

**Sequence of Consecutive Sentences**

Where petitioner was sentenced to serve consecutive sentences for escape and using an automobile without the consent of the owner, but the warden executed the sentences in a sequence reverse to that indicated by the court, there was no infringement on his rights and his petition for writ of habeas corpus was denied. *Petition of Cheadle*, 143 M 327, 389 P 2d 579.

**Speedy Trial upon Escape Charge**

Petitioner, who was presently confined

in the United States penitentiary at Leavenworth, Kansas, applied to the supreme court of Montana for writ of mandate to require the district court of Powell County, Montana, to grant him a speedy trial on an escape charge, averring that a detainer had been filed with that institution by the warden of the Montana state prison to which he had been sentenced to terms of eight years and five years to run concurrently. Since records showed that he had escaped from custody after

having served one year, two months and thirteen days of his sentences and he would be returned to the state prison to complete his unexpired sentences, the application was denied by the supreme court. In re Well's Petition, 139 M 611, 362 P 2d 420, 421.

#### References

Cited or applied in State ex rel. Ball v. Burrell, 129 M 585, 292 P 2d 144.

### CHAPTER 43—ROBBERY

#### 94-4301. (10973) Robbery defined.

##### Fear

Under this section a robbery victim is put in the fear required by section 94-4302 when he is forced to look down the barrel

of a 45-caliber automatic pistol held by a stranger whose purpose is to rob the victim. State v. Erickson, 141 M 118, 375 P 2d 314, 316.

#### 94-4302. (10974) What fear may be an element in robbery.

##### Presumption

It is reasonable to presume fear where a robbery victim is forced to look down the barrel of a 45-caliber automatic pistol

held by a stranger whose purpose is to rob his victim. State v. Erickson, 141 M 118, 375 P 2d 314, 316.

#### 94-4303. (10975) Punishment of robbery.

##### References

State v. Knight, 143 M 27, 387 P 2d 22.

### CHAPTER 44—SEDITION—CRIMINAL SYNDICALISM—DISPLAY OF RED FLAG—SUBVERSIVE ORGANIZATIONS

- Section 94-4411. Subversive Organization Registration Law—title of act.  
 94-4412. Purpose of act.  
 94-4413. Subversive organization defined.  
 94-4414. Organization subject to foreign control defined.  
 94-4415. Exceptions from definition of subversive organization.  
 94-4416. Organization pursuant to law—no exemption.  
 94-4417. Rules and regulations.  
 94-4418. Information filed with secretary of state.  
 94-4419. Amendment of charter, constitution, by-laws or other regulations—filing with secretary of state.  
 94-4420. Change of officers or purposes—filing with secretary of state.  
 94-4421. Semiannual statement of members.  
 94-4422. Report of meetings authorizing political action.  
 94-4423. Statements filed with secretary of state are public records.  
 94-4424. Anonymous letters prohibited.  
 94-4425. Penalty of organization for violating act.  
 94-4426. Penalty of officer of organization.  
 94-4427. Penalty of member of organization.

**94-4411. Subversive Organization Registration Law—title of act.** This act may be cited as the "Subversive Organization Registration Law."

**History:** En. Sec. 1, Ch. 215, L. 1951.

##### Title of Act

An act providing for the registration of certain societies, corporations, associations, political parties, assemblies, and other bodies and organizations; defining "subversive organizations," and requiring such

organizations to file reports, documents and information with the secretary of state, and providing for the making of rules and regulations by the secretary of state; prohibiting the sending and delivery to non-members of letters, leaflets, and other written or printed matter, unless the same

bears the name of such organization and      and providing penalties for violations of the names and addresses of its officers;      this act.

**94-4412. Purpose of act.** This act is adopted in the exercise of the police power of this state for the protection of the public peace and safety by requiring the registration of subversive organizations which are conceived and exist for the purpose of undermining and eventually destroying the democratic form of government in this state and in the United States.

History: En. Sec. 2, Ch. 215, L. 1951.

**94-4413. Subversive organization defined.** As used in this title, "subversive organization" means every corporation, association, society, camp, group, political party, assembly, and everybody or organization composed of two [2] or more persons or members, which comes within all or any of the following descriptions:

(a) Which directly or indirectly advocates, advises, teaches, or practices, the duty, necessity, or propriety of controlling, conducting, seizing, or overthrowing the government of the United States, of this state, or of any political subdivision thereof by force or violence;

(b) Which is subject to foreign control as defined in section 4 [94-4414] hereof.

History: En. Sec. 3, Ch. 215, L. 1951.

**94-4414. Organization subject to foreign control defined.** An organization is "subject to foreign control" if it comes within either of the following descriptions:

(a) It solicits or accepts financial contributions, loans, or support of any kind directly or indirectly from, or is affiliated directly or indirectly with, a foreign government or a political subdivision thereof, an agent, agency, or instrumentality of a foreign government or political subdivision thereof, a political party in a foreign country, or an international political organization;

(b) Its policies, or any of them, are determined by or at the suggestion of, or in collaboration with, a foreign government or a political subdivision thereof, an agent, agency, or instrumentality of a foreign government or a political subdivision thereof, a political party in a foreign country, or an international political organization.

History: En. Sec. 4, Ch. 215, L. 1951.

**94-4415. Exceptions from definition of subversive organization.** "Subversive organization" does not include any labor union or religious, fraternal, or patriotic organizations, society, or association whose objectives and aims do not contemplate the overthrow of the government of the United States, of this state or of any political subdivision thereof by force or violence.

History: En. Sec. 5, Ch. 215, L. 1951.

**94-4416. Organization pursuant to law—no exemption.** This act imposes additional requirements upon corporations, associations, or organizations which are subversive organizations. Neither the fact that such a corporation, association, or organization was organized pursuant to law nor that



its affairs and activities are in any respect regulated by law exempts it from complying with this title.

History: En. Sec. 6, Ch. 215, L. 1951.

**94-4417. Rules and regulations.** The secretary of state may adopt and promulgate such rules and regulations as may be necessary to carry out the provisions of this title, and may alter, amend, or repeal such rules and regulations.

History: En. Sec. 7, Ch. 215, L. 1951.

**94-4418. Information filed with secretary of state.** Every subversive organization in existence on July 1, 1951, shall within thirty (30) days after that date, and every subversive organization thereafter organized shall within ten (10) days after its organization, file with the secretary of state, on such forms and in such detail as he may prescribe, the following information and documents:

(a) A complete and detailed statement subscribed, under oath, by all of its officers, showing all of the following:

- (1) Its name and post office address;
- (2) The names and addresses of all its branches, chapters, and affiliates;
- (3) The names, nationalities, and residence addresses of its officers and members, and the qualifications required for membership in it;
- (4) The nature and extent of its existing and proposed aims, purposes, and activities;
- (5) The times and places of its meetings;
- (6) The description and location of the real property and the kind, quantity, and quality of the personal property owned by it, its assets and liabilities, the methods for the financing of its activities, and the names and addresses of all persons, organizations, and other sources who or which have contributed money, property, literature, or other things of value to the organization or any of its branches, chapters or affiliates for any of its purposes;

(7) Such other information as the secretary of state may from time to time require.

(b) A true copy, certified by all of its officers, of all of the following:

- (1) Its charter, articles of association, or constitution, and its by-laws, rules, and regulations;
- (2) Its oath, affirmation, or pledge of membership, if any;
- (3) Each agreement, resolution, and other instrument or document relating to its organization, powers, and purposes, and the powers and duties of its officers and members;
- (4) Each book, pamphlet, leaflet, or other printed, written, or illustrated matter directly or indirectly issued or distributed by it or in its behalf, or to or by its members with its knowledge, consent, or approval;
- (5) Such other documents as the secretary of state may from time to time require.

(c) A description of the uniforms, badges, insignia, or other means of identification prescribed by it, and worn or carried by its officers or members, or any of such officers or members.

(d) In case it is subject to foreign control, a statement of the manner in which it is subject.

History: En. Sec. 8, Ch. 215, L. 1951.

**94-4419. Amendment of charter, constitution, by-laws or other regulations—filing with secretary of state.** Every subversive organization shall within ten (10) days after any revision or amendment of, or other change with respect to, its charter, articles of association, constitution, by-laws, rules, regulations, oath, affirmation, or pledge of membership, or any part thereof, file with the secretary of state a true copy certified by all of its officers of the revised, amended, or changed charter, articles of association, constitution, by-laws, rules, regulations, oath, affirmation, or pledge of membership, or part thereof.

History: En. Sec. 9, Ch. 215, L. 1951.

**94-4420. Change of officers or purposes—filing with secretary of state.** Every subversive organization shall within ten (10) days after a change has been made in its officers, or in its aims, purposes, activities, property holdings, or methods and sources of financing its activities, file with the secretary of state a statement subscribed under oath by all of its officers showing the change.

History: En. Sec. 10, Ch. 215, L. 1951.

**94-4421. Semiannual statement of members.** Every subversive organization shall at least once in each period of six (6) months file with the secretary of state a statement subscribed under oath by all of its officers showing the names and residence addresses of all persons who have been admitted to membership during that period or, if no members have been admitted during that period, a statement to that effect similarly subscribed.

History: En. Sec. 11, Ch. 215, L. 1951.

**94-4422. Report of meetings authorizing political action.** Every subversive organization shall within ten (10) days after the adoption thereof file with the secretary of state, on such form and in such detail as he may prescribe, each resolution adopted, or the minutes of any meeting held by it, authorizing or providing for concerted action by its officers, members, or a part of its membership, to promote or prevent the passage of any act of legislation by any local, state, or federal legislative body, or to support or defeat any candidate for public office.

History: En. Sec. 12, Ch. 215, L. 1951.

**94-4423. Statements filed with secretary of state are public records.** All statements or documents filed with the secretary of state under this title [94-4411 to 94-4427] are public records and shall be open to public examination and inspection at all reasonable hours.

History: En. Sec. 13, Ch. 215, L. 1951.

**94-4424. Anonymous letters prohibited.** A subversive organization shall not send, deliver, mail or transmit, or suffer or permit to be sent, delivered, mailed, or transmitted, to any person in this state who is not a

member of the organization any anonymous letter, document, leaflet, or other written or printed matter. All letters, documents, leaflets, or other written or printed matter issued by a subversive organization which are intended to come to the attention of a person who is not a member of the organization shall bear the name of the organization and the name and residences of its officers.

**History:** En. Sec. 14, Ch. 215, L. 1951.

**94-4425. Penalty of organization for violating act.** Any subversive organization which violates any provisions of this title [94-4411 to 94-4427] is guilty of a felony punishable by fine of not less than one thousand dollars (\$1,000.00) nor more than ten thousand dollars (\$10,000.00). Any such violation constitutes a separate and distinct offense for each day, or part thereof, during which it is continued.

**History:** En. Sec. 15, Ch. 215, L. 1951.

**94-4426. Penalty of officer of organization.** Any officer or member of the board of directors, board of trustees, executive committee, or other similar governing body of a subversive organization who violates any provision of this title [94-4411 to 94-4427], or permits or acquiesces in the violation of any provision of this title by the organization is guilty of a felony punishable by fine of not less than five hundred dollars (\$500.00) nor more than five thousand dollars (\$5,000.00), or by imprisonment in a state prison for not less than six (6) months nor more than five (5) years, or by both.

**History:** En. Sec. 16, Ch. 215, L. 1951.

**94-4427. Penalty of member of organization.** Any person who becomes or remains a member of any subversive organization, or attends a meeting thereof, with knowledge that the organization has failed to comply with any provision of this title [94-4411 to 94-4427], is guilty of a misdemeanor punishable by fine of not less than ten dollars (\$10.00) nor more than one thousand dollars (\$1,000.00), or by imprisonment in the county jail for not less than ten (10) days nor more than one (1) year, or by both.

**History:** En. Sec. 17, Ch. 215, L. 1951.

#### **Separability of Provisions**

Section 18 of Ch. 215, L. 1951 read, "If any provision of this act or the application thereof to any person, corporation, association, organization, or circumstances, is for any reason held invalid, ineffective, or unconstitutional by a court of competent jurisdiction, the remainder of this act, or

the application of such provision to other persons, corporations, associations, organizations, or circumstances, shall not be affected thereby, and the legislative assembly hereby declares the severability of the several sections and provisions of this act, and that it would have enacted the same without the invalid provisions or the invalid applications, as the case may be, had such invalidity been apparent."

### **CHAPTER 47—PUNISHMENTS—ATTEMPTS AND OTHER GENERAL PROVISIONS**

Section 94-4720. Civil rights of convict suspended.

#### **94-4701. (11581) Acts made punishable by different provisions, etc.**

##### **Penalty in Addition to Others**

Statute imposing penalty of \$1,000 for excess freight weight over 25,000 pounds provided by statute, is obligatory upon

judge, is not violation either of double jeopardy provision of constitution or of this statute. State ex rel. Oleson v. District Court, Eleventh Judicial District, 151 M 12, 438 P 2d 560.



**Proof of Previous Conviction**

A prior foreign conviction must be charged and proved before the court is bound to fix a minimum penalty based thereon. *State v. Brown*, 136 M 382, 351 P 2d 219, 222.

**Separate Offenses Arising from Same Transaction**

Imposing two consecutive sentences upon defendant, one upon conviction of bur-

glary for breaking and entering bar and other upon conviction of larceny in stealing beer from bar, was proper. *Morigeau v. State*, 149 M 85, 423 P 2d 60.

Sentencing defendant to two five-year terms to run concurrently based on convictions of second degree assault on two different people in same brawl was not violation of this statute which applies only to one indivisible transaction. *State v. Manning*, 149 M 517, 429 P 2d 625.

**94-4708. (11588) Removal from office for neglect of official duty.****Operation and Effect**

This section does not restrain or limit the power of the governor to remove the third member of the unemployment com-

pensation commission. *State ex rel. Bonner v. District Court*, 122 M 464, 206 P 2d 166, 171.

**94-4710. (11590) Attempts to commit crime, when punishable.****References**

Cited or applied in *State v. Quinlan*, 126 M 52, 244 P 2d 1058, 1061 (dis-

sending opinion); *State v. Shambo*, 133 M 305, 322 P 2d 657, 658.

**94-4711. (11591) Attempts to commit crime, how punishable.****References**

Cited or applied in *State v. Dietz*, 135

M 496, 343 P 2d 539, 540; *Petition of Erickson*, 146 M 456, 409 P 2d 447.

**94-4713. (11593) Second offense, how punished after conviction, etc.****Cross-References**

Charging an offense, prior conviction, see. 95-1506.

second prosecution for a public offense for which defendant has once been prosecuted. In re *Bean's Petition*, 139 M 625, 365 P 2d 936, 937.

**Charge of Previous Conviction**

Charging the defendant with a prior conviction of a felony did not deprive him of a fair trial. *Petition of Noller*, 143 M 301, 387 P 2d 301.

**Proof of Nature of Crime**

When a judgment of prior conviction is offered as evidence the state must prove that the crime involved was a felony within the meaning of this section. *State v. Nelson*, 130 M 466, 304 P 2d 1110, 1115.

**Identity of Person under Prior Conviction**

Before a person can be convicted of the former convictions there must be proof aside from the judgment of prior convictions that the person convicted was in fact the defendant. *State v. Nelson*, 130 M 466, 304 P 2d 1110, 1115.

**Proof of Previous Conviction**

A prior foreign conviction must be charged and proved before the court is bound to fix a minimum penalty based thereon. *State v. Brown*, 136 M 382, 351 P 2d 219, 222.

**Lewd and Lascivious Act upon a Child**

Defendant convicted of a lewd and lascivious act upon a child under section 94-4106, which carried a penalty of imprisonment not exceeding 25 years, was properly sentenced to a term of not less than 10 years on a subsequent offense, pursuant to subd. 1 of this section, where the jury found that he had previously been convicted of lewd and lascivious acts upon a child. In re *Davis' Petition*, 139 M 622, 365 P 2d 948, 949.

It was not a denial of fair trial to allow the jury to consider the proven and admitted fact that the defendant in a first degree assault case had been convicted of three prior felonies, where only one would have served to increase the punishment under this section, when jury was instructed that the prior convictions were to be considered only in fixing the punishment, if and when the defendant was found guilty of the assault charge. *Petition of Jones*, 144 M 13, 393 P 2d 780.

**Pleading of Prior Conviction**

When a prior conviction is set forth in the information it does not constitute a

Where record indicated that petitioner for writ of habeas corpus had sustained a prior felony conviction and that under this section he might have received the same sentence for second degree burglary

with a prior offense as he did receive for first degree burglary, it did not show that petitioner was not prejudiced by not being fully informed as to the difference between first and second degree burglary, as a prior conviction was not charged or established. *Jones v. State*, 235 F Supp 673, 678.

#### References

Cited or applied in *State v. Dietz*, 135

M 496, 343 P 2d 539, 540; *State ex rel. Nelson v. Ellsworth*, 141 M 78, 375 P 2d 316, 318; *Petition of Jones*, 142 M 622, 387 P 2d 300; *State v. Knight*, 143 M 27, 387 P 2d 22; *State v. Pelke*, 143 M 262, 389 P 2d 164; *State v. Schleining*, 146 M 1, 403 P 2d 625; *Petition of Jones*, 146 M 305, 405 P 2d 978; *Petition of Spangler*, 146 M 344, 406 P 2d 686; *Petition of Erickson*, 146 M 456, 409 P 2d 447.

### 94-4715. (11595) Foreign conviction for former offense.

#### Identity of Person under Prior Conviction

Before a person can be convicted of the former convictions there must be proof aside from the judgment of prior convictions that the person convicted was in fact the defendant. *State v. Nelson*, 130 M 466, 304 P 2d 1110, 1115.

#### Proof of Conviction

A prior foreign conviction must be

charged and proved before the court is bound to fix a minimum penalty based thereon. *State v. Brown*, 136 M 382, 351 P 2d 219, 222.

#### Proof of Nature of Crime

When a judgment of prior conviction is offered as evidence the state must prove that the crime involved was a felony within the meaning of this section. *State v. Nelson*, 130 M 466, 304 P 2d 1110, 1115.

### 94-4716. (11596) Repealed.

#### Repeal

This section (Sec. 1235, Pen. C. 1895), relating to the commencement of subsequent terms of imprisonment upon con-

viction of two or more crimes, was repealed by Sec. 2, Ch. 196, Laws 1967, effective January 1, 1968. For new law, see secs. 95-2206 and 95-2213.

### 94-4716.1. Repealed.

#### Repeal

Section 94-4716.1 (Sec. 1, Ch. 130, L. 1961), relating to commencement of term for offense committed by prisoner under

sentence, was repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-2206 and 95-2213.

### 94-4717. (11597) Repealed.

#### Repeal

Section 94-4717 (Sec. 1236, Pen. C. 1895), relating to time term of imprisonment

commences, was repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-2206 and 95-2213.

**94-4720. (11600) Civil rights of convict suspended.** A sentence of imprisonment in the state prison for any term less than life suspends all the civil rights of the person so sentenced, and forfeits all public offices and private trusts, authority, or power, during such imprisonment. The governor has power to restore to citizenship any person convicted of any offense committed against the laws of the state, upon cause being shown, either after the expiration of sentence, or after pardon. The governor may request an investigation by the board of pardons to determine if such restoration to citizenship be advisable.

**History:** En. Sec. 154, p. 217, Bannack Stat.; re-en. Sec. 186, p. 313, Cod. Stat. 1871; re-en. Sec. 213, 4th Div. Rev. Stat. 1879; re-en. Sec. 279, 4th Div. Comp. Stat. 1887; amd. Sec. 1239, Pen. C. 1895; re-en. Sec. 8904, Rev. C. 1907; re-en. Sec. 11600, R. C. M. 1921; amd. Sec. 1, Ch. 87, L. 1955. Cal. Pen. C. Sec. 673.

#### Amendment

The 1955 amendment added the second and third sentences.

#### Effective Date

Section 2 of Ch. 87, Laws 1955 provided the act should be in effect from and after April 1, 1955.

**94-4723. (11603) Convict competent witness.****Proper Method to Impeach**

Where a defendant upon cross-examination admits his prior convictions of felonies it is error for the court to then allow the state to introduce into evidence the judgment record of prior convictions, for it serves no useful purpose since the credibility has already been impeached and it may weigh too heavily against the

defendant. *State v. Colloff*, 125 M 31, 231 P 2d 343, 344.

**Testimony of Accomplice**

An accomplice may testify in a criminal case even though he is a convicted felon at the time of his testimony. *State v. Barick*, 143 M 273, 389 P 2d 170.

**CHAPTER 48—RIGHTS OF DEFENDANT****94-4801. (11606) No person punishable but on legal conviction.****Collateral References**

Duty to advise accused as to right to assistance of counsel. 3 ALR 2d 1003.

**94-4803. (11608) Repealed.****Repeal**

This section (Sec. 1, p. 189, Cod. Stat. 1871), relating to the definition of a crim-

inal action, was repealed by Sec. 2, Ch. 196, Laws 1967, effective January 1, 1968.

**94-4804. (11609) Parties to a criminal action.****Operation and Effect**

In a criminal case the state is the opposite party to the defendant, and former section 93-1901-9, relating to calling the opposite party, is not applicable to a criminal proceeding. *State v. Moorman*, 133 M 148, 321 P 2d 236, 238.

**References**

Cited or applied in *State v. MacLean*, 129 M 500, 291 P 2d 250, 252.

**94-4805. (11610) Repealed.****Repeal**

This section (Sec. 1354, Pen. C. 1895), relating to the definition of defendant as

the party prosecuted in a criminal action, was repealed by Sec. 2, Ch. 196, Laws 1967, effective January 1, 1968.

**94-4806. (11611) Rights of defendant in a criminal action.****Cross-References**

Right to counsel, sec. 95-1001.

counsel could be discharged by the trial court. *Peters v. State*, 139 M 634, 366 P 2d 158, 159.

**Discharge of Court-appointed Counsel**

Where court-appointed counsel failed to advise the clerk's office as to what would be required for the record on appeal from conviction of burglary and there was no record before the supreme court, defendant had been denied his right to effective representation by counsel on his appeal and the cause was remanded to the district court for revocation of appointment of present counsel and appointment of competent and effective counsel to properly prosecute the appeal. *State v. Bubnash*, 139 M 517, 366 P 2d 155, 158.

Where defendant charged with burglary was granted the services of court-appointed counsel he did not have the right to discharge such counsel unless he was able to provide counsel at his own expense or desired to undertake his own defense. However, upon a proper showing, such

**Examination of Witnesses in Open Court**

Where defendant pleaded guilty to grand larceny, the extent of his punishment should have been determined under section 94-2706 by the exercise of a sound discretion on the part of the trial judge after the circumstances had been "presented by the testimony of witnesses examined in open court." *Kuhl v. District Court*, 139 M 536, 366 P 2d 347, 362.

**Impartial Jury**

Trial court was in error for refusing to grant the defendant a change of venue where evidence disclosed that local newspaper had fanned the feeling of the community against the defendant, that the local people believed the defendant to be guilty, and that the county officials them-



selves felt that the feeling against the defendant was so high that they moved him for safety to the state prison. *State v. Dryman*, 127 M 579, 269 P 2d 796, 800. (Dissenting opinion, 127 M 579, 269 P 2d 796, 801.)

#### **Right to Appear and Defend by Counsel**

By section 94-6512 a defendant is guaranteed counsel by appointment of the court, if he cannot himself employ an attorney. It is equally the duty of the court to make the appointment of counsel effective, i. e., to give court-appointed counsel a reasonable time for the preparation of

his case after he has been appointed. *State v. Blakeslee*, 131 M 47, 306 P 2d 1103, 1107. (Dissenting opinion, 131 M 47, 306 P 2d 1103, 1107.)

Where counsel was appointed by the court, after withdrawal of defendant's original counsel, but trial was commenced three days after such appointment, such appointment was made purposeless as it is the duty of the court to make the appointment effective by giving a reasonable time for the preparation of the case. *State v. Blakeslee*, 131 M 47, 306 P 2d 1103, 1107. (Dissenting opinion, 131 M 47, 306 P 2d 1103, 1107.)

### **94-4807. (11612) Repealed.**

#### **Repeal**

Section 94-4807 (Sec. 10, p. 190, Cod. Stat. 1871; Sec. 1356, Pen C. 1895), pro-

hibiting a second prosecution for the same offense, was repealed by Sec. 6, Ch. 228, Laws 1969.

## **CHAPTER 49—DEFINITIONS—PROSECUTION OF CRIMINAL ACTIONS —JURISDICTION OF COURTS**

(Repealed—Section 2, Chapter 196, Laws of 1967)

### **94-4901 to 94-4917. (11615 to 11631) Repealed.**

#### **Repeal**

Sections 94-4901 to 94-4917 (Sec. 1, p. 248, L. 1891; Secs. 1370 to 1375, 1380 to 1388, 1400, 1401, Pen. C. 1895), defining terms and dealing with prosecutions and

jurisdiction, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-203, 95-208, 95-210, 95-301, 95-302, 95-902, 95-1301, 95-1302, 95-1501, 95-1502, and 95-2001.

## **CHAPTER 50—LAWFUL RESISTANCE—INTERVENTION OF OFFICERS OF JUSTICE**

### **94-5002. (11633) By the party, in what cases and to what extent.**

#### **Use of Excessive Force**

In prosecution for first degree assault, defendant who fired bullet through apartment door striking investigating police officer, who was privileged to open apart-

ment door to limit of night latch and who announced that he was policeman, used excessive force and was properly convicted. *State v. Lukus*, 149 M 45, 423 P 2d 49.

## **CHAPTER 51—SECURITY TO KEEP THE PEACE**

### **94-5101. (11637) Information of threatened offense.**

#### **Compiler's Notes**

Section 94-4905, referred to in this sec-

tion in the parent volume, was repealed by Sec. 2, Ch. 196, Laws 1967.

## **CHAPTER 53—SUPPRESSION OF RIOTS**

### **94-5304. (11658) Magistrates and officers to command rioters to disperse.**

#### **Liability of Sheriff**

This section is merely declaratory of the common law and the sheriff is not liable

in damages for damage caused by mob violence. *Annala v. McLeod*, 122 M 498, 206 P 2d 811, 815.

**94-5305. (11659) To arrest rioters if they do not disperse.****Liability of Sheriff**

This section is merely declaratory of the common law and the sheriff is not

liable in damages for damage caused by mob violence. *Annala v. McLeod*, 122 M 498, 206 P 2d 811, 815.

**94-5314. Liability of officers for neglect of duties, etc.****Liability of Sheriff**

There was no provision imposing liability for damages upon the sheriff prior to

the enactment of this law. *Annala v. McLeod*, 122 M 498, 206 P 2d 811, 815.

### CHAPTER 55—REMOVAL OF OFFICERS OTHERWISE THAN BY IMPEACHMENT

**94-5501. (11687) Officers subject to removal.****Operation and Effect**

These sections do not restrain or limit the governor's power of removal of the third member on the unemployment compensation commission. *State ex rel. Bonner v. District Court*, 122 M 464, 206 P 2d 166, 171.

**Removal of Clerk of School District**

A clerk of a school district board of trustees may be removed without notice and hearing since he is not a public officer. *State ex rel. Running v. Jacobson*, 140 M 221, 370 P 2d 483, 486.

**94-5516. (11702) Removal of public officers by summary proceedings.****Operation and Effect**

Under this section of the Code it is the public policy of the state, in cases where a county officer is charged with collecting illegal fees, that such officer be entitled, as a matter of defense, to offer evidence of his good faith or honest mistake and the value received by the county. *State v. Hale*, 126 M 326, 249 P 2d 495, 496.

of party to appear the first day should be excluded and the last day included. *State ex rel. Burns v. Lacklen*, 129 M 243, 284 P 2d 998, 1005, overruling *State ex rel. Sullivan v. District Court*, 122 M 1, 196 P 2d 452, 455.

**References**

Cited or applied in *State ex rel. Olsen v. Public Service Comm.*, 131 M 104, 308 P 2d 633, 639.

**Time for Appearance of Party**

In computing time for citing by court

### CHAPTER 56—LOCAL JURISDICTION OF PUBLIC OFFENSES

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-5601 to 94-5619. (11703 to 11721) Repealed.****Repeal**

Sections 94-5601 to 94-5619 (Secs. 14, 16, 17, pp. 220, 221, *Bannaek Stat.*; Sec. 31, p. 275, *Cod. Stat. 1871*; Secs. 1560 to 1578,

*Pen. C. 1895*), relating to local jurisdiction of public offenses, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-304, and Title 95, ch. 4.

### CHAPTER 57—TIME OF COMMENCING CRIMINAL ACTIONS

**94-5703. (11724) Limitation of one year in misdemeanors.****References**

Cited in *State v. Saginaw*, 124 M 225, 220 P 2d 1021, 1025.

## CHAPTER 58—THE COMPLAINT

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-5801 to 94-5805. (11728 to 11732) Repealed.****Repeal**

These sections (Secs. 75 to 77, 79, pp. 202, 203, Cod. Stat. 1871; Sec. 1, p. 40, L. 1885; Secs. 1590 to 1594, Pen. C. 1895),

relating to the complaint, were repealed by Sec. 2, Ch. 196, Laws 1967, effective January 1, 1968. For new law, see secs. 95-603 and 95-901.

## CHAPTER 59—WARRANT OF ARREST—PROCEEDINGS ON EXECUTION THEREOF

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-5901 to 94-5918. (11733 to 11750) Repealed.****Repeal**

Sections 94-5901 to 94-5918 (Sec. 78, p. 202, Cod. Stat. 1871; Secs. 1600 to 1617, Pen. C. 1895), relating to arrest warrants and proceeding upon their execution, were

repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-601, 95-603, 95-609, 95-616, 95-901, 95-902, 95-1102, and 95-1105.

## CHAPTER 60—ARRESTS—BY WHOM AND HOW MADE—CLOSE PURSUIT—RETAKING AFTER ESCAPE

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-6001 to 94-6033. (11751 to 11772) Repealed.****Repeal**

Sections 94-6001 to 94-6033 (Secs. 111, 294, pp. 234, 261, Bannock Stat.; Secs. 63, 64, 66 to 72, 74, 450, pp. 201, 202, 258, Cod. Stat. 1871; Secs. 1630 to 1649, 1660, 1661,

Pen. C. 1895; Secs. 1 to 5, 7, Ch. 187, L. 1937; Secs. 1 to 5, Ch. 60, L. 1959), relating to arrests, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see Title 95, ch. 6, sec. 95-901 and Title 95, ch. 20.

## CHAPTER 61—EXAMINATION AND COMMITMENT OR DISCHARGE OF DEFENDANT

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-6101 to 94-6125. (11773 to 11797) Repealed.****Repeal**

Sections 94-6101 to 94-6125 (Secs. 33, 40, 43 to 46, pp. 223 to 225, Bannack Stat.; Secs. 86, 90, 99 to 102, 110, 111, 114 to 116, pp. 204 to 208, Cod. Stat. 1871; Secs. 1670 to 1694, Pen. C. 1895; Sec. 1, Ch. 8, L.

1919), relating to examination of accused, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1001, 95-1102, 95-1123, 95-1202 to 95-1204, 95-1708, and 95-1801.

## CHAPTER 62—PRELIMINARY PROVISIONS—FILING THE INFORMATION

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-6201 to 94-6208. (11798 to 11805) Repealed.****Repeal**

Sections 94-6201 to 94-6208 (Sec. 2, p. 249, L. 1891; Secs. 1720 to 1722, 1730 to 1734, Pen. C. 1895), relating to manner of prosecuting offenses and filing of in-

formations, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1302, 95-1303, 95-1502, 95-1503, and 95-1505.



CHAPTER 63—THE GRAND JURY—ITS FORMATION—POWERS AND DUTIES  
—FINDING AND PRESENTING AN INDICTMENT

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-6301 to 94-6335. (11806 to 11840) Repealed.**

**Repeal**

Sections 94-6301 to 94-6335 (Secs. 53, 54, 56, 67, 68, 71 to 73, 75, 77, 78, pp. 227, 229, 230, Bannack Stat.; Secs. 117 to 120, 123 to 129, 134, 135, 143, 145 to 152, 154, 156 to 159, pp. 209 to 214, Cod. Stat. 1871; Secs. 1750 to 1764, 1780 to 1791, 1810 to

1817, Pen. C. 1895), relating to the grand jury and the finding and presenting of an indictment, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1103, 95-1104, 95-1401 to 95-1406, 95-1408 to 95-1410.

CHAPTER 64—RULES OF PLEADING AND FORM OF INFORMATION AND  
INDICTMENT

**94-6401 to 94-6406. (11841 to 11846) Repealed.**

**Repeal**

Sections 94-6401 to 94-6406 (Secs. 80 to 83, p. 231, Bannack Stat.; Secs. 162 to 165, 187, pp. 216, 218, Cod. Stat. 1871; Secs. 1830 to 1835, Pen. C. 1895), relating to the

rules of pleading and form of information and indictment, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1410, 95-1501 to 95-1503, and 95-2001.

**94-6407. (11847) Repealed.**

**Repeal**

Section 94-6407 (Sec. 188, p. 218, Cod. Stat. 1871), prohibiting the charging of more than one offense in the same indictment or information, was repealed by Sec.

3, Ch. 172, Laws 1961. For new law, see secs. 95-1504, 95-1505.

**94-6407.1 to 94-6413. (11848 to 11853) Repealed.**

**Repeal**

Sections 94-6407.1 to 94-6413 (Secs. 84, 86 to 88, p. 231, Bannack Stat.; Secs. 166, 168 to 170, 189, pp. 216, 218, Cod. Stat. 1871; Secs. 1837 to 1842, Pen. C. 1895),

relating to the rules of pleading, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1503 to 95-1505 and 95-1702.

**94-6414. (11854) Presumptions of law, etc., need not be stated.**

**Cross-References**

Charging an offense, form of charge, sec. 95-1503.

**94-6422. (11862) Repealed.**

**Repeal**

This section (Sec. 93, p. 232, Bannack Stat.), relating to acquittal of one or more defendants under indictment against sev-

eral, was repealed by Sec. 2, Ch. 196, Laws 1967, effective January 1, 1968. For new law, see secs. 95-1504 and 95-1915.

**94-6423. (11863) Distinction between accessory before the fact, etc.**

**Aiding and Abetting**

While the statute defines larceny as the taking of property from the person of another yet it is sufficient to show the defendant's guilt that he aided or abetted in the commission of the crime. State v. Maciel, 130 M 569, 305 P 2d 335, 336.

**Instructions**

Where a verbal declaration of one co-defendant that he and the other codefendant were partners was given in evidence, it was error for the court to refuse defendant's instruction that such verbal declaration is insufficient to establish a

partnership. Although a partnership was immaterial because of this section and section 94-204, yet the jury may have given full consideration to the declaration and found defendant guilty on the strength thereof. *State v. Keller*, 126 M 142, 246 P 2d 817, 821.

#### Operation and Effect

Under this section and section 94-204, evidence was sufficient to sustain a conviction of assault in the second degree where defendant was at the scene of the crime and was admittedly a participant therein; it is not necessary to show that

he actually fired any one of the guns. *State v. Simon*, 126 M 218, 247 P 2d 481, 485.

#### Second Degree Assault

Under this section an information containing a single count charging the crime of second degree assault, as defined in section 94-602, was proper where only one crime was involved, namely, second degree assault, with at least two different ways of committing that crime; one by a direct assault and the other by aiding and abetting. *State v. Zadick*, 148 M 296, 419 P 2d 749, 751.

### 94-6424. (11864) Indictment against accessory.

#### Cross-References

Venue, where person in one county

commits or aids and abets commission of offense in another county, sec. 95-404.

### 94-6426 to 94-6428. (11866 to 11868) Repealed.

#### Repeal

Sections 94-6426 to 94-6428 (Secs. 96, 99, 100, pp. 232, 233, *Bannack Stat.*), relating to record of indictment or information, prohibiting disclosure of indictment or information until accused has been ar-

rested and authorizing conviction of offense charged, lesser degree, lesser included crime or attempt, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1409, 95-1503, and 95-1915.

### 94-6429. (11869) Allegation as to partnership property.

#### Cross-References

Charging an offense, form of charge, sec. 95-1503.

#### References

Cited or applied in *State v. Fairburn*, 135 M 449, 340 P 2d 157, 161; *In re Davis'* Petition, 141 M 565, 380 P 2d 880.

### 94-6430 to 94-6434. (11870 to 11874) Repealed.

#### Repeal

Sections 94-6430 to 94-6434 (Secs. 1859 to 1861, 2590, 2600, *Pen. C. 1895*), relating to amendments at trial, effect of verdict, defectively entitled affidavits and imma-

terial departures from form prescribed by code, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1505 and 95-1506.

## CHAPTER 65—ARRAIGNMENT OF DEFENDANT

(Repealed—Section 2, Chapter 196, Laws of 1967)

### 94-6501 to 94-6516. (11875 to 11890) Repealed.

#### Repeal

Sections 94-6501 to 94-6516 (Secs. 193, 196, 199 to 204, pp. 220 to 221, *Cod. Stat. 1871*; Sec. 1, p. 12, L. 1881; Secs. 1880 to 1895, *Pen. C. 1895*; Sec. 1, Ch. 33, L. 1903;

Sec. 1, Ch. 38, L. 1949), relating to arraignment, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-902, 95-1005, 95-1102, 95-1107, 95-1602 to 95-1604.

## CHAPTER 66—SETTING ASIDE THE INDICTMENT OR INFORMATION

(Repealed—Section 2, Chapter 196, Laws of 1967)

### 94-6601 to 94-6605. (11891 to 11895) Repealed.

#### Repeal

Sections 94-6601 to 94-6605 (Secs. 205, 207 to 210, pp. 221, 222, *Cod. Stat. 1871*; Secs. 1910 to 1914, *Pen. C. 1895*), relat-

ing to setting aside the indictment or information, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1702 and 95-1704.

## CHAPTER 67—DEMURRER

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-6701 to 94-6711. (11896 to 11906) Repealed.****Repeal**

Sections 94-6701 to 94-6711 (Secs. 211, 212, 215, 216, p. 222, Cod. Stat. 1871; Sec. 1, p. 73, L. 1885; Secs. 1920 to 1930, Pen.

C. 1895; Sec. 2, Ch. 172, L. 1961), relating to demurrers, were repealed by Sec. 2, Ch. 196, Laws 1967. For present law, see sec. 95-1702.

## CHAPTER 68—PLEAS

Section 94-6808.1. Definition of terms.

94-6808.2. Method of prosecution when conduct constitutes more than one offense.

94-6808.3. When prosecution barred by former prosecution.

94-6808.4. Former prosecution in another jurisdiction—when a bar.

94-6808.5. Former prosecution before court lacking jurisdiction or when fraudulently procured by the defendant.

**94-6801 to 94-6805. (11907 to 11911) Repealed.****Repeal**

Sections 94-6801 to 94-6805 (Secs. 217, 218, 221, pp. 222, 223, Cod. Stat. 1871; Secs. 1940 to 1944, Pen. C. 1895), relating

to pleas, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1606, 95-1607, 95-1901, and 95-1902.

**94-6806 to 94-6808. (11912 to 11914) Repealed.****Repeal**

Sections 94-6801 to 94-6808 (Secs. 222 to 224, p. 223, Cod. Stat. 1871; Secs. 1945

to 1947, Pen. C. 1895), relating to former acquittals, were repealed by Sec. 6, Ch. 228, Laws 1969.

**94-6808.1. Definition of terms.** (a) Same transaction. The term same transaction shall include conduct consisting of:

(1) a series of acts or omissions motivated by a purpose to accomplish a criminal objective, and necessary or incidental to the accomplishment of that objective; or

(2) a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.

(b) Included offense. An offense is an included offense when:

(1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(2) it consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(3) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

**History:** En. Sec. 1, Ch. 228, L. 1969.

**Title of Act**

An act to provide rules governing the defense of double jeopardy, providing when such defense shall or shall not be a

bar to a second prosecution and defining when conduct arising out of the same transaction may or may not establish the commission of more than one offense; repealing sections 94-4807, 94-6806, 94-6807, 94-6808 and 94-7234, R. C. M. 1947.



**94-6808.2. Method of prosecution when conduct constitutes more than one offense.** When the same transaction may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

- (a) one offense is included in the other; or
- (b) one offense consists only of a conspiracy or other form of preparation to commit the other; or
- (c) inconsistent findings of fact are required to establish the commission of the offenses; or
- (d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or
- (e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that the specific periods of such conduct constitute separate offenses.

**History:** En. Sec. 2, Ch. 228, L. 1969.

**94-6808.3. When prosecution barred by former prosecution.** Provided the offenses, if more than one, were known to the attorney prosecuting upon sufficient evidence to justify the filing of an information or the issuance of a warrant of arrest and were consummated prior to the original charge, and provided the jurisdiction and venue of the several offenses lie in a single court, a prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances:

(a) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense than the offense charged which is subsequently set aside is an acquittal of the greater inclusive offense that was charged.

(b) The former prosecution was terminated, after a complaint had been filed on a misdemeanor charge, after an information had been filed or an indictment found on a felony charge, by a final order or judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(c) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in:

- (1) a judgment of conviction which has not been reversed or vacated,
- (2) a verdict of guilty which has not been set aside and which is capable of supporting a judgment, so long as failure to enter judgment was for a reason other than a motion of the defendant,
- (3) a plea of guilty accepted by the court, so long as failure to enter judgment was for a reason other than a motion of the defendant.

(d) The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prose-

cution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:

(1) The defendant consents to the termination or waives his right to object to the termination.

(2) The trial court, in the exercise of its discretion, finds that the termination is necessary because:

(i) it is physically impossible to proceed with the trial in conformity with law; or

(ii) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or

(iii) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without manifest injustice to either the defendant or the state; or

(iv) the jury is unable to agree upon a verdict; or

(v) false statements of a juror on voir dire prevent a fair trial.

**History:** En. Sec. 3, Ch. 228, L. 1969.

#### **94-6808.4. Former prosecution in another jurisdiction—when a bar.**

When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state or of two courts of separate and/or concurrent jurisdiction in this state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:

(a) The first prosecution resulted in an acquittal or in a conviction as defined in section 3 [94-6808.3] and the subsequent prosecution is based on an offense arising out of the same transaction.

(b) The former prosecution was terminated, after the complaint has been filed on a misdemeanor charge, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.

**History:** En. Sec. 4, Ch. 228, L. 1969.

**94-6808.5. Former prosecution before court lacking jurisdiction or when fraudulently procured by the defendant.** A prosecution is not a bar within the meaning of sections 3 and 4 [94-6808.3 and 94-6808.4] under any of the following circumstances:

(a) The former prosecution was before a court which lacks jurisdiction over the defendant or the offense; or

(b) The former prosecution was procured by the defendant without the knowledge of the proper prosecuting officer or with the purpose of avoiding the sentence which might otherwise be imposed; or

(c) The former prosecution resulted in a judgment of conviction which was held invalid in any post-conviction hearing.

**History:** En. Sec. 5, Ch. 228, L. 1969.

**Repealing Clause**

Section 6 of Ch. 228, Laws 1969 read

"Sections 94-4807, 94-6806, 94-6807, 94-6808, 94-7234, R. C. M. 1947, and all acts and parts of acts in conflict herewith are hereby repealed."

**94-6809. (11915) Repealed.**

**Repeal**

Section 94-6809 (Sec. 135, p. 237, Bannack Stat.), relating to entry of plea of not guilty if defendant refuses to an-

swer, was repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-1606.

**CHAPTER 69—CHANGE OF PLACE OF TRIAL OR JUDGE**

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-6901 to 94-6913. (11916 to 11927) Repealed.**

**Repeal**

Sections 94-6901 to 94-6913 (Secs. 145, 146, 151 to 153, pp. 238 to 240, Bannack Stat.; Secs. 225 to 229, 233 to 235, pp. 223 to 225, Cod. Stat. 1871; Secs. 1970 to

1981, Pen. C. 1895; Sec. 1, Ch. 61, L. 1959; Sec. 1, Ch. 112, L. 1965), relating to change of place of trial, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1709 and 95-1710.

**CHAPTER 70—MODE OF TRIAL—FORMATION OF JURY AND CALENDAR OF ISSUES—POSTPONEMENT OF TRIAL**

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-7001 to 94-7013. (11928 to 11940) Repealed.**

**Repeal**

Sections 94-7001 to 94-7013 (Secs. 165, 166, pp. 242, 243, Bannack Stat.; Secs. 269 to 273, 282, 291, pp. 232 to 235, Cod. Stat. 1871; Secs. 1960, 1990 to 1992, 2000 to 2003, 2010 to 2014, Pen. C. 1895), relating

to mode of trial, formation of jury and calendar of issues and postponement of trial, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1301, 95-1410, 95-1708, 95-1901, and 95-1904 to 95-1907.

**CHAPTER 71—CHALLENGING THE JURY**

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-7101 to 94-7128. (11941 to 11968) Repealed.**

**Repeal**

Sections 94-7101 to 94-7128 (Secs. 156, 157, p. 241, Bannack Stat.; Secs. 277, 278, 283 to 286, pp. 233, 234, Cod. Stat. 1871; Sec. 1, p. 54, L. 1881; Secs. 2030 to 2057,

Pen. C. 1895; Sec. 1, Ch. 4, L. 1925), relating to challenges to the jury, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1908 and 95-1909.

**CHAPTER 72—THE TRIAL**

**94-7201, 94-7202. (11969, 11970) Repealed.**

**Repeal**

Sections 94-7201 and 94-7202 (Sec. 2071, Pen. C. 1895; Sec. 1, Ch. 82, L. 1907), relating to order of trial and departures

therefrom, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1910 and 95-1911.



**94-7203. (11971) Defendant presumed innocent—reasonable doubt.****Burden of Proof**

In criminal cases the burden of proof never shifts, but the burden of the evidence may shift frequently. *State v. Moorman*, 133 M 148, 321 P 2d 236, 238.

In a prosecution for grand larceny, an instruction which had the effect of placing a burden on the defendant to explain his possession of stolen property was erroneous. Such a burden deprives defendant of his cloak of innocence and forces him to testify. *State v. Greeno*, 135 M 580, 342 P 2d 1052.

**Operation and Effect**

In a prosecution for the crime of carrying a concealed weapon; wherein the defendant was found guilty by a jury, it was held on appeal that in view of the uncertainty in the mind of the state's

only eyewitness as compared with witnesses for the defendant, coupled with the effect of this section, the evidence was not sufficient to justify a conviction for the crime charged. *State v. Gilbert*, 125 M 104, 232 P 2d 338, 341.

**"Reasonable Doubt"—Instruction**

Instruction that mere unexplained possession of stolen property was not sufficient to justify conviction but that one found in possession of property that may have been stolen must explain such possession in order to remove effect of that fact as a circumstance to be considered with other evidence pointing to guilt, did not deprive the defendant of the presumption of innocence. *State v. Gray*, — M —, 447 P 2d 475.

**94-7205. (11973) Repealed.****Repeal**

This section (Sec. 301, p. 236, Cod. Stat. 1871), relating to separate trials, was re-

pealed by Sec. 2, Ch. 196, Laws 1967, effective January 1, 1968. For new law, see sec. 95-1504.

**94-7206. (11974) Discharging defendant that he may be a witness.****Cross-References**

Charging an offense, joinder of offenses and defendants, sec. 95-1504.

**94-7207. (11975) Same.****Cross-References**

Charging an offense, joinder of offenses and defendants, sec. 95-1504.

**94-7208. (11976) Effect of such discharge.****Cross-References**

Charging an offense, joinder of offenses and defendants, sec. 95-1504.

**94-7209. (11977) Rules of evidence in civil actions, etc.****Adverse Witness Statute**

In a criminal case the state of Montana is the opposite party to the defendant, and former section 93-901-9, relating to calling the opposite party, is not applicable to a criminal proceeding. *State v. Moorman*, 133 M 148, 321 P 2d 236, 238.

**Inspection of Writings**

Even if section 93-8301 [now superseded by M. R. Civ. P., Rule 34] is made applicable to criminal cases by this section, defendant was not entitled to the inspection of written materials, where there was no showing as to what the material consisted of, whether it was relevant to the defense, or that it was admissible in evidence. *State ex rel. Keast v. District Court*, 135 M 545, 342 P 2d 1071.

**Physician-Patient Privilege**

The physician-patient privilege is not available to a defendant in a criminal action, since the qualifying language "in a civil action" used in section 93-701-4, subsection (4), specifically limits the privilege to civil actions and is thus within the exception of this section. *State v. Campbell*, 146 M 251, 405 P 2d 978.

**Statement Explaining Constitutional Rights**

Trial court did not err in permitting state's witness to read entire statement wherein defendant was warned of constitutional rights and which was signed by defendant since statement was material as evidence that defendant's constitutional rights and waiver thereof were clearly and

understandably enunciated. *State v. Lucero*, — M —, 445 P 2d 731.

### References

Cited or applied in *State v. Storm*, 127

M 414, 265 P 2d 971, 976 (dissenting opinion); *State v. Pivalar*, 127 M 427, 265 P 2d 969, 970 (dissenting opinion); *State v. Reid*, 127 M 552, 267 P 2d 986, 990.

## 94-7220. (11988) Conviction on testimony of accomplice.

### Cross-Reference

Child under sixteen not an accomplice to commission of infamous crime against nature, sec. 94-4120.

### Corroboration

The evidence which corroborates the testimony of an accomplice could be furnished by the defendant. It could be circumstantial. It need not extend to every fact to which the accomplice testified and need not be sufficient to justify a conviction or establish a *prima facie* case of guilt: it being sufficient if it tends to connect defendants with the commission of the crime. Whether it tends to do so is a question of law, while its weight—its efficacy to fortify the testimony of the accomplice and render his story trustworthy—is a matter for the consideration of the jury. *State v. Donges*, 126 M 341, 251 P 2d 254, 257.

In a legal sense corroboration is something which leads an impartial and reasonable mind to believe that material testimony is true; it may also consist of admissions, declarations or conduct of the defendant, writings, or other documentary evidence which tends to show concert of action between the accomplice and the defendant. *State v. Harmon*, 135 M 227, 340 P 2d 128; *State v. Moran*, 142 M 423, 384 P 2d 777.

### Instructions

Where the defense requested instructions as to the effect of accomplice's testimony and there was evidence in the record from which the jury might have concluded that a deputy sheriff was an accomplice of the defendant, the court should have instructed the jury that if they believed the deputy sheriff was an accomplice then they must weigh his evidence as provided by section 93-2001-1, subd. 4 and also that such evidence must be corroborated as required by this section. *State v. Porter*, 125 M 503, 242 P 2d 984, 990.

### Insufficient Corroboration

In a prosecution for an infamous crime against nature, where the only evidence other than the testimony of the accomplice showed that the accomplice had stayed at the defendant's house over night and slept with the defendant, the corroborating evidence was not sufficient to sustain a con-

viction as it does nothing more than to show opportunity on the part of defendant to have committed the crime. *State v. Gangner*, 130 M 533, 305 P 2d 338.

### Operation and Effect

In a sodomy case, court should have given the requested instructions of the defendant to the effect that if the jury finds the prosecuting witness was an accomplice, then the jury must acquit the defendant, where the only evidence connecting the defendant with the commission of the crime was the testimony of the prosecuting witness. *State v. Searle*, 125 M 467, 239 P 2d 995, 998.

### Person Making Forged Instrument Not Accomplice of Person Passing Forged Instrument

The testimony of the person who forged the indorsement on a warrant and who was not implicated in the matter of passing or uttering the instrument is corroborating evidence to the testimony of an accomplice of the defendant charged with uttering the forged instrument. The person who forged the indorsement is not an accomplice to the defendant who uttered the instrument as the making of the instrument and the uttering of it are two separate crimes although they both constitute forgery. *State v. Phillips*, 127 M 381, 264 P 2d 1009, 1014. (See, however, the dissenting opinions in 127 M 381, 264 P 2d 1009, 1016, 1018.)

### Sufficiency of Corroborative Evidence

Corroborating evidence need not be direct, but may be circumstantial; it need not be sufficient to justify a conviction, or to establish a *prima facie* case of guilt; it need not be sufficient to connect the defendant with the commission of the crime, but it is sufficient if it tends to do so. *State v. Harmon*, 135 M 227, 340 P 2d 128.

Evidence was sufficient to corroborate the testimony given by alleged accomplice where the record disclosed facts and circumstances which tended to connect the defendant with the commission of burglary in the first degree. *State v. Laverdure*, 140 M 236, 370 P 2d 489, 491; *State v. Barick*, 143 M 273, 389 P 2d 170.

### Weight Given Corroborative Evidence

If the trial judge is satisfied that the evidence is corroborative, it is his duty to

submit the case to the jury to determine what effect should be given to the corroboration and whether it is sufficient to war-

rant a conviction. *State v. Harmon*, 135 M 227, 340 P 2d 128.

#### **94-7221 to 94-7233. (11989 to 12001)**

##### **Repeal**

Sections 94-7221 to 94-7233 (Secs. 188, 192, 193, p. 246, Bannack Stat.; Secs. 309, 313, 314, 317, 321, 324, pp. 237 to 239, Cod. Stat. 1871; Secs. 2090 to 2102,

#### **Repealed.**

Pen. C. 1895; Sec. 1, Ch. 113, L. 1907; Sec. 1, Ch. 54, L. 1935), relating to trial, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-1706, Title 95, ch. 19 and sec. 95-2403.

#### **94-7234. (12002) Repealed.**

##### **Repeal**

Section 94-7234 (Sec. 2103, Pen. C. 1895), relating to conviction or acquittal as bar

to subsequent prosecution, was repealed by Sec. 6, Ch. 228, Laws 1969.

#### **94-7235 to 94-7239. (12003 to 12007)**

##### **Repeal**

Sections 94-7235 to 94-7239 (Secs. 116, 194, pp. 205, 246, Bannack Stat.; Secs. 2104 to 2108, Pen. C. 1895), relating to

#### **Repealed.**

trial, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1111, 95-1901, 95-1903, 95-1913, and 95-1915.

### CHAPTER 73—CONDUCT OF JURY AFTER SUBMISSION OF CASE

#### **94-7301 to 94-7306. (12009 to 12014)**

##### **Repeal**

Sections 94-7301 to 94-7306 (Secs. 323, 330, p. 239, Cod. Stat. 1871; Secs. 2120 to 2125, Pen. C. 1895; Sec. 1, Ch. 29, L.

#### **Repealed.**

1945), relating to conduct of jury after submission of case, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-1913.

#### **94-7308. (12016) Repealed.**

##### **Repeal**

Section 94-7308 (Sec. 332, p. 240, Cod. Stat. 1871), relating to adjourning of court

during absence of jury, was repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-1914.

### CHAPTER 74—THE JURY

(Repealed—Section 2, Chapter 196, Laws of 1967)

#### **94-7401 to 94-7420. (12017 to 12036)**

##### **Repeal**

Sections 94-7401 to 94-7420 (Secs. 195 to 202, pp. 247, 248, Bannack Stat.; Secs. 333 to 335, 337, 341 to 347, pp. 240, 241, Cod. Stat. 1871; Secs. 2140 to 2159, Pen.

#### **Repealed.**

C. 1895), relating to the verdict, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-506, 95-508, 95-1109, 95-1506, and Title 95, chs. 19 and 22.

### CHAPTER 75—BILLS OF EXCEPTION

(Repealed—Section 2, Chapter 196, Laws of 1967)

#### **94-7501 to 94-7508. (12037 to 12045)**

##### **Repeal**

Sections 94-7501 to 94-7508 (Secs. 2170, 2172 to 2175, Pen. C. 1895; Secs. 1, 2, Ch.

#### **Repealed.**

34, L. 1903; Secs. 15 to 16, Ch. 225, L. 1921), relating to bills of exception, were repealed by Sec. 2, Ch. 196, Laws 1967.



## CHAPTER 76—NEW TRIALS

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-7601 to 94-7605. (12046 to 12050) Repealed.****Repeal**

Sections 94-7601 to 94-7605 (Secs. 352, 353, p. 242, Cod. Stat. 1871; Sec. 1, p. 43, L. 1881; Secs. 2190 to 2194, Pen. C. 1895;

Sec. 17, Ch. 225, L. 1921; Sec. 1, Ch. 150, L. 1931), relating to new trials, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-2101.

## CHAPTER 77—ARREST OF JUDGMENT

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-7701 to 94-7704. (12051 to 12054) Repealed.****Repeal**

Sections 94-7701 to 94-7704 (Secs. 238 to 240, p. 253, Bannack Stat.; Secs. 2200

to 2203, Pen. C. 1895), relating to arrest of judgment, were repealed by Sec. 2, Ch. 196, Laws 1967.

## CHAPTER 78—JUDGMENT—SUSPENSION OF SENTENCE AND PROBATION

(Repealed—Section 4, Chapter 194, Laws of 1955; Section 2, Chapter 196, Laws of 1967)

**94-7801 to 94-7841. (12055 to 12074, 12078 to 12086) Repealed.****Repeal**

Sections 94-7801 to 94-7841 (Secs. 208, 210 to 212, p. 249, Bannack Stat.; Secs. 360, 362, 365 to 367, 389, 390, pp. 244, 245, 248, Cod. Stat. 1871; Sec. 1, pp. 32, 33, L. 1883; Secs. 2210 to 2229, Pen. C. 1895; Secs. 1 to 9, Ch. 21, L. 1913; Sec. 18, Ch. 225, L. 1921; Sec. 1, Ch. 53, L. 1935; Sec. 1, Ch. 184, L. 1937; Sec. 1, Ch. 40, L. 1939;

Sec. 1, Ch. 65, L. 1953; Secs. 1 to 3, 5 to 7, 9, Ch. 194, L. 1955; Secs. 1 to 7, Ch. 249, L. 1959), relating to judgment, suspension of sentence and probation, were repealed by Sec. 4, Ch. 194, Laws 1955; Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-202, Title 95, ch. 6, secs. 95-1107, 95-1123, 95-1904, Title 95, chs. 21 and 22, and secs. 95-2302, and 95-2305.

## CHAPTER 79—UNIFORM ACT FOR OUT-OF-STATE PAROLEE SUPERVISION

**94-7901. Governor may make interstate compact for control of crime, etc.****Return of Parolee without Extradition**

Parolee's rights under United States constitution were not violated when parolee was returned to state from Oregon for parole violations without resort to extradition and, even if constitutional right

was involved, it was waived by parolee's agreement with state wherein, as condition of parole, he waived certain rights. In re Petition of Dixon, 149 M 412, 430 P 2d 642.

## CHAPTER 80—THE EXECUTION

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-8001 to 94-8023. (12087 to 12104) Repealed.****Repeal**

Sections 94-8001 to 94-8023 (Secs. 218 to 220, 222, 224 to 232, pp. 250 to 252, Bannack Stat.; Sec. 1, p. 56, L. 1885; Secs. 2240 to 2257, Pen. C. 1895; Sec. 1, Ch.

125, L. 1941; Secs. 1 to 5, Ch. 236, L. 1959; Secs. 98 to 100, Ch. 199, L. 1965), relating to execution of judgment, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-2301 to 95-2312.

## CHAPTER 81—APPEALS TO SUPREME COURT—WHEN ALLOWED—HOW TAKEN—EFFECT THEREOF

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-8101 to 94-8114. (12105 to 12118) Repealed.****Repeal**

Sections 94-8101 to 94-8114 (Secs. 242, 246, 247, 250, 251, pp. 253, 254, Bannack Stat.; Secs. 2270 to 2283, Pen. C. 1895; Sec. 1, Ch. 42, L. 1935), relating to appeals

to the supreme court, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-2403 to 95-2407, 95-2424, and 95-2429.

## CHAPTER 82—DISMISSING APPEALS FOR IRREGULARITY—ARGUMENT ON APPEAL—JUDGMENT ON APPEAL

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-8201 to 94-8215. (12119 to 12132) Repealed.****Repeal**

Sections 94-8201 to 94-8215 (Secs. 254 to 256, p. 255, Bannack Stat.; Secs. 403, 405 to 407, p. 250, Cod. Stat. 1871; Secs. 2300 to 2302, 2310 to 2312, 2320 to 2327, Pen. C. 1895; Sec. 1, Ch. 136, L. 1931),

relating to dismissing of appeals for irregularity and argument and judgment on appeal, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1904, 95-2403, 95-2411, 95-2421, 95-2425 to 94-2427, and 95-2430.

## CHAPTER 83—IN WHAT CASES DEFENDANT MAY BE ADMITTED TO BAIL

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-8301 to 94-8307. (12133 to 12139) Repealed.****Repeal**

Sections 94-8301 to 94-8307 (Secs. 112 to 238, 240 to 243, pp. 207 to 227, Cod. Stat. 1871), relating to bail and cases in

which defendant may be admitted to bail, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1108, 95-1109, 95-1111, 95-1118, and 95-1123.

## CHAPTER 84—BAIL ON BEING HELD TO ANSWER BEFORE INFORMATION

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-8401 to 94-8405. (12140 to 12144) Repealed.****Repeal**

These sections (Secs. 239, 244 to 246, pp. 227, 228, Cod. Stat. 1871; Secs. 2350 to 2354, Pen. C. 1895), relating to bail on being held to answer upon an examination

for a public offense, were repealed by Sec. 2, Ch. 196, Laws 1967, effective January 1, 1968. For new law, see secs. 95-1102, 95-1113, 95-1114 and 95-1123.

## CHAPTER 85—BAIL ON INDICTMENT OR INFORMATION BEFORE CONVICTION

- Section 94-8508. Sureties for guaranteed arrest bond certificates—filing of undertaking—guaranteed arrest bond certificate.  
 94-8509. Violations of motor vehicle laws—posting of guaranteed arrest bond certificate in lieu of cash.  
 94-8510. Certification of names of sureties—withdrawal by surety company.

**94-8501 to 94-8507. (12145 to 12151) Repealed.****Repeal**

Sections 94-8501 to 94-8507 (Secs. 2360 to 2366, Pen. C. 1895), relating to bail on being held to answer before information,

were repealed by Sec. 2, Ch. 196, Laws 1967. For present law, see secs. 95-602, 95-1102 to 95-1104, 95-1111, and 95-1123.

**94-8508. Sureties for guaranteed arrest bond certificates—filing of undertaking—guaranteed arrest bond certificate.** (A) Any domestic or foreign surety company which has qualified to transact surety business in this state may, in any year, become surety in an amount not to exceed one hundred dollars (\$100.00) with respect to any guaranteed arrest bond certificates issued in such year by an automobile club or association or by an insurance company authorized to write automobile liability insurance within this state, by filing with the commissioner of insurance an undertaking thus to become surety.

(B) Such undertaking shall be in form to be prescribed by the commissioner and shall state the following:

(1) The name and address of the automobile club or clubs, automobile association, or insurance company or companies, or associations with respect to the guaranteed arrest bond certificates of which the surety company undertakes to be surety.

(2) The unqualified obligation of the surety company to pay the fine or forfeiture in an amount not to exceed one hundred dollars (\$100.00) of any person who, after posting a guaranteed arrest bond certificate with respect to which the surety company has undertaken to be surety, fails to make the appearance to guarantee which the guaranteed arrest bond certificate was posted.

(C) The term, guaranteed arrest bond certificate, means any printed card or other certificate issued by an automobile club, association or insurance company, to any of its members or insureds, which said card or certificate is signed by such member or insured and contains a printed statement that such automobile club, association or insurance company and a surety company, or an insurance company authorized to transact both automobile liability insurance and surety business in the state of Montana, guarantee the appearance of the person whose signature appears on the card or certificate and that they will, in the event of failure of such person to appear in court at the time of trial, pay any fine or forfeiture imposed on such person in an amount not to exceed one hundred dollars (\$100.00).

**History:** En. Sec. 1, Ch. 39, L. 1957.

**Title of Act**

An act authorizing qualified surety companies to become surety with respect to guaranteed arrest bond certificates of automobile clubs and associations and insurance companies authorized to write automobile liability insurance within the state of Montana, and requiring the acceptance of such certificates in lieu of cash or

property bail in the event of certain violations of motor vehicle laws; providing that all acts and parts of acts in conflict herewith are repealed.

**Cross-References**

Sureties for guaranteed arrest bond certificates, filing of undertaking, definition of guaranteed arrest bond certificate, sec. 95-1121.

**94-8509. Violations of motor vehicle laws—posting of guaranteed arrest bond certificate in lieu of cash.** Any guaranteed arrest bond certifi-



cate with respect to which a surety company has become surety or a guaranteed arrest bond certificate issued by an insurance company authorized to transact both automobile liability insurance and surety business within this state, as provided in section 1 [94-8508] hereof, shall, when posted by the person whose signature appears thereon, be accepted in lieu of cash bail in an amount not to exceed one hundred dollars (\$100.00), as a bail bond to guarantee the appearance of such person, in any court, including municipal courts, in this state, at such time as may be required by the court, when such person is arrested for violation of any motor vehicle law of this state or ordinance of any municipality in this state (except for the offense of driving while intoxicated or for any felony) committed prior to the date of expiration shown on such guaranteed arrest bond certificate so posted as a bail bond in any court in this state shall be subject to the forfeiture and enforcement provisions with respect to bail bonds posted in criminal cases as provided by law, and that any such guaranteed arrest bond certificate posted as bail bond in any municipal court in this state shall be subject to the forfeiture and enforcement provisions of the chapter or ordinance of the particular municipality pertaining to bail bonds posted.

**History:** En. Sec. 2, Ch. 39, L. 1957.

ing of guaranteed arrest bond certificates in lieu of cash, sec. 95-1122.

**Cross-References**

Violations of motor vehicle laws, post-

**94-8510. Certification of names of sureties—withdrawal by surety company.** The commissioner of insurance shall certify to each justice of the peace, police magistrate and district judge the names of surety companies who have become sureties with respect to guaranteed arrest bond certificates, and shall likewise immediately notify such official upon the withdrawal of such company as surety. No such withdrawal by any company shall be effective for thirty (30) days after the filing thereof with the state insurance commissioner.

**History:** En. Sec. 3, Ch. 39, L. 1957.

**Cross-References**

Certification of names of sureties, withdrawal by surety company, sec. 95-1123.

**Repealing Clause**

Section 4 of Ch. 39, Laws 1957 repealed all acts and parts of acts in conflict therewith.

**CHAPTER 86—BAIL ON APPEAL—DEPOSIT IN LIEU OF BAIL**

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-8601 to 94-8605. (12152 to 12156) Repealed.**

**Repeal**

Sections 94-8601 to 94-8605 (Sec. 118, p. 235, Bannack Stat.; Secs. 2370, 2371, 2380 to 2382, Pen. C. 1895), relating to

bail on appeal and deposit in lieu of bail, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1102, 95-1112, 95-1123.

## CHAPTER 87—SURRENDER OF DEFENDANT—FORFEITURE OF BAIL—RECOMMITMENT OF DEFENDANT

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-8701 to 94-8718. (12157 to 12174) Repealed.****Repeal**

Sections 94-8701 to 94-8718 (Sec. 124, p. 236, Bannack Stat.; Secs. 263 to 268, p. 230, Cod. Stat. 1871; Sec. 1, p. 45, L. 1873; Secs. 2390 to 2392, 2400 to 2406, 2420 to 2427, Pen. C. 1895; Sec. 1, Ch. 181, L.

1965), relating to surrender of bailed defendant, forfeiture of bail and recommitment, were repealed by Sec. 2, Ch. 196, Laws 1967. For present law, see secs. 95-1102, 95-1107, 95-1115 to 95-1117, and 95-1123.

## CHAPTER 88—WHO MAY BE WITNESSES IN CRIMINAL ACTIONS

**94-8801. (12175) Who are competent witnesses.****References**

State v. Barick, 143 M 273, 389 P 2d 170.

**94-8802. (12176) Competency of husband and wife as witnesses.****Evidence Other Than Communications**

Statute applies to communications only with result that testimony of deputy sheriff that wife of defendant accompanied him to area where evidence which served to convict defendant was recovered should have been allowed. State v. Houchin, 149 M 503, 428 P 2d 971.

**Operation and Effect**

It was error to permit wife to testify against husband in trial for assault by unlawfully threatening another by pointing a loaded revolver in violation of subd. 4 of section 94-602 where no offense against the wife was charged. State v. Storm, 124 M 102, 220 P 2d 674, 675.

**94-8803. (12177) When the defendant is not a competent witness, etc.****Credibility Instruction**

In prosecution for second-degree assault, court did not err in giving general instruction which prescribed standard by which jury might judge defendant's credibility. State v. Manning, 149 M 517, 429 P 2d 625.

**Privilege against Self Incrimination**

In a prosecution for grand larceny, an instruction which had the effect of placing a burden on the defendant to explain his possession of stolen property was erroneous. Such a burden deprives defendant of his cloak of innocence and forces him to testify. The cases of State v. Sparks, 40 M 82, 105 P 87 and State v. Willette, 46 M 326, 127 P 1013, to the extent they impose a burden to explain or testify concerning any charge of possessing stolen

goods are overruled. State v. Greeno, 135 M 580, 342 P 2d 1052.

**Right To Remain Silent**

Instruction that mere unexplained possession of stolen property was not sufficient to justify conviction but that one found in possession of property that may have been stolen must explain such possession in order to remove effect of that fact as circumstance to be considered with other evidence pointing to guilt did not deprive defendant of his right to remain silent. State v. Gray, — M —, 447 P 2d 475.

**References**

Cited or applied in State v. Dillon, 125 M 24, 230 P 2d 764, 767; State v. London, 131 M 410, 310 P 2d 571, 585; State v. Barick, 143 M 273, 389 P 2d 170.

**94-8804. (12178) Testimony of several persons concerned, etc.****Operation and Effect**

Testimony of witness who had previously pleaded guilty to charges on which defendant was being tried and who claimed immunity under statute was admissible at defendant's trial even though witness had refused to answer questions on deposition prior to trial on the ground that his answers then might have tended to incriminate him. State v. Corliss, 150 M 40, 430 P 2d 632.

**Testimony of Accomplice**

An accomplice may testify in a criminal case even though he is a convicted felon at the time of his testimony. State v. Barick, 143 M 273, 389 P 2d 170.

## CHAPTER 89—COMPELLING ATTENDANCE OF WITNESSES—SUBPOENAS

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-8901 to 94-8909. (4945, 12179 to 12186) Repealed.****Repeal**

Sections 94-8901 to 84-8909 (Sec. 4656, Pol. C. 1895; Secs. 2460 to 2467, Pen. C. 1895), relating to compelling witnesses' at-

tendance and to subpoenas, were repealed by Sec. 2, Ch. 196, Laws 1967. For present law, see sec. 95-1801.

## CHAPTER 90—WITNESSES FROM WITHOUT STATE—HOW SECURED IN CRIMINAL PROCEEDINGS

Section 94-9003. Witness from another state summoned to testify in this state.

**94-9001. "Witness" and "state" defined.**

NOTE.—Uniform State Law. In addition to the states listed in the note in the parent volume the following also have adopted the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings: Alaska, District of Columbia, Illinois, Kansas,

Kentucky, Missouri, New Mexico, Oklahoma, Panama Canal Zone, South Carolina, Texas, and Virgin Islands.

**Cross-References**

Production and suppression of evidence, Title 95, ch. 18.

**94-9003. Witness from another state summoned to testify in this state.**

(1) If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation, which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate will be presented to a judge of a court of record in the county in which the witness is found.

(2) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, such judge may direct that such witness be forthwith brought before him; and the judge being satisfied of the desirability of such custody and delivery, for which such determination said certificate shall be prima facie proof, may order that said witness be forthwith taken into custody and delivered to an officer of this state, which order shall be sufficient authority to such officer to take such witness into custody and hold him unless and until he may be released by bail, recognizance, or order of the judge issuing the certificate.

(3) If the witness is summoned to attend and testify in this state, he shall be tendered the sum of ten cents (10¢) a mile for each mile and five dollars (\$5.00) for each day that he is required to travel and attend as a witness, provided further that in those cases in which the state wherein the witness is found has by statutory enactment required that the summoned witness be paid an amount or amounts in excess of the amount hereinbefore in this paragraph provided, then said witness may be tendered said amount or amounts so required by said state to be tendered though the said amount or amounts so required to be tendered are in excess of the said amounts in



this paragraph provided for. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

**History:** En. Sec. 3, Ch. 188, L. 1937; all acts and parts of acts in conflict there-  
amd. Sec. 1, Ch. 117, L. 1949. with.

#### **Amendment**

The 1949 amendment added the proviso to the first sentence of paragraph (3).

#### **Repealing Clause**

Section 2 of Ch. 117, Laws 1949 repealed

#### **Effective Date**

Section 3 of Ch. 117, Laws 1949 provided the act should be in effect from and after its passage and approval. Approved February 25, 1949.

### CHAPTER 91—EXAMINATION OF WITNESSES CONDITIONALLY

(Repealed—Section 2, Chapter 196, Laws of 1967)

#### **94-9101 to 94-9112. (12187 to 12198) Repealed.**

##### **Repeal**

Sections 94-9101 to 94-9112 (Secs. 2480 to 2491, Pen. C. 1895; Sec. 1, Ch. 109, L. 1907), relating to examination of witnesses

conditionally, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-1802.

### CHAPTER 92—EXAMINATION OF WITNESSES ON COMMISSION

#### **94-9201. (12199) Examination of witness residing out of the state.**

##### **Cross-References**

Production and suppression of evidence, Title 95, ch. 18.

### CHAPTER 93—PROCEEDINGS ON INQUIRY AS TO SANITY OF A DEFENDANT

#### **94-9301 to 94-9306. (12213 to 12218) Repealed.**

##### **Repeal**

Sections 94-9301 to 94-9306 (Secs. 2520 to 2525, Pen. C. 1895), relating to sanity

proceedings, were repealed by Sec. 2, Ch. 196, Laws 1967. For present law, see secs. 95-504 to 95-507, and 95-1116.

### CHAPTER 94—COMPROMISING OFFENSES BY LEAVE OF COURT

(Repealed—Section 2, Chapter 196, Laws of 1967)

#### **94-9401 to 94-9403. (12220 to 12222) Repealed.**

##### **Repeal**

Sections 94-9401 to 94-9403 (Secs. 2540 to 2542, Pen. C. 1895), relating to com-

promise of offenses by leave of court, were repealed by Sec. 2, Ch. 196, Laws 1967.

## CHAPTER 95—DISMISSAL OF ACTIONS FOR WANT OF PROSECUTION OR OTHER REASONS

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-9501 to 94-9507. (12223 to 12229) Repealed.****Repeal**

Sections 94-9501 to 94-9507 (Sec. 179, p. 244, Bannack Stat.; Secs. 2550 to 2556, Pen. C. 1895), relating to dismissal

of prosecutions, were repealed by Sec. 2, Ch. 196, Laws 1967. For present law, see secs. 95-602, 95-1102, 95-1303, 95-1703, 95-1706, and 95-1708.

## CHAPTER 96—PROCEEDINGS AGAINST CORPORATIONS

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-9601 to 94-9610. (12230 to 12239) Repealed.****Repeal**

Sections 94-9601 to 94-9610 (Secs. 470, 471, 3d Div. Comp. Stat. 1887; Secs. 2570 to 2579, Pen. C. 1895), relating to pro-

ceedings against corporations, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-615.

## CHAPTER 97—DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-9701 to 94-9707. (12240 to 12246) Repealed.****Repeal**

Sections 94-9701 to 94-9707 (Secs. 2610 to 2616, Pen. C. 1895), relating to disposal

of property stolen or embezzled, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-714 and 95-716.

## CHAPTER 98—PROBATION, PAROLE AND CLEMENCY

- Section 94-9821. Act, how cited.  
 94-9822. Board of pardons—organization.  
 94-9823. Definitions.  
 94-9824. Seal, orders, records, report.  
 94-9825. Director and employees—salaries to be paid monthly—approval and auditing.  
 94-9826. Expenses to be paid.  
 94-9827. Legal adviser of the board.  
 94-9828. Duties of the director.  
 94-9829. Duties of probation and parole officers.  
 94-9830. Conditions of probation or suspension of sentence.  
 94-9831. Arrest—subsequent disposition.  
 94-9832. Parole authority and procedure.  
 94-9833. Conditional release.  
 94-9834. Information from prison officials.  
 94-9835. Persons may be heard—counsel.  
 94-9836. Subpoenas.  
 94-9837. Rules.  
 94-9838. Return of parole violator.  
 94-9839. Service of term for additional crime.  
 94-9840. Discharge of prisoner, parolee or conditional releasee.  
 94-9841. Cases of executive clemency.  
 94-9842. Notice of hearing applications for executive clemency.  
 94-9843. Publication of order.  
 94-9844. Proof of publication.  
 94-9845. Record of meeting, what to contain.  
 94-9846. When publication not necessary.  
 94-9847. Decision to be made.  
 94-9848. Governor may respite.  
 94-9849. Governor to report to legislative assembly.

94-9850. Cases of juveniles excluded.

94-9851. Effective date—application to persons presently on parole or probation or eligible for.

## 94-9801 to 94-9820. (12247 to 12266) Repealed.

### Repeal

These sections (Secs. 2630 to 2646, Pen. C. 1895; Secs. 3 to 6, 8 to 12, p. 192, L. 1891; and Secs. 1 to 3, Ch. 95, L. 1907),

relating to pardons and paroles, were repealed by Sec. 31, Ch. 153, Laws 1955. For new provisions, see secs. 94-9821 to 94-9851.

**94-9821. Act, how cited.** This act shall be known and may be cited as the "Probation, Parole and Executive Clemency Act."

**History:** En. Sec. 1, Ch. 153, L. 1955.

### Title of Act

An act creating a board of pardons and prescribing the appointment and composition thereof, with power and duty to grant paroles, within restrictions, to supervise probations and suspended sentences, to recommend after duly noticed public hearing that the governor remit fines and forfeitures, grant pardons, absolute or conditional; grant commutations of punishments after conviction and judgment for offenses committed against the criminal laws of this state; providing for a director and a staff to administer the provisions of this act, and defining their duties; requiring records of board proceedings; providing for arrest of parolees or probationers upon violation of conditions of release; providing penalties for parole or probation violators; defining rights of attorneys to hearing before the board; providing the board with power to subpoena witnesses, and make rules and regulations under the provisions of this act; defining governor's power to respite; requiring

governor to report acts of executive clemency to the legislative assembly; excluding juveniles; providing a saving clause; repealing sections 94-9801, 94-9802, 94-9803, 94-9804, 94-9805, 94-9806, 94-9807, 94-9808, 94-9809, 94-9810, 94-9811, 94-9812, 94-9813, 94-9814, 94-9815, 94-9816, 94-9817, 94-9818, 94-9819 and 94-9820, Revised Codes of Montana, 1947, and all acts and parts of acts in conflict herewith; and providing an effective date clause.

### Good Time Allowance

Under the "new parole laws" (sections 94-9821 to 94-9851) a prisoner retains the right to earn good time under the old good time statutes (sections 80-739, 80-741, repealed by Laws 1955, ch. 117, sec. 2 and section 80-740) and he is subject to forfeiture of this good time. *Hill v. State*, 139 M 407, 365 P 2d 44, 46, 95 ALR 2d 1261.

The "new parole laws" (sections 94-9821 to 94-9851) have nothing to do with the forfeiture of earning of good time. *Hill v. State*, 139 M 407, 365 P 2d 44, 46, 95 ALR 2d 1261.

**94-9822. Board of pardons—organization.** There is hereby created a state board of pardons, hereinafter referred to as the "board," consisting of three (3) members who shall be appointed by the governor with the advice and consent of the senate. The board shall administer the executive clemency, probation and parole system, and shall endeavor to secure the effective application and improvement of such system and the laws upon which it is based. The members of the board shall serve on a per diem basis and shall be paid at the rate of fifteen dollars (\$15.00) per day of service, plus actual and necessary expenses, and shall meet at least once each month at the state prison. The members of the board shall serve for terms of six (6) years, and until their successors are duly appointed and qualified, provided, however, that two (2) of those first appointed after this act takes effect, shall serve for terms of two (2) and four (4) years, respectively. The governor shall appoint the members of the board and call a meeting thereof within thirty (30) days of the effective date thereof. The board shall immediately thereafter set up the system herein provided for, and make the necessary appointments of its director, and other employees. Suitable quarters, supplies and equipment shall be provided.



The principal office of the board shall be in Deer Lodge, Montana. A vacancy occurring before the expiration of any member's term of office shall be filled in the same manner for the unexpired portion of said term. The governor may at any time, after notice and hearing, remove any member for neglect of duty, malfeasance, misfeasance or nonfeasance in office.

**History:** En. Sec. 2, Ch. 153, L. 1955.

#### **Powers of Board**

The power of the state board of pardons is limited to permitting a convict to leave the enclosure of the state prison after he has served a period of confinement fixed for him by the board in accordance with section 94-9833. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 555.

Neither section 94-9832 nor any other section in the code gives the state board of pardons power to extinguish a former sentence by paroling a man to a subse-

quent sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 555.

Maximum sentences cannot be changed or altered by the state board of pardons. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 555.

The state board of pardons does not have the right to pardon or commute a sentence as the exclusive power to pardon and commute a sentence rests in the office of the governor under Art. VII, sec. 9 of the Montana Constitution. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 555.

**94-9823. Definitions.** When used in this act, unless the context otherwise requires:

(a) "Probation" is the release by the court without imprisonment except as otherwise provided by law, of a defendant found guilty of a crime upon verdict or plea, subject to conditions imposed by the court and subject to the supervision of the board upon direction of the court.

(b) "Parole" is the release to the community of a prisoner by the decision of the board prior to the expiration of his term, subject to conditions imposed by the board and subject to its supervision.

(c) "Executive clemency" refers to the powers of the governor as provided by section 9 of Article VII of the Constitution of the state of Montana.

**History:** En. Sec. 3, Ch. 153, L. 1955.

#### **Effect of Granting of a Parole**

A parole releases from confinement a convict who has been committed to an institution, before the expiration of his sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 555.

The granting of a parole to an escape

sentence by virtue of the wording of section 94-4203 did not result in a discharge of the original sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 557.

#### **References**

In re Kane's Petition, 145 M 516, 402 P 2d 403.

**94-9824. Seal, orders, records, report.** The board shall adopt an official seal of which the courts shall take judicial notice. A majority of the board shall constitute a quorum. Decision of the board may be by majority vote. The orders of the board shall not be reviewable except as to compliance of terms of this act. The board shall keep a record of its acts and decisions available to the public, providing, however, that all social records, including the pre-sentence report, the pre-parole report and the supervision history obtained in the discharge of official duty by any member or employee of the board, shall be confidential and shall not be disclosed directly or indirectly to anyone other than the members of the board or a judge; provided, however, that the board or a court may in its discretion, whenever the best interest or welfare of a particular defendant or

prisoner makes such action desirable or helpful, permit the inspection of the report or any parts thereof by the prisoner or his attorney. The board shall report as provided in section 2 [82-4002] of this act.

**History:** En. Sec. 4, Ch. 153, L. 1955; amd. Sec. 42, Ch. 93, L. 1969.

#### Amendments

The 1969 amendment substituted the

reference to the reporting requirements of section 82-4002 for former provision requiring report at close of each fiscal year to be made to governor, to board of prison commissioners and to the legislature.

**94-9825. Director and employees—salaries to be paid monthly—approval and auditing.** The board shall appoint a state director of probation and parole, hereinafter referred to as the "director" who shall appoint, with the approval of the board, an assistant director, probation and parole officers and other employees required to administer the provisions of this act. The director shall receive an annual salary in such amount as may be specified by the legislative assembly in the appropriation to the board of pardons payable monthly, which shall include compensation for all services rendered as interstate compact administrator. If the legislative assembly does not specify the maximum salary of the state director in the appropriation to the board of pardons, it shall be fixed by the board after approval by the board of examiners. Before approving any salary increase, the board of examiners shall review the salaries of comparable positions in Montana state government, other states, and private industry. All other officers and employees of the board shall receive such compensation for their services as may be fixed by the board. All officers and employees of the board shall hold office at the pleasure of the board and shall perform such duties as are imposed on them by law or by the board.

The salaries of all officers and employees of the board shall be paid monthly after such salaries have been approved by the board upon claims therefor.

**History:** En. Sec. 5, Ch. 153, L. 1955; amd. Sec. 1, Ch. 122, L. 1957; amd. Sec. 11, Ch. 97, L. 1961; amd. Sec. 10, Ch. 225, L. 1963; amd. Sec. 16, Ch. 237, L. 1967.

#### Amendments

The 1957 amendment raised the salary of the director from \$6,000 to \$7,000 per annum.

The 1961 amendment deleted from the end of the section the words "to be audited and approved by the state board of examiners."

The 1963 amendment substituted the provision for a maximum salary of \$8,400 for the director for a provision fixing the salary at \$7,000; and added to the second sentence the words "which shall include compensation for all services rendered as interstate compact administrator."

The 1967 amendment substituted "in such amount \* \* \* to the board of pardons" for "of not more than eight thousand four hundred dollars (\$8,400) per annum" in the second sentence; and inserted the third and fourth sentences.

#### Repealing Clause

Section 2 of Ch. 122, Laws 1957 repealed all acts and parts of acts in conflict therewith.

#### Effective Dates

Section 3 of Ch. 122, Laws 1957 provided the act should be in effect from and after its passage and approval. Approved March 5, 1957.

Section 11 of Ch. 225, Laws 1963 read "This act shall be effective from and after February 28, 1963."

**94-9826. Expenses to be paid.** All expenses incurred by the board pursuant to the provisions of this act, including the actual and necessary traveling and other expenses and disbursements of the members thereof, its officers and employees, incurred while on business of the board either within or without the state, shall, unless otherwise provided in this act,

be paid from funds appropriated, after being approved by the board upon claims therefor.

**History:** En. Sec. 6, Ch. 153, L. 1955; end of the section the words "to be audited and approved by the state board of examiners."

**Amendment**

The 1961 amendment deleted from the

**94-9827. Legal adviser of the board.** The board may appoint any qualified attorney or the attorney general to act as its legal adviser and represent it in all proceedings whenever so requested by the board.

**History:** En. Sec. 7, Ch. 153, L. 1955.

**94-9828. Duties of the director.** The director shall be the executive officer of the board. He shall be responsible for such investigation and supervision as may be requested by the board or the courts. He shall, subject to the approval of the board, divide the state into districts and assign probation and parole officers to serve in the various districts and courts; he shall obtain office quarters for such staff in each district as may be necessary. He shall assign the secretarial, bookkeeping and accounting work to the clerical employees, including receipt and disbursement of money. He shall direct the work of the probation and parole officers and other employees assigned to him. He shall formulate methods of investigation, supervision, record keeping and reports. He shall conduct training courses for the staff. He shall seek to cooperate with all agencies, public and private, which are concerned with the treatment or welfare of persons on probation or parole. He shall further be charged with the administration of the provisions of the interstate compact for the supervision of parolees and probationers.

**History:** En. Sec. 8, Ch. 153, L. 1955.

**94-9829. Duties of probation and parole officers.** Probation and parole officers shall investigate all persons referred to them for investigation by the director of probation and parole or by any court to which they are instructed by the director to serve. They shall furnish to each person released under their supervision a written statement of the conditions of probation or parole and shall instruct him regarding same. They shall keep informed of the conduct and condition of each person released under their supervision and use all suitable methods to aid and encourage him to bring about improvement in his conduct and condition. Probation and parole officers shall keep detailed records of their work. They shall supervise the collection and disbursement of all moneys when so instructed by the director in accordance with the orders of a court. They shall make such reports in writing as the director may require.

**History:** En. Sec. 9, Ch. 153, L. 1955.

**94-9830. Conditions of probation or suspension of sentence.** The board may adopt general rules or regulations concerning the conditions of probation or suspension of sentence. Such conditions shall apply in the absence of any specific or inconsistent conditions imposed by a court. Nothing herein contained shall limit the authority of the court to impose or modify



any general or specific conditions of probation or of suspension of sentence.

The probation and parole officer may recommend, and by order duly entered, a court may modify any condition of probation or suspension of sentence at any time. Due notice shall be given to the probation and parole officer before any such conditions are modified and he shall be given an opportunity to be heard thereon. The court shall cause a copy of any such order to be delivered to the probation and parole officer and the probationer.

History: En. Sec. 10, Ch. 153, L. 1955.

**94-9831. Arrest—subsequent disposition.** At any time during probation or suspension of sentence a court may issue a warrant for the arrest of the defendant for violation of any of the conditions of release, or a notice to appear to answer to a charge of violation. Such notice shall be personally served upon the defendant. The warrant shall authorize all officers named therein to return such defendant to the custody of the court or to any suitable detention facility designated by the court. Any probation and parole officer may arrest such defendant without a warrant, or may deputize any other officer with power of arrest to do so by giving him a written statement setting forth that the defendant has, in the judgment of said probation and parole officer, violated the conditions of his release. Such written statement delivered with the defendant by the arresting officer to the official in charge of a county jail or other place of detention shall be sufficient warrant for the detention of the defendant. The probation and parole officer, after making an arrest, shall present to the detaining authorities a similar statement of the circumstances of violation. Provisions regarding release on bail of persons charged with crime, shall be applicable to the defendants arrested under these provisions.

Upon such arrest and detention, the probation and parole officer shall immediately notify the court with jurisdiction over such prisoner, and shall submit in writing a report showing in what manner the defendant has violated the conditions of release. Thereupon, or upon an arrest by warrant as herein provided, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charged. The hearing may be informal or summary. If the violation is established, the court may continue to revoke the probation or suspension of sentence, and may require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

A probationer or defendant under suspension of sentence for whose return a warrant has been issued by the court, shall, after the issuance of the warrant, if it is found that such warrant cannot be served, be deemed a fugitive from, or to have fled from, justice. If it shall appear that he has violated the provisions of his release, whether the time from the issuing of such warrant to the date of his arrest, or any part of it, shall be counted as time served on probation or suspended sentence, shall be determined by the court.

**History:** En. Sec. 11, Ch. 153, L. 1955.

#### **Commencement of Sentence**

Where relator was sentenced to four years' confinement and the execution of the sentence was then suspended, which suspension was later revoked, the sentence commenced to run for all purposes on the date when judgment of conviction was entered. Any time between the imposition of the suspended sentence and its revocation should have been credited to the relator and failure to do so resulted in his

illegal confinement. State ex rel. Wetzel v. Ellsworth, 143 M 54, 387 P 2d 442.

#### **Subsequent Arrest for Violation**

Where petitioner was placed on probation for one year on conditions aimed at rehabilitating him, subsequent imposition of judgment after he violated his probation did not put him in jeopardy in violation of the federal constitution or section 18, art. III, of the Montana constitution. In re Williams' Petition, 145 M 45, 399 P 2d 732.

**94-9832. Parole authority and procedure.** The board shall release on parole any person confined in the Montana state prison, except persons under sentence of death, when in its opinion there is reasonable probability that the prisoner can be released without detriment to himself or to the community, provided,

1. That no convict serving a time sentence shall be paroled until he shall have served at least one-quarter ( $\frac{1}{4}$ ) of his full term, less good time allowances off, as provided in section 80-740; except that any convict serving a time sentence may be paroled after he shall have served, upon his term of sentence, twelve and one-half ( $12\frac{1}{2}$ ) years;

2. No convict, serving a life sentence, shall be paroled until he shall have served twenty-five (25) years, less the good time allowances off, as provided in section 80-740. All paroles shall issue upon order of the board, duly adopted.

Within two (2) months after his admission and at such intervals thereafter as it may determine, the board shall consider all pertinent information regarding each prisoner, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment and attitude in prison, and the reports of such physical and mental examinations as have been made.

Before ordering the parole of any prisoner, the board shall have the prisoner appear before it and shall interview him. A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every prisoner while on parole shall remain in the legal custody of the institution from which he was released, but shall be subject to the orders of the board.

The board may adopt such other rules not inconsistent with law as it may deem proper or necessary, with respect to the eligibility of prisoners for parole, the conduct of parole hearings or conditions to be imposed upon parolees. Whenever an order for parole is issued it shall recite the conditions thereof.

**History:** En. Sec. 12, Ch. 153, L. 1955.

#### **Compiler's Notes**

Section 80-740, referred to in the first and second paragraphs of this section, was repealed by Sec. 101, Ch. 199, Laws 1965. For present law, see sec. 80-1905.

#### **Discretion of Board**

Since the release of inmates on parole or by virtue of commutation of sentence rests in the discretion of the state board of pardons, their determination is not subject to review by the courts. Goff v. State, 139 M 641, 367 P 2d 557, 558.

**Effect of Granting of a Parole**

A parole releases from confinement a convict who has been committed to an institution, before the expiration of his sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 555.

The granting of a parole to an escape sentence by virtue of the wording of section 94-4203 did not result in a discharge of the original sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 557.

**Hearing**

Hearings involving inmates of the state prison are set by the state board of pardons and are entirely within their discretion. The only requirement for a hearing or interview arises when the board is about to order a parole. Goff v. State, 139 M 641, 367 P 2d 557, 558.

In petition for writ of habeas corpus brought by an inmate of the state prison, allegation of bias and prejudice by a member of the state board of pardons was without merit, where the files of the board disclosed that such member had disqualified himself from participating in any hearing involving petitioner. Goff v. State, 139 M 641, 367 P 2d 557, 558.

**Power of Board**

This section does not give the state board of pardons power to extinguish a former sentence by paroling a man to a subsequent sentence. State ex rel. Her-

man v. Powell, 139 M 583, 367 P 2d 553, 555.

**Right to Parole**

All inmates confined in the Montana state prison are eligible for parole except those under death sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 556.

In the case of consecutive sentences a prisoner is required to serve a period equivalent to one-fourth of the combined total of each sentence (less good time) before he is eligible for parole although subsequent sentence is for escape. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 557.

A prisoner is not entitled to release as a matter of right until he has completed his maximum sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 556; Goff v. State, 139 M 641, 367 P 2d 557, 559.

**Verdict "Without Parole"**

When jury returned verdict imposing sentence "without parole," trial court properly refused it since only parole board has authority to decide whether prisoner shall be paroled. State v. Brooks, 150 M 399, 436 P 2d 91.

**References**

Cited or applied in State ex rel. Ball v. Burrell, 129 M 585, 292 P 2d 144; In re Kane's Petition, 145 M 516, 402 P 2d 403; Petition of Frost, 146 M 18, 403 P 2d 612.

**94-9833. Conditional release.** A prisoner having served one-fourth ( $\frac{1}{4}$ ) of his term or terms, less good time allowances, shall upon parole, be deemed as released on parole until the expiration of the maximum term or terms for which he was sentenced less good time allowances as provided in section 80-740.

**History:** En. Sec. 13, Ch. 153, L. 1955.

**Compiler's Notes**

Section 80-740, referred to in this section, was repealed by Sec. 101, Ch. 199, Laws 1965. For present law, see sec. 80-1905.

**Good Time Allowance**

Under former section 80-740 a convict, by escaping, forfeits all his good time.

**94-9834. Information from prison officials.** It shall be the duty of all prison officials to grant to the members of the board, or its properly accredited representatives, access at all reasonable times to any prisoner over whom the board has jurisdiction under this act, to provide for the board or such representatives facilities for communicating with and observing such prisoner, and to furnish to the board such reports as the board shall require concerning the conduct and character of any prisoner in their

State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 557.

**Right to Parole**

An inmate with multiple sentences, whether concurrent or consecutive, is eligible for parole. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 556.

**References**

In re Kane's Petition, 145 M 516, 402 P 2d 403.



custody and any other facts deemed by the board pertinent in determining whether such prisoner shall be paroled.

History: En. Sec. 14, Ch. 153, L. 1955.

**94-9835. Persons may be heard—counsel.** The board shall be required to hear oral statements from all persons desiring to be heard before the board and any person may be represented by counsel, provided that the board shall have the power to regulate procedure at all hearings.

History: En. Sec. 15, Ch. 153, L. 1955.

**94-9836. Subpoenas.** The board shall have the power to issue subpoenas compelling the attendance of such witnesses and the production of such records, books, papers and documents as it may deem necessary for investigation of the case of any person before it. Subpoenas may be signed and oaths administered by the board or any member thereof. Subpoenas so issued may be served by any sheriff, constable, police officer, parole and probation officer, or other law-enforcement officer. In case of contumacy by, or refusal of any person to obey a subpoena issued to such person, any member of the board or duly authorized representative of any of them may make application to any court of record of this state and such court shall have jurisdiction to issue to such person an order requiring such person to appear before the board and there to produce evidence if so ordered, or there to give testimony touching the matter under investigation; any failure to obey such order of the court may be punished by said court as a contempt thereof. Any person who shall without just cause fail, or refuse to attend and testify, or to answer any lawful inquiry or to produce records, books, papers and other documents if it is in his power to do so, in obedience to a subpoena of the board or any member thereof, shall be punished by a fine of not more than two hundred dollars (\$200) or by imprisonment for not longer than sixty (60) days, or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

History: En. Sec. 16, Ch. 153, L. 1955.

**94-9837. Rules.** The board shall have the power and duty to make rules for the conduct of persons heretofore or hereafter placed on parole or on probation under the supervision of the board by any court in this state, and for the investigation and supervision of such persons, except that the board shall not make any rule applying to a person on probation which conflicts with the conditions of probation imposed by the court.

History: En. Sec. 17, Ch. 153, L. 1955.

**94-9838. Return of parole violator.** At any time during release on parole or conditional release the board may issue a warrant for the arrest of the released prisoner for violations of any of the conditions of release, or a notice to appear to answer to a charge of violation. Such notice shall be served personally upon the prisoner. The warrant shall authorize all officers named therein to return such prisoner to the actual custody of the penal institution from which he was released, or to any other suitable detention facility designated by the board. Any probation and parole officer may

arrest such prisoner without a warrant, or may deputize any other officer with power to arrest to do so by giving him a written statement setting forth that the prisoner has, in the judgment of said probation and parole officer, violated the conditions of his release. Such written statement delivered with the prisoner by the arresting officer to the official in charge of the institution from which the prisoner was released or other place of detention, shall be sufficient warrant for the detention of the parolee or conditional releasee. The probation and parole officer, after making an arrest, shall present to the detaining authorities a similar statement of the circumstances of violation. Pending hearing, as hereinafter provided, upon any charge of violation, the prisoner shall remain incarcerated in such institution.

Upon such arrest and detention, the probation and parole officer shall immediately notify the board and shall submit in writing a report showing in what manner the prisoner has violated the conditions of release. Thereupon, or upon an arrest by warrant as herein provided, the board shall cause the prisoner to be promptly brought before it for a hearing on the violation charged, under such rules and regulations as the board may adopt. If the violation is established, the board may continue or revoke the parole or conditional release, or enter such other order as it may see fit.

A prisoner for whose return a warrant has been issued by the board shall, after the issuance of such warrant, if it is found that the warrant cannot be served, be deemed a fugitive or to have fled from justice. If it shall appear that he has violated the provisions of his release, whether the time from the issuing of such warrant to the date of his arrest, or any part of it, shall be counted as time served under the sentence, shall be determined by the board.

**History:** En. Sec. 18, Ch. 153, L. 1955.

**94-9839. Service of term for additional crime.** Any prisoner who commits a crime while at large upon parole or conditional release, and who is convicted and sentenced therefor, shall serve such sentence concurrently with the terms under which he was released, unless otherwise ordered by the court in sentencing for the new offense.

**History:** En. Sec. 19, Ch. 153, L. 1955.

**94-9840. Discharge of prisoner, parolee or conditional releasee.** The period served on parole or conditional release shall be deemed service of the term of imprisonment, and, subject to the provisions contained in section 18 [94-9838] herein relating to a prisoner who is a fugitive from, or has fled from, justice, the total time served may not exceed the maximum term or sentence. When a prisoner on parole or conditional release has performed the obligations of his release, the board shall make a final order or discharge and issue a certificate of discharge to the prisoner.

**History:** En. Sec. 20, Ch. 153, L. 1955.

**References**

In re Kane's Petition, 145 M 516, 402 P 2d 403.

**94-9841. Cases of executive clemency.** The board shall investigate and report to the governor with respect to all cases of pardons, remissions of fines and forfeitures, and commutations of punishment after conviction and

judgment for any offenses committed against the criminal laws of the state. A majority of the board shall advise, investigate, and approve each such case before the action of the governor shall be final. All applications for executive clemency shall be made to the board, which shall cause an investigation to be made of all the circumstances surrounding the crime for which the applicant was convicted, and as to the individual circumstances relating to social conditions of the applicant. If the board, or a majority thereof, approves such application for executive clemency, it shall advise the governor and recommend action to be taken.

**History:** En. Sec. 21, Ch. 153, L. 1955.

**94-9842. Notice of hearing applications for executive clemency.** After the board has duly considered an application for executive clemency, and has by majority vote favored a recommendation of executive clemency to the governor, it must pass an order in substance as follows:

"Whereas, the Board of Pardons has officially received an application for Executive Clemency concerning \_\_\_\_\_, a convict confined in the State Prison (or to one \_\_\_\_\_, who has been found guilty of an offense committed against the laws of the state), who was convicted of the crime of \_\_\_\_\_ committed at \_\_\_\_\_, in the County of \_\_\_\_\_, State of Montana, on the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and sentenced for a term of \_\_\_\_ years.

"Therefore, be it ordered that \_\_\_\_ the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, be set apart for the consideration of said Executive Clemency matter; and all persons having an interest therein desiring to be heard either for or against the granting of the pardon (or commutation, remission of the fine or forfeiture) are hereby notified to be present at \_\_\_\_ o'clock of said day, at \_\_\_\_\_.

"Further, ordered that a copy of this order be printed and published in the \_\_\_\_\_ (here insert name of some newspaper of general circulation in the county where the crime was committed) a daily (or weekly) newspaper printed and published at \_\_\_\_\_ in the county of \_\_\_\_\_, once each week for two weeks beginning, \_\_\_\_\_, 19\_\_\_\_, and ending \_\_\_\_\_."

**History:** En. Sec. 22, Ch. 153, L. 1955.

**94-9843. Publication of order.** The board must cause a copy of such order to be published in the newspaper therein designated, at least once a week for two weeks prior to the hearing, and at the same time cause to be deposited in the postoffice at the seat of government, postpaid, a copy of said order and notice addressed to the district judge, county attorney and sheriff, respectively, of the county where the crime was committed, and in like manner mail a copy of the order to the petitioner and the convict.

**History:** En. Sec. 23, Ch. 153, L. 1955.

**94-9844. Proof of publication.** Prior to the time set for hearing, proof of the publication of notice must be made by the publisher or managing agent.

**History:** En. Sec. 24, Ch. 153, L. 1955.



**94-9845. Record of meeting, what to contain.** At the hearing the board must cause to be kept a record showing:

1. The name of all persons appearing before the board on behalf of the person pardoned by the governor;
2. The name of all persons appearing before the board in opposition to the granting of the same;
3. The testimony of all persons giving evidence before the board;
4. That the affidavit and return from the printer of the publication of the notice and order of hearing was on file prior to the hearing.

**History:** En. Sec. 25, Ch. 153, L. 1955.

**94-9846. When publication not necessary.** No publication need be made as provided in sections 22, 23 and 24 [94-9842, 94-9843 and 94-9844], in the following cases:

1. When there is imminent danger of the death of the person convicted or imprisoned.
2. When the term of imprisonment of the applicant is within ten (10) days of its expiration.

**History:** En. Sec. 26, Ch. 153, L. 1955.

**94-9847. Decision to be made.** Within thirty (30) days after the hearing of any case, the board must make a decision in writing, and if such decision be made to recommend executive clemency, the copy of the decision, together with all papers used in each case shall be immediately transmitted to the governor.

**History:** En. Sec. 27, Ch. 153, L. 1955.

**94-9848. Governor may respite.** The governor has the power to grant respites after conviction and judgment, for any offenses committed against the criminal laws of the state, for such time as he thinks proper.

**History:** En. Sec. 28, Ch. 153, L. 1955.

**94-9849. Governor to report to legislative assembly.** The governor must communicate to the legislative assembly at each regular session, each case of remission of fine or forfeiture, reprieve, commutation, or pardon granted since the last previous report, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of remission, commutation, pardon or reprieve, with the reason for granting the same, and the objection, if any, of any of the members of the board made thereto.

**History:** En. Sec. 29, Ch. 153, L. 1955.

**94-9850. Cases of juveniles excluded.** The provisions of this act shall not apply to probation in the juvenile courts or to parole from state institutions for juveniles.

**History:** En. Sec. 30, Ch. 153, L. 1955.

**94-9851. Effective date—application to persons presently on parole or probation or eligible for.** This act shall be in full force and effect from and after April 1, 1955. The provisions of this act are hereby extended to

all persons who, at the effective date hereof, may be on probation or parole, or eligible to be placed on probation or parole under existing laws, with the same force and effect as if this act had been in operation at the time such persons were placed on probation or parole or became eligible to be placed thereon as the case may be, provided that no person convicted and sentenced before the effective date hereof shall have his rights and earned good time reduced by the application of this act.

**History:** En. Sec. 33, Ch. 153, L. 1955.

#### Separability Clause

Section 32 of Ch. 153, Laws 1955 read "If any clause, sentence, section, paragraph or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid or inoperative, such judgment shall not affect, impair or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, section, paragraph or part directly adjudged to be invalid or inoperative."

#### Repealing Clause

Section 31 of Ch. 153, Laws 1955 read "That sections 94-9801, 94-9802, 94-9803, 94-9804, 94-9805, 94-9806, 94-9807, 94-9808, 94-9809, 94-9810, 94-9811, 94-9812, 94-9813, 94-9814, 94-9815, 94-9816, 94-9817, 94-9818, 94-9819 and 94-9820, Revised Codes of Montana, 1947, and all other acts and parts of acts inconsistent with the provisions of this act are hereby repealed."

### CHAPTER 99—BASTARDY PROCEEDINGS

#### 94-9901. (12267) Complaint in bastardy, what to contain, how entitled.

##### Cross-Reference

Procedure to this chapter, see Table A,

Application of Montana Rules of Civil

M. R. Civ. P.

#### 94-9908. (12274) Power of court over judgments and orders.

##### Collateral References

Foreign filiation or support order in bastardy proceedings, requiring periodic

payments, as extraterritorially enforceable. 16 ALR 2d 1098.

### CHAPTER 100—JUSTICES' AND POLICE COURT PROCEEDINGS—APPEALS

(Repealed—Section 2, Chapter 196, Laws of 1967)

#### 94-100-1 to 94-100-46. (12302 to 12347) Repealed.

##### Repeal

Sections 94-100-1 to 94-100-46 (Secs. 472, 476, 477, 479, 490, 492, 493, 503, 504, 510, pp. 262 to 265, Cod. Stat. 1871; Secs. 2680 to 2725, Pen. C. 1895; Sec. 1, Ch. 50, L. 1955), relating to proceedings in and ap-

peals from justices' and police courts, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-1102, Title 95, chs. 16 and 17, secs. 95-1801, 95-1908, 95-1909, 95-1913, and Title 95, ch. 20.

### CHAPTER 101—THE WRIT OF HABEAS CORPUS

(Repealed—Section 2, Chapter 196, Laws of 1967)

#### 94-101-1 to 94-101-33. (12348 to 12380) Repealed.

##### Repeal

Sections 94-101-1 to 94-101-33 (Secs. 2769, 2771, Pen. C. 1895; Secs. 9630 to 9662, Rev. C. 1907), relating to habeas

corpus, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-2701 to 95-2713, 95-2715, and 95-2716.

## CHAPTER 201—CORONER'S INQUESTS

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-201-1 to 94-201-13. (12381 to 12393) Repealed.****Repeal**

Sections 94-201-1 to 94-201-13 (Sees. 2790 to 2802, Pen. C. 1895; Sec. 1, Ch. 56, L. 1959), relating to coroner's inquests,

were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see Title 95, ch. 6, and secs. 95-803 to 95-809.

## CHAPTER 301—SEARCH WARRANTS

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-301-1 to 94-301-21. (12394 to 12414) Repealed.****Repeal**

Sections 94-301-1 to 94-301-21 (Sees. 2820 to 2840, Pen. C. 1895), relating to

search warrants, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see Title 95, ch. 7.

## CHAPTER 501—UNIFORM CRIMINAL EXTRADITION ACT

**94-501-1. Definitions.**

NOTE.—Uniform State Law. In addition to the states listed in the note in the parent volume the following also have adopted the Uniform Criminal Extradition Act: Alaska, Colorado, Connecticut, Georgia, Hawaii, Illinois, Iowa, Kentucky, Missouri, Oklahoma, Panama Canal Zone, Tennessee, Texas, and Virgin Islands.

**References**

Cited or applied in *State ex rel. Middlemas v. District Court*, 125 M 310, 233 P 2d 1038, 1039; *State v. Booth*, 134 M 235, 328 P 2d 1104, 1109.

**94-501-3. Demand—form.****Improper Form, Discharge of Fugitive**

If the demand for extradition to the governor of the asylum state is not in proper form, the alleged fugitive will be discharged. *State v. Booth*, 134 M 235, 328 P 2d 1104, 1109.

**Substantial Charge of Crime**

A substantial charge of crime in the required papers submitted by the demanding state is a sufficient basis for extradition. *State v. Booth*, 134 M 235, 328 P 2d 1104, 1110.

**94-501-6. Extradition of persons not present in demanding state, etc.****References**

Cited in *State v. Booth*, 134 M 235, 328 P 2d 1104, 1109.

**94-501-7. Issuance of warrant of arrest by governor—recitals therein.****References**

Cited or applied in *State v. MacLean*, 129 M 500, 291 P 2d 250, 252.

**94-501-20. Guilt or innocence of accused, when inquired into.****Operation and Effect**

It is sufficient in habeas corpus proceedings to justify holding the petitioner if it is shown in Montana that the governor received from the governor of Oregon a copy of the affidavit made by the prosecuting witness, charging the defend-

ant with a felony and also of the warrant of arrest issued by the judge of a district court of the state of Oregon and duly authenticated. *State ex rel. Middlemas v. District Court*, 125 M 310, 233 P 2d 1038, 1040.



CHAPTER 601—MISCELLANEOUS PROVISIONS RESPECTING  
SPECIAL PROCEEDINGS OF A CRIMINAL NATURE

(Repealed—Section 2, Chapter 196, Laws of 1967)

**94-601-1 to 94-601-3. (12429 to 12431) Repealed.****Repeal**

These sections (Secs. 2890 to 2892, Pen. C. 1895), relating to special proceedings, designation of parties, entitling affidavits,

and subpoenas, were repealed by Sec. 2, Ch. 196, Laws 1967, effective January 1, 1968.

## CHAPTER 701—PRISONER'S ATTENDANCE AT COURT—HOW OBTAINED

**94-701-1. (12432) Persons imprisoned in state prison or in, etc.****Proper Procedure**

Inmate of state prison, who sought speedy trial upon a justice court complaint, by virtue of which a detainer had been filed at the prison, should have petitioned the district court setting forth

the facts of complaint against him and requested a speedy trial, rather than directing such request to the county attorney or petitioning the supreme court. *Petition of Ditton*, 145 M 594, 403 P 2d 205.

## CHAPTER 801—FINES AND FORFEITURES—DISPOSAL OF

Section 94-801-1. Fines, costs, and forfeitures, how disposed of.

94-801-2. Traffic fines collected from juvenile offenders—disposition.

**94-801-1. (12433) Fines, costs, and forfeitures, how disposed of.** All fines and forfeitures collected in any court, except police courts, must be applied to the payment of the costs of the case in which the fine is imposed or the forfeiture incurred; and after such costs are paid, the residue must, save as hereinafter provided, be paid to the county treasurer of the county in which the court is held and if not otherwise provided by law, by him credited to the general school fund of said county. In the event the fine or forfeiture arises from an action commenced pursuant to section 94-301 or section 94-304 of this code, the residue thereof, after such costs are paid, may be directed by the court to be paid, in whole or in part, to the wife, or to the guardian or custodian of the child or children. If the said fine or forfeiture is paid to the county treasurer at the time of such payment there shall be filed with the county treasurer, a complete statement showing the total of the fine or forfeiture received or incurred with an itemized statement of the costs incurred by the county in such action, which statement shall give the title of the cause and be subscribed by the person or officer making such payment.

**History:** En. Sec. 2910, Pen. C. 1895; re-en. Sec. 9715, Rev. C. 1907; re-en. Sec. 12433, R. C. M. 1921; amd. Sec. 1, Ch. 83, L. 1923; amd. Sec. 1, Ch. 92, L. 1961. Cal. Pen. C. Sec. 1570.

third sentence, substituted the words "If the said fine or forfeiture is paid to the county treasurer at the time of such payment" for "at the time of payment of any such fine or forfeiture."

**Amendment**

The 1961 amendment inserted the words "save as hereinafter provided" after "the residue must" in the first sentence; divided the former section into two sentences, the first and third sentences in the amended section; inserted the present second sentence; and, at the beginning of the present

**Repealing Clause**

Section 2 of Ch. 92, Laws 1961 repealed all acts and parts of acts in conflict therewith.

**References**

State ex rel. City of Libby v. Haswell, 147 M 492, 414 P 2d 652.

**94-801-2. Traffic fines collected from juvenile offenders—disposition.**

All fines collected by the district courts from children under eighteen (18) years of age, for unlawful operation of motor vehicles resulting from traffic summonses issued by the peace officers of the cities, counties, or by highway patrolmen, together with that portion of the fines which is specified in section 4 [75-5304] of this act, shall be retained by the county treasurer of the county in which the offense occurred and at the end of each month distributed as follows:

(a) Fines collected as the result of summonses issued by city police officers shall be distributed to the city in which the police officer is employed, and credited to the city general fund;

(b) Fines collected as the result of summonses issued by county peace officers shall be retained by the county treasurer and credited to the county road fund;

(c) Fines collected as the result of summonses issued by state highway patrolmen shall be paid to the state treasurer of Montana and by him credited to the general fund of the state;

(d) That portion of the fines, as provided for in section 4 [75-5304] of this act, shall be paid to the state treasurer of Montana and by him credited to the automobile driver education account in the earmarked revenue fund.

**History:** En. Sec. 1, Ch. 149, L. 1961; amd. Sec. 11, Ch. 226, L. 1965; amd. Sec. 10, Ch. 214, L. 1969.

**Title of Act**

An act to provide for the distribution of fines collected by district courts for the unlawful operation of motor vehicles by children under the age of eighteen (18) years; providing for time of such distribution; repealing all acts or parts of acts in conflict herewith.

**Amendments**

The 1965 amendment inserted "together with all penalty assessments levied and paid as provided for in section 4 of this

act" after "highway patrolmen" in the first paragraph; and added paragraph (d).

The 1969 amendment substituted "that portion of the fines which is specified in section 4 of this act" for the insertion made by the 1965 amendment in the first paragraph and substituted "That portion of the fines, as provided for in section 4 of this act" for "All penalty assessments levied and paid as provided for in section 4 of this act" in paragraph (4).

**Repealing Clause**

Section 2 of Ch. 149, Laws 1961 repealed all acts and parts of acts in conflict therewith.

**CHAPTER 901—RECIPROCAL ENFORCEMENT OF SUPPORT**

(Repealed—Section 3, Chapter 208, Laws of 1961)

**94-901-1 to 94-901-18. Repealed.****Repeal**

These sections (Secs. 1 to 18, Ch. 222, L. 1951), relating to reciprocal enforce-

ment of support, were repealed by Sec. 3, Ch. 208, Laws 1961. For new provisions, see secs. 93-2601-41 to 93-2601-82.

**CHAPTER 1001—CRIMINAL LAW STUDY COMMISSION**

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|--------------------|---|
| Section 94-1001-1. | Intent and purpose of act.                                  |
| 94-1001-2.         | Appointment of criminal law study commission—scope of work. |
| 94-1001-3.         | Composition of commission—application for appointment.      |
| 94-1001-4.         | Distribution of proposed changes to bench and bar.          |
| 94-1001-5.         | Submission of final draft to supreme court.                 |

- 94-1001-6. Notice by supreme court to bench and bar—hearings.
- 94-1001-7. Legislative adoption required.
- 94-1001-8. Changes suggested by supreme court.
- 94-1001-9. Employment of secretary and research services by commission.
- 94-1001-10. Reimbursement of commission members.
- 94-1001-11. Officers of commission—rules—records.

**94-1001-1. Intent and purpose of act.** The intent and purpose of this act is to establish a commission to suggest changes in the criminal law of the state of Montana to the end of uniformity in definition of crimes, arrests, trials, sentencing, pardon and parole.

**History:** En. Sec. 1, Ch. 103, L. 1963.

**Title of Act**

An act authorizing and empowering the supreme court of the state of Montana to recommend changes in the criminal law of the state of Montana to the end of uniformity in definition of crimes, arrests, trials, sentencing, pardon and parole, for the purpose of simplifying judicial proceedings and promoting the speedy determination of litigation upon its merits; creating a commission to prepare suggested changes in the criminal law of the state of Montana and prescribing the membership

and powers and duties of said commission; providing for employment of a secretary-stenographer of the commission and employment of research agencies, if deemed necessary; providing for the payment of actual travel and other expenses incurred by members of said commission in the discharge of their duties; providing that such recommended changes in the criminal law of the state of Montana shall be submitted to the Thirty-ninth Legislative Assembly of the state of Montana for its consideration; repealing all acts and parts of acts in conflict herewith and providing for an effective date of this act.

**94-1001-2. Appointment of criminal law study commission—scope of work.** That within thirty (30) days following the adjournment of this legislative assembly, the supreme court of Montana shall appoint a commission of eleven (11) persons, which commission shall meet and organize itself within thirty (30) days following appointment; and which commission shall make a complete study, consider and finally prepare suggested changes in the criminal law of the state of Montana to the end of uniformity in definition of crimes, arrests, trials, sentencing, pardon and parole, which suggested changes shall be comprehensive in scope.

**History:** En. Sec. 2, Ch. 103, L. 1963.

**94-1001-3. Composition of commission—application for appointment.** The commission shall be composed of the chief justice of the supreme court of the state of Montana, or an associate justice of the supreme court designated by the chief justice, three (3) judges from the district court of the state, and seven (7) lawyers. The judges so selected shall be from a list of suggested members submitted to the supreme court by the president of the Montana judges' association. Any lawyer actively engaged in the practice of law in the state of Montana or members of the faculty of the Montana university law school may submit an application to the supreme court indicating a desire to serve on such commission. The supreme court shall select members of the commission from among the applicants. The supreme court shall have the power to provide for terms of office, removals from office, filling of vacancies and changes in personnel of the commission.

**History:** En. Sec. 3, Ch. 103, L. 1963.

**94-1001-4. Distribution of proposed changes to bench and bar.** The commission so appointed shall prepare its suggested changes and shall dis-



tribute copies to the bench and bar of the state for their consideration and suggestions as they may submit to the commission.

**History:** En. Sec. 4, Ch. 103, L. 1963.

**94-1001-5. Submission of final draft to supreme court.** The commission shall within six (6) months after distribution of copies of the suggested changes submit the tentative final draft of suggested changes in the criminal law of the state of Montana, to the supreme court for approval.

**History:** En. Sec. 5, Ch. 103, L. 1963.

**94-1001-6. Notice by supreme court to bench and bar—hearings.** The submission of the tentative final draft to the supreme court will be noticed by the court by mailing notice of hearing to all district judges of the state and all attorneys licensed to practice in the Montana courts, as shown by the records of the clerk of the supreme court, and heard by it within ninety (90) days after submission by the commission, and all interested persons and organizations may appear that day by petition specifying their suggestions or objections thereon.

**History:** En. Sec. 6, Ch. 103, L. 1963.

**94-1001-7. Legislative adoption required.** Any suggested changes promulgated under this act shall be effective only upon adoption by the legislature.

**History:** En. Sec. 7, Ch. 103, L. 1963.

**94-1001-8. Changes suggested by supreme court.** The supreme court of this state shall have the right to suggest changes and amendments to the criminal law of the state of Montana from time to time for consideration by the legislative assembly.

**History:** En. Sec. 8, Ch. 103, L. 1963.

**94-1001-9. Employment of secretary and research services by commission.** The said commission may from time to time employ a secretary-stenographer, as it deems necessary, to assist in its work, and shall fix the compensation of such secretary-stenographer. It shall further have the power to employ the services of any research agency which it deems necessary in the discharge of its duties.

**History:** En. Sec. 9, Ch. 103, L. 1963.

**94-1001-10. Reimbursement of commission members.** Members of said commission shall serve without compensation, but shall be reimbursed for actual travel and other expenses incurred in the discharge of their duties, including attendance at meetings.

**History:** En. Sec. 10, Ch. 103, L. 1963.

**94-1001-11. Officers of commission—rules—records.** The said commission shall from time to time elect one of its members as chairman, and may from time to time elect such other officers from among its membership as the commission may deem desirable. The commission is empowered to

adopt rules for its own procedure, and to make all arrangements for its meetings, and to carry out the purpose for which it is created. The commission is directed to keep accurate records of its activities and proceedings.

**History:** En. Sec. 11, Ch. 103, L. 1963.

phrases may be declared unconstitutional or invalid."

#### **Separability Clause**

Section 12 of Ch. 103, Laws 1963 read "If any sentence, section, clause or phrase of this act is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act. The legislative assembly of the state of Montana hereby declares that it would have passed this act irrespective of the fact that any one or more sections, sentences, clauses or

#### **Repealing Clause**

Section 13 of Ch. 103, Laws 1963 repealed all acts and parts of acts in conflict therewith.

#### **Effective Date**

Section 14 of Ch. 103, Laws 1963 provided the act should be in effect from and after its passage and approval. Approved March 1, 1963.

### **CHAPTER 1101—INTERSTATE AGREEMENT ON DETAINERS**

- Section 94-1101-1. Agreement on detainees adopted—text.  
 94-1101-2. District courts to act.  
 94-1101-3. Enforcement and cooperation by public agencies.  
 94-1101-4. Escape from custody on detainee—penalty.  
 94-1101-5. Institutional officers to honor agreement.  
 94-1101-6. Coordinator of agreement—appointment—duties.

**94-1101-1. Agreement on detainees adopted—text.** The agreement on detainees is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows: The contracting states solemnly agree that:

#### **Article I**

The party states find that charges outstanding against a prisoner, detainees based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainees based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainees, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

#### **Article II**

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant

to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to article III or article IV hereof.

### Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial at the next term of court after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt request[ed].

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainees have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place



of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

#### Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request; and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V (e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

### Article V

(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the periods provided by this act, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

#### Article VI

(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

#### Article VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

#### Article VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same.



However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect nor shall it affect their rights in respect thereof.

### Article IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstances is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

**History:** En. Sec. 1, Ch. 215, L. 1963.

#### Title of Act

An act to provide for the reciprocal and expeditious disposition of detainers filed against inmates of prisons or other correctional institutions of party states; to provide for the speedy trial of persons confined in a penal or other correctional institution of a party state on charges and detainers based on untried indictments, informations or complaints and to provide for the final disposition of such charges and detainers; to provide that temporary

custody of such prisoners may be made available to appropriate officers of party states for trial; to provide that escape from such temporary custody shall be punishable by confinement in the state prison for a term of not less than one year nor more than ten years; to provide for the appointment of a coordinator of this agreement; providing for an effective date and a repealing clause.

#### References

In re Palmer's Petition, 144 M 519, 399 P 2d 90.

**94-1101-2. District courts to act.** The phrase "appropriate court" as used in the agreement on detainers shall, with reference to the courts of this state, mean; district courts.

**History:** En. Sec. 2, Ch. 215, L. 1963.

**94-1101-3. Enforcement and cooperation by public agencies.** All courts, departments, agencies, officers and employees of this state and its political subdivisions are hereby directed to enforce the agreement on detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose.

**History:** En. Sec. 3, Ch. 215, L. 1963.

**94-1101-4. Escape from custody on detainer—penalty.** Every prisoner confined in state prison for a term less than for life who has been lawfully delivered into the temporary custody of appropriate officers of a party state for trial on a charge or detainer based on an untried indictment, information or complaint and who escapes therefrom, is punishable by imprisonment in the state prison for a term of not less than one year nor more than ten years; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison.

**History:** En. Sec. 4, Ch. 215, L. 1963.

**94-1101-5. Institutional officers to honor agreement.** It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this state to give over the person of any inmate thereof whenever so required by the operation of the agreement on detainers.

**History:** En. Sec. 5, Ch. 215, L. 1963.

**94-1101-6. Coordinator of agreement—appointment—duties.** The governor shall appoint an officer of this state as coordinator of this agreement who, acting jointly with like officers of party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this act, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

**History:** En. Sec. 6, Ch. 215, L. 1963.

**Repealing Clause**

Section 8 of Ch. 215, Laws 1963 repealed all acts and parts of acts in conflict therewith.

**Transmittal of Copies of Act**

Section 7 of Ch. 215, Laws 1963 read "Copies of this act shall, upon its approval, be transmitted to the governor of each state, the attorney general and the administrator of general services of the United States, and the council of state governments."

**Effective Date**

Section 9 of Ch. 215, Laws 1963 provided the act should be in effect from and after its passage and approval. Approved March 9, 1963.





## TITLE 95

### MONTANA CODE OF CRIMINAL PROCEDURE

- Chapter 1. Scope, purpose and construction, 95-101, 95-102.  
2. Definitions, 95-201 to 95-211.  
3. Jurisdiction, 95-301 to 95-304.  
4. Venue, 95-401 to 95-412.  
5. Competency of accused, 95-501 to 95-509.  
6. Arrest, 95-601 to 95-619.  
7. Search and seizure, 95-701 to 95-718.  
8. The office of the coroner, 95-801 to 95-814.  
9. Initial appearance of arrested person, 95-901, 95-902.  
10. Right to counsel, 95-1001 to 95-1006.  
11. Bail, 95-1101 to 95-1123.  
12. Preliminary examination, 95-1201 to 95-1204.  
13. Leave to file information and time for filing information, 95-1301 to 95-1303.  
14. Grand jury, 95-1401 to 95-1410.  
15. Charging an offense, 95-1501 to 95-1506.  
16. Arraignment of defendant, 95-1601 to 95-1608.  
17. Pretrial motions, 95-1701 to 95-1710.  
18. Production and suppression of evidence, 95-1801 to 95-1806.  
19. Trial in district court, 95-1901 to 95-1916.  
20. Justice and police court proceedings, 95-2001 to 95-2009.  
21. Post-trial motions, 95-2101.  
22. Sentence and judgment, 95-2201 to 95-2226.  
23. Execution of sentence, 95-2301 to 95-2312.  
24. Appeal by state and defendant, 95-2401 to 95-2430.  
25. Appellate review of legal sentences, 95-2501 to 95-2504.  
26. Post-conviction hearing, 95-2601 to 95-2608.  
27. Habeas corpus, 95-2701 to 95-2716.  
28. Adoption of Rules of Criminal Procedure, 95-2801 to 95-2806.

## CHAPTER 1

### SCOPE, PURPOSE AND CONSTRUCTION

- Section 95-101. **Scope.**  
95-102. **Purpose and construction.**

**95-101. Scope.** These provisions shall govern the procedure in the courts of Montana in all criminal proceedings except where provision for a different procedure is specifically provided by law.

**History:** En. 95-101 by Sec. 1, Ch. 196, Title of Act  
L. 1967.

An act creating a Montana Code of Criminal Procedure, to codify and generally revise the statutes which govern court procedures in criminal matters.

**95-102. Purpose and construction.** These provisions are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay.

**History:** En. 95-102 by Sec. 1, Ch. 196,  
L. 1967.

## CHAPTER 2

## DEFINITIONS

Section	95-201.	Meanings of words and phrases.
	95-202.	Singular term includes plural—gender.
	95-203.	Charge.
	95-204.	Conviction.
	95-205.	Court.
	95-206.	Judge.
	95-207.	Judgment.
	95-208.	Magistrate.
	95-209.	Offense.
	95-210.	Peace officer.
	95-211.	Sentence.

**95-201. Meanings of words and phrases.** For the purposes of this code, the words and phrases described in this chapter have the meanings designated in this chapter, except when a particular context clearly requires a different meaning.

**History:** En. 95-201 by Sec. 1, Ch. 196,  
L. 1967.

**95-202. Singular term includes plural—gender.** Singular term shall include the plural and the masculine gender shall include the feminine except when a particular context clearly requires a different meaning.

**History:** En. 95-202 by Sec. 1, Ch. 196,  
L. 1967.

**95-203. Charge.** “Charge” means a written statement presented to a court accusing a person of the commission of an offense and includes complaint, information and indictment.

**History:** En. 95-203 by Sec. 1, Ch. 196,  
L. 1967.

**95-204. Conviction.** “Conviction” means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

**History:** En. 95-204 by Sec. 1, Ch. 196,  
L. 1967.

**95-205. Court.** “Court” means a place where justice is judicially administered and includes a judge thereof.

**History:** En. 95-205 by Sec. 1, Ch. 196,  
L. 1967.

**95-206. Judge.** “Judge” means a person who is invested by law with the power to perform judicial functions and includes court, justice of the peace or police magistrate when a particular context so requires.

**History:** En. 95-206 by Sec. 1, Ch. 196,  
L. 1967.

**95-207. Judgment.** “Judgment” means an adjudication by the court that the defendant is guilty or not guilty and if the adjudication is that the defendant is guilty, it includes the sentence pronounced by the court.

**History:** En. 95-207 by Sec. 1, Ch. 196,  
L. 1967.

**95-208. Magistrate.** "Magistrate" is an officer having power to issue a warrant for the arrest of a person charged with an offense and includes:

- (a) The justices of the supreme court.
- (b) The judges of the district courts.
- (c) Justices of the peace.
- (d) Police magistrates in towns or cities.

**History:** En. 95-208 by Sec. 1, Ch. 196, L. 1967.

#### Public Offenses

Prosecution for violation of city ordinance, punishable by fine, was one for a "public offense" within former section giv-

ing police magistrate power to issue warrant for arrest of a person charged with a public offense and former statute governing police court procedure. State ex rel. Marquette v. Police Court, 86 M 297, 309, 283 P 430.

**95-209. Offense.** "Offense" means a violation of any penal statute of this state or of any ordinance of its political subdivisions.

**History:** En. 95-209 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

Crime and public offense defined, sec. 94-112.

**95-210. Peace officer.** "Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses while acting within the scope of his authority.

**History:** En. 95-210 by Sec. 1, Ch. 196, L. 1967.

**95-211. Sentence.** "Sentence" is the punishment imposed on the defendant by the court.

**History:** En. 95-211 by Sec. 1, Ch. 196, L. 1967.

## CHAPTER 3

### JURISDICTION

Section 95-301. Jurisdiction of the district court.

95-302. Jurisdiction of the justice of the peace courts.

95-303. Jurisdiction of police and municipal courts.

95-304. State criminal jurisdiction.

**95-301. Jurisdiction of the district court.** The district courts have jurisdiction of all public offenses not otherwise provided for.

**History:** En. 95-301 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

District courts, jurisdiction and powers, Mont. Const. Art. VIII, § 11.

**95-302. Jurisdiction of the justice of the peace courts.** The justices' courts have:

(a) Jurisdiction of all misdemeanors punishable by a fine not exceeding five hundred dollars (\$500.00) or imprisonment not exceeding six (6) months, or both such fine and imprisonment; excluding jurisdiction in cases commenced under the Montana Dangerous Drug Act except to act as examining and committing courts and to conduct preliminary hearings as provided in subsection (c).



(b) Concurrent jurisdiction, with district courts, of all misdemeanors punishable by a fine only, not exceeding fifteen hundred dollars (\$1,500.00); and

(c) Jurisdiction to act as examining and committing courts and for such purpose to conduct preliminary hearings.

**History:** En. 95-302 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 11, Ch. 314, L. 1969.

#### Cross-References

Dangerous drug act, 54-129 to 54-138.

#### Enlargement of Jurisdiction by Implication

Statute providing for penalty assessments in addition to statutory limitations on the imposition of fines was void for indirectly enlarging the jurisdiction of the justice and police courts as prescribed by statutes defining jurisdiction of such courts in terms of maximum fine which may be imposed for the offense charged, notwithstanding state's argument that the jurisdiction had been enlarged by implication, rejected by court for the reason that such a serious governmental function as jurisdiction of the courts specially provided for in constitutional terms is not so easily amended by the theory of implication. State ex rel. Sanders v. City of Butte, 151 M 171, 441 P 2d 190.

#### Exclusive Jurisdiction

Former provision, together with the provisions sections 11 and 21 of article VIII of the constitution, under authority of which it was enacted, apparently reposed in justice courts exclusive original jurisdiction of all misdemeanors unless a law specifically provided that the district court should have jurisdiction or fix the penalty above the justice court maximum. Ex parte Sheehan, 100 M 244, 251, 49 P 2d 438.

#### Legislature's Authority

Within constitutional limitations, legislature may confer jurisdiction in any class of cases on either the district courts or justice's courts. State v. Holt, 121 M 459, 194 P 2d 651.

#### Unlicensed Practice of Medicine

Justice court did not have jurisdiction of prosecution for practicing medicine without license, bearing maximum punishment of \$1,000 fine or one year's imprisonment. State ex rel. Freebourn v. District Court, 105 M 77, 69 P 2d 748.

### DECISIONS UNDER FORMER LAW

#### Appointed Counsel

An indigent charged with the crime of petit larceny, specifically enumerated in former section, is not entitled to court-appointed counsel, and since district court had no jurisdiction over justice court to appoint counsel for indigent defendant, attorney was not entitled to compensation. State ex rel. Johnson v. District Court, 147 M 263, 410 P 2d 933.

#### Common Nuisance (Liquor) Prosecution

In a prosecution for maintaining a common nuisance under section 19, Chapter 9, Extraordinary Session of 1921 (since repealed), made supplemental to and a part

of the laws relating to intoxicating liquors, held that the district court had original jurisdiction, under section 37 of the Enforcement Act (Chapter 143, Laws 1917) (since repealed), conferring upon the district court original jurisdiction for violations of liquor laws and continued in force by Chapter 9, notwithstanding the offense is made a misdemeanor by section 19 thereof, punishable by a fine not exceeding \$500 and imprisonment in the county jail for not exceeding six months, and therefore otherwise triable in a justice court under this section. State v. Bowker, 63 M 1, 4, 205 P 961; State v. Sorenson, 65 M 65, 69, 210 P 752.

**95-303. Jurisdiction of police and municipal courts.** (a) The police courts have criminal jurisdiction as authorized by sections 11-1602 and 11-1603.

(b) Municipal courts have criminal jurisdiction as authorized by section 11-1702.

**History:** En. 95-303 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

Police and municipal courts, creation and jurisdiction, Mont. Const. Art. VIII, § 24.

#### Jurisdiction of Police Court

City police court had jurisdiction of defendant, arrested by a city police officer without a warrant, while driving on city streets, and promptly taken to the city police court where the arresting officer

reported and charged defendant with operating a motor vehicle within the corporate limits of the city while under the influence

of intoxicating liquor, in violation of city ordinance. *City of Bozeman v. Ramsey*, 139 M 148, 362 P 2d 206, 215.

**95-304. State criminal jurisdiction.** (a) A person is subject to prosecution in this state for an offense which he commits, while either within or outside the state, by his own conduct or that of another for which he is legally accountable, if:

(1) The offense is committed either wholly or partly within the state; or

(2) The conduct outside the state constitutes an attempt to commit an offense within the state, and an act in furtherance of the offense occurs in the state; or

(3) The conduct within the state constitutes an attempt, solicitation or conspiracy to commit in another jurisdiction an offense under the laws of this state and such other jurisdiction.

(b) An offense is committed partly within this state, if either the conduct which is an element of the offense, or the result which is an element, occurs within the state. In homicide, the "result" is either the physical contact which causes death, or the death itself, and if the body of a homicide victim is found within the state, the death is presumed to have occurred within the state.

(c) An offense which is based on an omission to perform a duty imposed by the law of this state is committed within the state, regardless of the location of the offender at the time of the omission.

(d) This state includes the land and water and the air space above such land and water with respect to which the state has legislative jurisdiction.

**History:** En. 95-304 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

District courts, jurisdiction and powers, Mont. Const. Art. VIII, § 11.

Federal jurisdiction, secs. 83-103 et seq. Jurisdiction of Indian country, secs. 83-801 et seq.

Territorial jurisdiction, limitations on, sec. 83-102.

#### Tribal Indians

The state has jurisdiction over Indian wards for crimes committed by them within the state but without the bounds of "Indian country." *Buckman v. State*, 139 M 630, 366 P 2d 346; *In re Diserly's Petition*, 140 M 219, 370 P 2d 763.

Crimes committed by Indians within Montana, but without the bounds of "Indian country" are within the jurisdiction of the state courts. *Petition of Fox*, 141 M 189, 376 P 2d 726, 727.

#### Tribal Indians—Forgery

State court had jurisdiction of prosecution of tribal Indian for forgery of check

obtained from Indian agency office where check was cashed in a town outside of the boundaries of the Indian reservation. *Petition of Fox*, 141 M 189, 376 P 2d 726, 727.

#### Tribal Indians—Larceny

State court presumptively had jurisdiction of prosecution of tribal Indian charged with larceny of a horse from Indian land where accused did not show that entire asportation took place on Indian land. *State v. Akers*, 106 M 43, 58, 74 P 2d 1138.

#### Tribal Indians—Statutory Rape

State court properly entertained jurisdiction of prosecution for crime committed by tribal Indian against Indian girl while off reservation, as against contention that federal court had exclusive jurisdiction of the offense. *State v. Youpee*, 103 M 86, 91, 61 P 2d 832.

#### Variance between Pleading and Proof

Under former statutes permitting conviction in any county into which the guilty person takes stolen property, there was no variance between the venue as laid in an information charging larceny of horses in

a certain county of this state and proof that the horses were stolen in Canada and driven into said county. *State v. De Wolfe*,

29 M 415, 421, 74 P 1084, overruled on other grounds in *State v. Penna*, 35 M 535, 546, 90 P 787.

## CHAPTER 4

### VENUE

- Section 95-401. Place of trial.  
 95-402. Where offense committed partly in one and partly in another county.  
 95-403. Where offense committed on or near county boundary.  
 95-404. Where a person in one county commits or aids and abets the commission of an offense in another county.  
 95-405. Offenses committed while in transit.  
 95-406. Death and cause of death in different places.  
 95-407. Offense commenced outside the state.  
 95-408. Stolen property.  
 95-409. Escape from prison.  
 95-410. Bigamy.  
 95-411. Kidnaping.  
 95-412. Treason.

**95-401. Place of trial.** In all criminal prosecutions the trial shall be in the county where the offense was committed unless otherwise provided by law. All objections to improper place of trial are waived by a defendant unless made before trial. If an objection is made a hearing shall be held and the venue established before proceeding to trial.

**History:** En. 95-401 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

Place of trial, Mont. Const. Art. III, § 16.

#### Information

An information stating generally that a crime was committed in Missoula county, but containing no other allegation as to venue, is sufficient, it not being necessary that it should allege that the crime was not committed on the Fort Missoula mili-

tary reservation, which is situated within that county. Judicial notice may be taken of the fact that the reservation in question is situated in Missoula county. *State v. Tully*, 31 M 365, 369, 78 P 760.

#### Venue Allegations

Information alleging that homicide was committed in Missoula county was sufficient as to venue, it being unnecessary to allege that crime occurred on Fort Missoula military reservation located within county. *State v. Tully*, 31 M 365, 78 P 760.

**95-402. Where offense committed partly in one and partly in another county.** Where two (2) or more acts are requisite to the commission of any offense, the trial may be in any county in which any of such acts occur.

**History:** En. 95-402 by Sec. 1, Ch. 196, L. 1967.

#### In General

Where defendants, president and cashier of a bank, prepared an alleged false report

to the superintendent of banks in P. county and transmitted it by mail to the superintendent of banks in L. & C. county, the district court of the former county had jurisdiction. *State v. Cassill*, 70 M 433, 227 P 49.

**95-403. Where offense committed on or near county boundary.** Where an offense is committed on or within one-half ( $\frac{1}{2}$ ) mile of the boundary of two (2) or more counties, and it cannot be readily determined in which county the offense was committed, the offender may be tried in any of such counties.

**History:** En. 95-403 by Sec. 1, Ch. 196, L. 1967.

#### Judicial Notice as to Location

Courts will take judicial notice of the

fact that a point located a given number of miles from a named town is in a certain county, hence that a point 25 miles north of Brockton is in Roosevelt county. *State v. Akers*, 106 M 43, 58, 74 P 2d 1138.



**95-404. Where a person in one county commits or aids and abets the commission of an offense in another county.** Where a person in one county commits, aids, abets or procures the commission of an offense in another county the offender may be tried in either county.

**History:** En. 95-404 by Sec. 1, Ch. 196,  
L. 1967.

**Cross-References**

Indictment or information against accessory to felony, sec. 94-6424.

**95-405. Offenses committed while in transit.** If an offense is committed in, on or against any instrument of conveyance passing within this state, and it cannot readily be determined in which county the offense was committed, the offender may be tried in any county through which such instrument of conveyance has passed or in the county where the travel terminates.

**History:** En. 95-405 by Sec. 1, Ch. 196,  
L. 1967.

**95-406. Death and cause of death in different places.** If cause of death is inflicted in one county and the death ensues in another county, the offender may be tried in either county.

**History:** En. 95-406 by Sec. 1, Ch. 196,  
L. 1967.

**Variance between Pleading and Proof**

Under former section requiring trial of homicide in county where fatal injury was inflicted, held that, where a person is shot in one county but dies in another, and defendant is charged with murder in the former county, it is unnecessary to allege

where the deceased died; and, though it is alleged that he died in the county where the fatal shot was fired, while the evidence shows that he died in another county, there is no variance. That term refers to a disagreement between the allegations in the information and the proof, with reference to some matter that is legally essential to the charge. *State v. Crean*, 43 M 47, 54, 114 P 603.

**95-407. Offense commenced outside the state.** If the commission of an offense commenced outside the state is consummated within this state, the offender shall be tried in the county where the offense was consummated.

**History:** En. 95-407 by Sec. 1, Ch. 196,  
L. 1967.

**Variance between Pleading and Proof**

There was no variance between information charging larceny of horses in Cascade

county and proof that horses were stolen in Canada and driven into Cascade county. *State v. De Wolfe*, 29 M 415, 74 P 1084, overruled on other grounds in *State v. Penna*, 35 M 535, 546, 90 P 787.

**95-408. Stolen property.** Where a person obtains property by larceny, robbery, false pretenses or embezzlement, he may be tried in any county in which he exerted control over such property.

**History:** En. 95-408 by Sec. 1, Ch. 196,  
L. 1967.

**Animal Driven into Another County**

While jurisdiction in prosecution for larceny of livestock is determined by place where crime is committed, where property is taken in one county and thereafter brought into another, jurisdiction under this section is in either county; held, in case of concerted plan to steal horses and ship out of state by railroad, there was continuous commission of the crime from

place of taking to destination, even though defendant's active participation ceased at a place between, and county into which animal driven had jurisdiction. *State v. Akers*, 106 M 43, 58, 74 P 2d 1138.

**Judicial Notice as to Location**

Courts will take judicial notice of the fact that a point located a given number of miles from a named town is in a certain county, hence that a point 25 miles north of Brockton is in Roosevelt county. *State v. Akers*, 106 M 43, 58, 74 P 2d 1138.

**Variance between Pleading and Proof**

There was no variance between information charging larceny of horses in Cascade county and proof that horses were stolen

in Canada and driven into Cascade county. *State v. De Wolfe*, 29 M 415, 74 P 1084, overruled on other grounds in *State v. Penna*, 35 M 535, 546, 90 P 787.

## DECISIONS UNDER FORMER LAW

**Constitutionality**

Former provision which also provided for apportioning costs held not unconstitutional as being in conflict with section 27 of article III, the due process clause, section 4 of article XII, prohibiting the legislature from levying taxes upon the inhabitants or property in, inter alia, counties for county purposes, nor open to objection that it violated section 23 of article V, prohibiting more than one subject in a legislative bill and requiring that it be expressed in its title. *Rosebud County v. Flinn*, 109 M 537, 539, 543, 98 P 2d 330.

**"Larceny"**

"Larceny," as used in predecessor section meant grand larceny, the title of the act referring to property feloniously taken characterizing that crime as a felony. *Rosebud County v. Flinn*, 109 M 537, 541, 98 P 2d 330.

**Meaning of Words "Prosecution" and "Costs"**

Under former provision which also provided for apportioning costs of prosecution and trial, held that apparently only one construction could be given to section 8 of article III and section 27 of article VIII of the constitution of Montana, and former section 94-6201 appearing to have defined the meaning of the term "prosecution," namely, that the prosecution commences with the filing of the information or indictment, and not before. The section, where it used the term "costs," meant any legal and proper costs of prosecution and trial after filing of the information, including cost and expense of investigation and production of evidence. Costs incurred preliminary to filing the information were not proper claims against county where offense committed. *Rosebud County v. Flinn*, 109 M 537, 541, 98 P 2d 330.

**95-409. Escape from prison.** A person who escapes from prison may be tried in any county in the state.

**History:** En. 95-409 by Sec. 1, Ch. 196, L. 1967.

**95-410. Bigamy.** A person who commits the offense of bigamy may be tried in any county where the bigamous marriage or bigamous cohabitation has occurred.

**History:** En. 95-410 by Sec. 1, Ch. 196, L. 1967.

**95-411. Kidnaping.** A person who commits the offense of kidnaping may be tried in any county in which his victim has traveled or has been confined during the course of the offense.

**History:** En. 95-411 by Sec. 1, Ch. 196, L. 1967.

**95-412. Treason.** A person who commits the offense of treason may be tried in any county.

**History:** En. 95-412 by Sec. 1, Ch. 196, L. 1967.

## CHAPTER 5

## COMPETENCY OF ACCUSED

**Section 95-501. Mental disease or defect excluding responsibility.**

**95-502. Evidence of mental disease or defect admissible when relevant to element of the offense.**

- 95-503. Mental disease or defect excluding responsibility is affirmative defense—requirement of notice—form of verdict and judgment when finding of irresponsibility is made.
- 95-504. Mental disease or defect excluding fitness to proceed.
- 95-505. Psychiatric examination of defendant with respect to mental disease or defect.
- 95-506. Determination of fitness to proceed—effect of finding of unfitness—proceedings if fitness is regained.
- 95-507. Determination of irresponsibility on basis of report—access to defendant by psychiatrist of his own choice—form of expert testimony when issue of responsibility is tried.
- 95-508. Legal effect of acquittal on the ground of mental disease or defect excluding responsibility—commitment—release or discharge.
- 95-509. Statements for purposes of examination or treatment inadmissible except on issue of mental condition.

**95-501. Mental disease or defect excluding responsibility.** (a) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(b) As used in this chapter, the terms “mental disease or defect” does not include an abnormality manifested only by re-repeated criminal or otherwise antisocial conduct.

**History:** En. 95-501 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

Who are capable of committing crimes, sec. 94-201.

#### Irresistible Impulse

“One may have mental capacity and intelligence sufficient enough to distinguish

between right and wrong with reference to the particular act, and to understand the consequences of its commission, and yet be so far deprived of volition and self control by the overwhelming violence of mental disease that he is not capable of voluntary action, and therefore not able to choose the right and avoid the wrong.” State v. Peel, 23 M 358, 369, 59 P 169.

**95-502. Evidence of mental disease or defect admissible when relevant to element of the offense.** Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

**History:** En. 95-502 by Sec. 1, Ch. 196, L. 1967.

**95-503. Mental disease or defect excluding responsibility is affirmative defense—requirement of notice—form of verdict and judgment when finding of irresponsibility is made.** (a) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish by a preponderance of the evidence.

(b) (1) Evidence of mental disease or defect excluding responsibility is not admissible unless the defendant, at the time of entering his plea of not guilty or within ten (10) days thereafter or at such later time as the court may, for good cause, permit, files a written notice of his purpose to rely on such defense.

(2) The defendant shall give similar notice when in a trial on the merits, he intends to rely on a mental disease or defect, to prove that he did not have a particular state of mind which is an essential element of



the offense charged. Otherwise, except on good cause shown, he shall not introduce in his case in chief, expert testimony in support of that defense.

(c) When the defendant is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and the judgment shall so state.

**History:** En. 95-503 by Sec. 1, Ch. 196, L. 1967.

**Cross-References**

How insanity must be proven, sec. 94-119.

**95-504. Mental disease or defect excluding fitness to proceed.** No person who as a result of mental disease or defect is unable to understand the proceedings against him or to assist in his own defense, shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.

**History:** En. 95-504 by Sec. 1, Ch. 196, L. 1967.

be tried or punished held declaratory of the common law as it had existed at least since Blackstone's day. *State v. Kitchens*, 129 M 331, 286 P 2d 1079, 1083.

**Declaratory of Common Law**

Provision that an insane person cannot

**95-505. Psychiatric examination of defendant with respect to mental disease or defect.** (a) Whenever the defendant has filed a notice of intention to rely on the defense of mental disease or defect excluding responsibility, or there is reason to doubt his fitness to proceed, or reason to believe that mental disease or defect of the defendant will otherwise become an issue in the cause, the court shall appoint at least one (1) qualified psychiatrist or shall request the superintendent of the Montana state hospital to designate at least one (1) qualified psychiatrist, which designation may be or include himself, to examine and report upon the mental condition of the defendant. The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period of not exceeding sixty (60) days or such longer period as the court determines to be necessary for the purpose and may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination.

(b) In such examination any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect.

(c) The report of the examination shall include the following:

- (1) A description of the nature of the examination;
- (2) A diagnosis of the mental condition of the defendant;
- (3) If the defendant suffers from a mental disease or defect, an opinion as to his capacity to understand the proceedings against him and to assist in his own defense;

(4) When a notice of intention to rely on the defense of irresponsibility has been filed, an opinion as to the ability of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law at the time of the criminal conduct charged; and

(5) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged.

If the examination cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of mental disease or defect.

The report of the examination shall be filed (in triplicate) with the clerk of court, who shall cause copies to be delivered to the county attorney and to counsel for the defendant.

**History:** En. 95-505 by Sec. 1, Ch. 196, L. 1967.

**95-506. Determination of fitness to proceed—effect of finding of unfitness—proceedings if fitness is regained.** (a) When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. If neither the county attorney nor counsel for the defendant contests the finding of the report filed pursuant to section 95-505, the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon such hearing, the parties shall have the right to summon and cross-examine the psychiatrists who joined in the report and to offer evidence upon the issue.

(b) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsection (c) of this section, and the court shall commit him to the custody of the superintendent of the Montana state hospital, to be placed in an appropriate institution of the state department of public institutions for so long as such unfitness shall endure. When the court, on its own motion or upon the application of the superintendent of the Montana state hospital, or the county attorney, or the defendant or his legal representative, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charge and may order the defendant to be discharged, or, subject to the law governing the civil commitment of persons suffering from mental disease or defect, order the defendant to be committed to an appropriate institution of the state department of public institutions.

(c) The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible to fair determination prior to trial and without the personal participation of the defendant.

**History:** En. 95-506 by Sec. 1, Ch. 196, L. 1967.

#### DECISIONS UNDER FORMER LAW

##### Sanity Formerly Jury Question

Where the question of the defendant's present sanity is presented, it is within the sound discretion of the court to determine whether the matter should be inquired into in a special proceeding, where as the question of the defendant's sanity at

the time of the commission of the offense should be tried by the jury impaneled to pass upon his guilt or innocence of the crime charged. *State v. Peterson*, 24 M 81, 60 P 809.

The doubt as to accused's sanity at time of trial, mentioned in former section au-

thorizing special proceeding to determine sanity, was one arising in the mind of the presiding judge, and was to be left to his judicial conscience. Unless there was a doubt in the mind of the judge a quo—a doubt which he must legally determine as he would determine any other matter of grave import before him—he was not warranted in calling a special jury to try the issue. *State v. Howard*, 30 M 518, 528, 77 P 50.

Under former sections making sanity a jury question, held that where, after death sentence has been pronounced, there is good reason to suppose that accused has become insane, the sheriff, with the concurrence of the judge of the court by which the judgment was rendered, may summon a jury to inquire into the question of his sanity in conformity with former sections; but where during the course of the trial or before judgment of conviction is pronounced a doubt arises as to his mental condition, the special sanity proceeding must be held. *State v. Vetter*, 77 M 66, 249 P 666.

Where in a prosecution for homicide no attempt was made to prove insanity and the question of defendant's sanity during the trial or at any time was not suggested to the court, failure of the court to call a jury to determine his sanity, a matter addressed to its sound discretion, was not an abuse thereof. *State v. Schlaps*, 78 M 560, 575, 254 P 858.

#### —Construction of Former Statute

A doubt as to accused's sanity at time of trial (within former section providing for issue to be determined by jury in special proceeding) may come from matters which are brought to attention of trial judge wholly beyond the common-law record or which although occurring at trial do not appear in the record, or which although shown in the record are not admissible as evidence. *State v. Kitchens*, 129 M 331, 286 P 2d 1079, 1083.

The question whether a doubt as to accused's sanity at time of trial is raised in any given case addresses itself directly to trial court's discretion. Its abuse will be reviewed on appeal, and where an abuse does appear, the reviewing court will say as a matter of law a doubt did arise requiring that special proceeding be held. *State v. Kitchens*, 129 M 331, 286 P 2d 1079, 1083.

The weight of successive adjudications by four different courts and judges, in other proceedings, that the defendant was insane, were sufficient as a matter of law to raise doubt as to his sanity at time of trial and to require special sanity proceeding. The testimony of a witness that the defendant was sane does not alter the case, for at this stage of the proceedings the court is only concerned with the preliminary question whether there is reason to doubt defendant's sanity. *State v. Kitchens*, 129 M 331, 286 P 2d 1079, 1085.

**95-507. Determination of irresponsibility on basis of report—access to defendant by psychiatrist of his own choice—form of expert testimony when issue of responsibility is tried.** (a) If the report filed pursuant to section 95-505 finds that the defendant at the time of the criminal conduct charged suffered from a mental disease or defect which rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, and the court, after a hearing if a hearing is requested by the attorney prosecuting or the defendant, is satisfied that such mental disease or defect was sufficient to exclude responsibility, the court on motion of the defendant shall enter judgment of acquittal on the ground of mental disease or defect excluding responsibility.

(b) When either the defendant or the state wishes the defendant to be examined by a qualified psychiatrist or other expert, selected by the one proposing the examination, such examiner shall be permitted to have reasonable access to the defendant for the purpose of such examination.

(c) Upon the trial, any psychiatrist who reported pursuant to section 95-505 may be called as a witness by the prosecution or by the defense. If the issue is being tried before a jury, the jury shall not be informed that the psychiatrist was designated by the court or by the superintendent of the Montana state hospital. Both the prosecution and the defense may summon any other qualified psychiatrist or other expert to testify, but no one who has not examined the defendant shall be competent to testify



to an expert opinion with respect to the mental condition or responsibility of the defendant, as distinguished from the validity of the procedure followed by, or the general scientific propositions stated by another witness.

(d) When a psychiatrist or other expert who has examined the defendant testifies concerning his mental condition, he shall be permitted to make a statement as to the nature of his examination, his diagnosis of the mental condition of the defendant at the time of the commission of the offense charged and his opinion as to the ability of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law or to have a particular state of mind which is an element of the offense charged. He shall be permitted to make any explanation reasonably serving to clarify his diagnosis and opinion and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion.

**History:** En. 95-507 by Sec. 1, Ch. 196,  
L. 1967.

**95-508. Legal effect of acquittal on the ground of mental disease or defect excluding responsibility — commitment — release or discharge.**

(a) When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the court shall order him to be committed to the custody of the superintendent of the Montana state hospital to be placed in an appropriate institution for custody, care and treatment.

(b) If the superintendent of the Montana state hospital believes that a person committed to his custody, pursuant to subsection (a) of this section, may be discharged or released on condition without danger to himself or others, he shall make application for the discharge or release of such person in a report to the court by which such person was committed and shall transmit a copy of such application and report to the county attorney of the county from which the defendant was committed. The court shall thereupon appoint at least two (2) qualified psychiatrists to examine such person and to report within sixty (60) days, or such longer period as the court determines to be necessary for the purpose, their opinion as to his mental condition. To facilitate such examinations and the proceedings thereon, the court may cause such person to be confined in any institution located near the place where the court sits, which may hereafter be designated by the superintendent of the Montana state hospital as suitable for the temporary detention of irresponsible persons.

(c) If the court is satisfied by the report filed pursuant to subsection (b) of this section, and such testimony of the reporting psychiatrists as the court deems necessary that the committed person may be discharged or released on condition without danger to himself or others, the court shall order his discharge or his release on such conditions as the court determines to be necessary. If the court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and the burden shall be upon the committed person to prove that he may safely be discharged or released. According to the determination of the court upon the hearing, the committed person shall thereupon be dis-

charged or released on such conditions as the court determines to be necessary, or shall be recommitted to the custody of the superintendent of the Montana state hospital, subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.

(d) If, within five (5) years after the conditional release of a committed person, the court shall determine, after hearing evidence, that the conditions of release have not been fulfilled and that for the safety of such person or for the safety of others his conditional release should be revoked, the court shall forthwith order him to be recommitted to the superintendent of the Montana state hospital, subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.

(e) A committed person may make application for his discharge or release to the court by which he was committed, and the procedure to be followed upon such application shall be the same as that prescribed above in the case of an application by the superintendent of the Montana state hospital. However, no such application by a committed person need be considered until he has been confined for a period of not less than six (6) months from the date of the order of commitment, and if the determination of the court be adverse to the application, such person shall not be permitted to file a further application until one (1) year has elapsed from the date of any preceding hearing on an application for his release or discharge.

History: En. 95-508 by Sec. 1, Ch. 196,  
L. 1967.

**95-509. Statements for purposes of examination or treatment inadmissible except on issue of mental condition.** A statement made by a person subjected to psychiatric examination or treatment pursuant to sections 95-505, 95-506, 95-508 for the purposes of such examination or treatment shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition but it shall be admissible upon that issue, whether or not it would be otherwise deemed a privileged communication unless such statement constitutes an admission of guilt of the crime charged.

History: En. 95-509 by Sec. 1, Ch. 196,  
L. 1967.

## CHAPTER 6

### ARREST

Section	95-601.	Definitions.
	95-602.	Method of arrest.
	95-603.	Issuance and service of arrest warrant upon complaint.
	95-604.	Arrest with a warrant.
	95-605.	Procedure when warrant defective.
	95-606.	Arrest without a warrant.
	95-607.	Time of making arrest.
	95-608.	Arrest by a peace officer.
	95-609.	Assisting a peace officer.
	95-610.	Release by officer of person arrested.
	95-611.	Arrest by a private person.
	95-612.	When summons may be issued.

- 95-613. Effect of not answering summons.
- 95-614. Notice to appear.
- 95-615. Offenses committed by corporations.
- 95-616. Persons exempt from arrest.
- 95-617. Magistrate may order arrest.
- 95-618. Roadblocks.
- 95-619. Close pursuit—power of arrest by officers of another state.

**95-601. Definitions.** (a) Arrest Defined: An arrest is taking a person into custody in the manner authorized by law.

(b) Warrant of Arrest: A warrant of arrest is a written order from a court directed to a peace officer, or to some other person specifically named, commanding him to arrest a person. This term includes the original warrant of arrest or a copy certified by the issuing court.

(c) Summons: A summons is a written order issued by the court which commands a person to appear before a court at a stated time and place.

(d) Notice to Appear: A notice to appear is a written direction issued by a peace officer that a person appear before a court at a stated time and place to answer an offense set forth therein.

**History:** En. 95-601 by Sec. 1, Ch. 196,  
L. 1967.

**Cross-References**

Issuance of warrant upon failure to comply with conditions of bail, sec. 95-1107.

**95-602. Method of arrest.** (a) An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest.

(b) All necessary and reasonable force may be used in making an arrest, but the person arrested shall not be subject to any greater restraint than is necessary to hold or detain him.

(c) All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to make an authorized arrest.

**History:** En. 95-602 by Sec. 1, Ch. 196,  
L. 1967.

**Use of Force**

In making a lawful arrest, the officer may use all necessary means to effect the

arrest if the person to be arrested either flees or forcibly resists, but if the officer unnecessarily assaults him, he is criminally liable for such assault. State v. Prlja, 57 M 461, 189 P 64.

**95-603. Issuance and service of arrest warrant upon complaint.** (a) A complaint, as the basis of an arrest warrant, shall be in writing.

(b) When a complaint is presented to a court charging a person with the commission of an offense, the court shall examine upon oath the complainant and may also examine any witnesses.

(c) If it appears from the contents of the complaint and the examination of the complainant and other witnesses, if any, that there is probable cause to believe that the person against whom the complaint was made has committed an offense a warrant shall be issued by the court for the arrest of the person complained against. In the discretion of the court or upon the request of the county attorney, a summons instead of a warrant shall issue. More than one (1) warrant or summons may issue on the same complaint.



(d) A warrant of arrest shall:

(1) Be in writing in the name of the state of Montana or in the name of a municipality if a violation of a municipal ordinance is charged;

(2) Set forth the nature of the offense;

(3) Command that the person against whom the complaint was made be arrested and brought before the court issuing the warrant, or if he is absent or unable to act before the nearest or most accessible court in the same county. If an arrest is made in a county other than the one in which the warrant was issued the arrested person shall be taken without unnecessary delay before the nearest and most accessible judge in the county where the arrest was made;

(4) Specify the name of the person to be arrested or if his name is unknown, shall designate such person by any name or description by which he can be identified with reasonable certainty;

(5) State the date when issued and the municipality or county where issued, and

(6) Be signed by the judge of the court with the title of his office.

(e) The warrant of arrest may specify the amount of bail.

(f) The warrant shall be directed to all peace officers in the state. It shall be executed by a peace officer and may be executed in any county of the state. However, warrants issued for the violation of city ordinances cannot be executed outside the city limits, except as otherwise provided by sections 11-927 and 11-960.

**History:** En. 95-603 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

Issuance of warrant upon failure to comply with conditions of bail, sec. 95-1107.

Setting and accepting bail under warrant of arrest, sec. 95-1104.

#### Extent of Examination before Issuing Warrant

Magistrate examining complaint need not go into matter as thoroughly as is required at trial. State ex rel. Vanek v. Justice Court, 110 M 550, 554, 104 P 2d 14.

#### Peace Officer Defined

One acting under authority of the county attorney as special investigator of offenses against the narcotics law, who made an arrest without a warrant, held not a "peace officer" within the meaning of a former section providing that an arrest may be made by a peace officer or a private person. State v. Hum Quock, 89 M 503, 519, 300 P 220.

#### When Mandamus Lies to Compel Magistrate's Disposal

Held, on application for writ of mandamus to compel a justice of the peace to dispose of an accusation brought under section 94-1440, prohibiting an appointive state officer from being a member of a political committee, etc., that the writ will issue commanding the justice to take action by either issuing a warrant of arrest or dismissing the complaint where two weeks expired before examination of the accuser and two months in examining six witnesses to ascertain whether a violation was probable or not, but it will not issue to control his discretion, i.e., to issue a warrant of arrest. State ex rel. Vanek v. Justice Court, 110 M 550, 554, 104 P 2d 14.

#### Where Warrant May Be Executed

The sheriff of Flathead county has authority to arrest person in Powell county under warrant issued in Flathead county upon such person's release from prison. Application of Campeau, 122 M 375, 209 P 2d 1012, 1013.

### DECISIONS UNDER FORMER LAW

#### Duty To Make Complaint

Former provision that a person who has reason to believe that a crime has been

committed and that a certain person has committed it, must make complaint before a magistrate, did not require one to dis-

close to a county attorney evidence within his knowledge tending to disprove the defendant's guilt, and an instruction that it

did was erroneous. *State v. Jackson*, 71 M 421, 434, 230 P 370.

**95-604. Arrest with a warrant.** When making an arrest by virtue of a warrant, the peace officer making the arrest shall inform the person to be arrested of his authority, of the intention to arrest him, of the cause of the arrest, and of the fact that a warrant has been issued for his arrest, except when he flees or forcibly resists before the officer making the arrest has an opportunity so to inform him, or when the giving of such information will imperil the arrest. The peace officer making the arrest need not have the warrant in his possession at the time of the arrest, but after the arrest, if the person arrested so requests, the warrant shall be shown to him as soon as practicable.

**History:** En. 95-604 by Sec. 1, Ch. 196, L. 1967.

**95-605. Procedure when warrant defective.** No warrant of arrest shall be dismissed nor shall any person in custody for an offense be discharged from such custody because of technical irregularities not affecting the substantial rights of the accused.

**History:** En. 95-605 by Sec. 1, Ch. 196, L. 1967.

**95-606. Arrest without a warrant.** A peace officer or person making an arrest without a warrant must inform the person to be arrested of his authority, if any, of the intention to arrest him and the cause of the arrest, except when the person to be arrested is actually engaged in the commission of or in an attempt to commit an offense, or is pursued immediately after its commission, or after an escape, or when the giving of such information will imperil the arrest.

**History:** En. 95-606 by Sec. 1, Ch. 196, L. 1967.

#### Exception

Where officer is well known to those whom he seeks to arrest and where those parties, instead of surrendering as directed by officer, immediately prepare to fire upon him, ceremony of disclosing official character of officer and reason for arrest is voluntarily dispensed with by parties to be arrested. *State v. Gay*, 18 M 51, 44 P 411.

#### Privileged Entry Where No Arrest Warrant

Opening defendant's apartment door to limit of night latch to determine what had caused raging man to fall silent, which was reasonable ground to believe a necessity existed, was a privileged entry even though defendant could not have been arrested under the statutes in view of evidence that when the police arrived no disturbance was in progress, they had no warrant for the arrest of the defendant and they had at no time informed the defendant that they intended to arrest him. *State v. Lukus*, 149 M 45, 423 P 2d 49.

**95-607. Time of making arrest.** An arrest may be made on any day and at any time of the day or night except that a person cannot be arrested in his home or private dwelling place, at night, for a misdemeanor committed at some other time and place unless upon the direction of a magistrate endorsed upon a warrant of arrest.

**History:** En. 95-607 by Sec. 1, Ch. 196, L. 1967.

**95-608. Arrest by a peace officer.** A peace officer may arrest a person when:

- (a) He has a warrant commanding that such person be arrested, or
- (b) He believes, on reasonable grounds, that a warrant for the person's arrest has been issued in this state, or
- (c) He believes, on reasonable grounds, that a felony warrant for the person's arrest has been issued in another jurisdiction, or
- (d) He believes on reasonable grounds, that the person is committing an offense, or that the person has committed an offense and the existing circumstances require his immediate arrest.

**History:** En. 95-608 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968.

#### **Accused's Lack of Mens Rea**

Under section 3200, R. C. M. 1921 (since repealed) the mere possession of narcotics was prima facie evidence of guilt and therefore lack of knowledge, on the part of the recipient of a package through the mails, that it contained morphine did not render her arrest unlawful, her lack in that respect being a matter of defense at the trial. *State ex rel. Kuhr v. District Court*, 82 M 515, 519, 268 P 501.

#### **Peace Officer Defined**

One acting under authority of the county attorney as special investigator of offenses against the narcotics law, who made an arrest without a warrant, held not a "peace officer" within the meaning of former arrest statutes. *State v. Hum Quock*, 89 M 503, 300 P 220.

#### **Privileged Entry Where No Arrest Warrant**

Opening defendant's apartment door to limit of night latch to determine what had caused raging man to fall silent, which was reasonable ground to believe a necessity existed, was a privileged entry even though defendant could not have been arrested under the statutes in view of evidence that when the police arrived no disturbance was in progress, they had no warrant for the arrest of the defendant and they had at no time informed the defendant that they intended to arrest him. *State v. Lukus*, 149 M 45, 423 P 2d 49.

**95-609. Assisting a peace officer.** (a) A peace officer making a lawful arrest may command the aid of male persons over the age of eighteen (18).

(b) A person commanded to aid a peace officer shall have the same authority to arrest as that officer.

#### **Subsequent to Confession**

Where defendant was requested to go to the sheriff's office for questioning and was not arrested until after his confession was given, the arrest without a warrant subsequent to the confession was a proper one within former section. *State v. Nelson*, 139 M 180, 362 P 2d 224, 229.

#### **Unlawful Arrest**

In action for damages for unlawful arrest which occurred after store manager handed plaintiff's check to officer and plaintiff seized check from officer's hand, arrest could not be justified by alleging a violation of sections 94-35-169 and 94-4202. *Harrer v. Montgomery Ward & Co.*, 124 M 295, 221 P 2d 428, 435.

#### **Use of Force To Arrest With and Without Warrant**

Person named in warrant must submit even though not guilty of any offense; officer, after making his purpose known and exhibiting warrant, if asked to do so, may use such force as is necessary to make arrest without subjecting himself to charge of trespass; where arrest without warrant is not justified, such an arrest constitutes a trespass on the personal liberties of the one arrested, against which he may use such force as is necessary to prevent arrest or effect escape; in prosecution for resisting an officer, it is not sufficient that officer believed there was a violation of law, but it must appear that conditions described in statute governing arrest without warrant existed (applying former section 94-6003). *State v. Bradshaw*, 53 M 96, 161 P 710.



(c) A person commanded to aid a peace officer in making an arrest shall not be civilly liable for any reasonable conduct in aid of the officer.

**History:** En. 95-609 by Sec. 1, Ch. 196, L. 1967.

**95-610. Release by officer of person arrested.** A peace officer having custody of a person arrested without a warrant is authorized to release the person without requiring him to appear before a court when the officer is satisfied that there are no grounds for criminal complaint against the person arrested.

**History:** En. 95-610 by Sec. 1, Ch. 196, L. 1967.

**95-611. Arrest by a private person.** A private person may arrest another when:

(a) He believes, on reasonable grounds, that an offense is being committed or attempted in his presence; or

(b) When a felony has in fact been committed and he believes, on reasonable grounds, that the person arrested has committed it.

**History:** En. 95-611 by Sec. 1, Ch. 196, L. 1967.

held lawful. *State v. Hum Quock*, 89 M 503, 519, 300 P 220.

#### Authority To Arrest

The authority of a private person to make an arrest without a warrant is more limited than that of an officer to make a like arrest. *State ex rel. Sadler v. District Court*, 70 M 378, 386, 225 P 1000.

#### Determining Lawfulness of Arrest

While the legality of an arrest by a private person without a warrant cannot depend upon what is found in the possession of the person arrested, the fact that his belief that a crime was being committed is found to be correct accredits the belief and gives weight to the evidence upon which he acted. *State v. Hum Quock*, 89 M 503, 519, 300 P 220.

In determining whether a private person had "reasonable cause" for believing that a crime had been or was being committed in his presence when he made an arrest, under authority of predecessor section, without a warrant, a liberal rather than a strict course should be followed; if he acted in good faith and the facts and circumstances were such as to warrant a man of prudence and caution in believing as he did when making the arrest, it should be

#### False Imprisonment

In action for false imprisonment, it was proper to refuse the defendant an instruction to effect that law gives a private person the right to make an arrest when person arrested has committed, or is about to commit, a public offense in his presence, and that, if the jury believes that the plaintiff had taken from the defendant property of the latter which he was attempting to recover at the time of the alleged imprisonment, the verdict should be for the defendant. *Kroeger v. Passmore*, 36 M 504, 511, 93 P 805.

#### Probable Cause

To entitle a private person to make an arrest, for a public offense committed or attempted in his presence, the facts and circumstances must be such that upon them alone he would be justified in making a complaint upon which a warrant might issue, i.e., the facts and circumstances must be sufficient to warrant the conclusion that there is probable cause for believing that an offense is being committed. *State ex rel. Sadler v. District Court*, 70 M 378, 386, 225 P 1000.

### DECISIONS UNDER FORMER LAW

#### Construction

Former section dealing with arrests by private persons was required to be read with and was limited by former section requiring the private person making the ar-

rest to take the person arrested before a magistrate or deliver him to a police officer without unnecessary delay. *Kroeger v. Passmore*, 36 M 504, 93 P 805.

**95-612. When summons may be issued.** (a) When authorized to issue a warrant of arrest a court may in lieu thereof issue a summons.

(b) The summons shall:

- (1) Be in writing in the name of the state of Montana;
- (2) State the name of the person summoned and his address, if known;
- (3) Set forth the nature of the offense;
- (4) State the date when issued, and the municipality or county where issued;
- (5) Be signed by the judge of the court with the title of his office; and
- (6) Command the person to appear before a court at a certain time and place.

(c) The summons may be personally served in the same manner as the summons in a civil action.

**History:** En. 95-612 by Sec. 1, Ch. 196,  
L. 1967.

**95-613. Effect of not answering summons.** Upon failure of the person summoned to appear, the magistrate shall issue a warrant of arrest. If after issuing a summons the magistrate becomes satisfied that the person summoned will not appear as commanded by the summons he may at once issue a warrant of arrest.

**History:** En. 95-613 by Sec. 1, Ch. 196,  
L. 1967.

**95-614. Notice to appear.** (a) Whenever a peace officer is authorized to arrest a person without a warrant, he may instead issue to such person a notice to appear.

(b) The notice shall:

- (1) Be in writing;
- (2) State the name of the person and his address, if known;
- (3) Set forth the nature of the offense;
- (4) Be signed by the officer issuing the notice; and
- (5) Direct the person to appear before a court at a certain time and place.

(c) Upon failure of the person to appear, a summons or warrant of arrest may issue.

**History:** En. 95-614 by Sec. 1, Ch. 196,  
L. 1967.

**95-615. Offenses committed by corporations.** (a) Upon a charge filed against a corporation for the commission of an offense the court shall issue a summons setting forth the nature of the offense and commanding the corporation to appear before the court at a certain time and place.

(b) The summons for the appearance of a corporation may be served in the manner provided for service of summons upon a corporation in a civil action.

(c) If, after being summoned, the corporation does not appear, a plea of not guilty shall be entered by the court having jurisdiction to try the

offense for which the summons was issued, and such court shall proceed to trial and judgment without further process.

**History:** En. 95-615 by Sec. 1, Ch. 196,  
L. 1967.

**95-616. Persons exempt from arrest.** (a) Electors shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during their attendance at election, and in going to and returning from the same.

(b) Senators and representatives shall, in all cases, except felony or breach of the peace, be privileged from arrest during the sessions of the state legislature, and in going to and returning from the same.

(c) The militia shall in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at musters and election, and in going to and returning from the same.

(d) Judges, attorneys, clerks, sheriffs, and other court officers shall be privileged from arrest while attending court and while going to and returning from court.

**History:** En. 95-616 by Sec. 1, Ch. 196,  
L. 1967.

Exemptions from arrest, privileges of militia, sec. 77-158.

#### Cross-References

Electors, privilege from arrest, sec. 23-308.

Home guard, freedom from arrest, sec. 77-1213 (b).

Legislators, freedom from arrest, Mont. Const. Art. V, § 15.

**95-617. Magistrate may order arrest.** A magistrate may orally order a peace officer or private person to arrest any one committing or attempting to commit a public offense in the presence of such magistrate.

**History:** En. 95-617 by Sec. 1, Ch. 196,  
L. 1967.

**95-618. Roadblocks.** (a) Definition. For the purpose of this act, a "temporary roadblock" means any structure, device, or means used by the duly elected or appointed law-enforcement officers of this state, and their deputies, for the purpose of controlling all traffic through a point on the highway whereby all vehicles may be slowed or stopped.

(b) Authority to Establish Roadblocks. The duly elected or appointed law-enforcement officers of this state, and their deputies, are hereby authorized to establish, in their respective jurisdictions, or in other jurisdictions within the state, temporary roadblocks on the highways of this state for the purpose of identifying drivers, and apprehending persons wanted for violation of the laws of this state, or of any other state, or of the United States, who are using the highways of this state.

(c) Minimum Requirements. For the purpose of warning and protecting the traveling public, the minimum requirements to be met by such officers establishing temporary roadblocks, if time and circumstances allow, are:

1. The temporary roadblock must be established at a point on the highway clearly visible at a distance of not less than one hundred (100) yards, in either direction.



2. At the point of the temporary roadblock, a sign shall be placed on the center line of the highway displaying the word "stop" in letters of sufficient size and luminosity to be readable at a distance of not less than fifty (50) yards, in both directions, either in daytime or darkness.

3. At the same point of the temporary roadblock, at least one (1) red light, which shall be a flashing or intermittent beam of light, must be placed at the side of the roadway clearly visible to the oncoming traffic, at a distance of not less than one hundred (100) yards.

4. At a distance of not less than two hundred (200) yards from the point of the temporary roadblock, warning signs must be placed at the side of the highway, containing any wording of sufficient size and luminosity, to warn the oncoming traffic that a "police stop" lies ahead. A burning beam light, flare, or a lantern must be placed near such signs for the purpose of attracting the attention of approaching drivers during hours of darkness. A red flag may be used for the same purpose during daylight hours.

(d) Existing Law Preserved. Nothing in this act shall be deemed to limit, or encroach upon the existing authority of Montana law-enforcement officers in the performance of their duties involving traffic control.

(e) Penalty. Any person who shall proceed or travel through a roadblock without subjecting himself to the traffic control so established shall be guilty of a misdemeanor, and shall be punished by a fine of not more than five hundred dollars (\$500.00), or by imprisonment in the county jail for not more than six (6) months, or by both fine and imprisonment.

**History:** En. 95-618 by Sec. 1, Ch. 196,  
L. 1967.

**Cross-References**

Inspections of vehicles by highway patrol and highway commission, sec. 32-21-155.

**95-619. Close pursuit—power of arrest by officers of another state.**

(a) Any peace officer of another state of the United States, who enters this state in close pursuit and continues within this state in such close pursuit of a person in order to arrest him, shall have the same authority to arrest and hold in custody such person, as peace officers of this state have to arrest and hold in custody a person on the ground that he has committed a crime in this state.

(b) Hearing as to Locality of Arrest. If an arrest is made in this state by an officer of another state in accordance with the provisions of section 95-619 (a), he shall, without unnecessary delay, take the person arrested before a judge of a court of record who shall conduct a hearing for the sole purpose of determining if the arrest was in accordance with the provisions of section 95-619 (a) and not of determining the guilt or innocence of the arrested person. If the judge determines that the arrest was in accordance with such provisions, he shall commit the person arrested to the custody of the officer making the arrest, who shall without unnecessary delay take him to the state from which he fled. If the judge determines that the arrest was unlawful, he shall discharge the person arrested.

(c) Construction of Act. Section 95-619 (a) shall not be construed so as to make unlawful any arrest in this state which would otherwise be lawful.

(d) "State" Defined. For the purpose of this act the word state shall include the District of Columbia.

(e) Certification of Act. Upon the passage and approval by the governor of this act, it shall be the duty of the secretary of the state (or other officer) to certify a copy of this act to the executive department of each of the states of the United States.

(f) Act, How Cited. This act may be cited as the Uniform Act on Close Pursuit.

History: En. 95-619 by Sec. 1, Ch. 196,  
L. 1967.

## CHAPTER 7

### SEARCH AND SEIZURE

- Section 95-701. Searches and seizures—when authorized.  
 95-702. Scope of search without warrant.  
 95-703. Search warrant defined.  
 95-704. Grounds for search warrant.  
 95-705. Scope of search with warrant.  
 95-706. Filing of application.  
 95-707. By whom served.  
 95-708. Service and execution of search warrants.  
 95-709. Use of force in execution of search warrant.  
 95-710. Detention and search of persons on premises.  
 95-711. When warrant may be executed.  
 95-712. Return to court of things seized under search warrant.  
 95-713. Custody and disposition of things seized under search warrant.  
 95-714. Custody and disposition of things seized without search warrant.  
 95-715. Return of property seized.  
 95-716. Disposition of unclaimed property.  
 95-717. When search and seizure not illegal.  
 95-718. Admissibility in other proceedings.

**95-701. Searches and seizures—when authorized.** A search of a person, object or place may be made and instruments, articles or things may be seized in accordance with the provisions of this chapter when the search is made:

- (a) As an incident to a lawful arrest.
- (b) With the consent of the accused or of any other person who is lawfully in possession of the object or place to be searched, or who is believed upon reasonable cause to be in such lawful possession by the person making the search.
- (c) By the authority of a valid search warrant.
- (d) Under the authority and within the scope of a right of lawful inspection granted by law.

History: En. 95-701 by Sec. 1, Ch. 196,  
L. 1967.

#### Cross-References

Unreasonable searches and seizures prohibited, Mont. Const. Art. III, § 7.

#### Consent

Any right which defendant may have had to complain of seizure of jacket he was wearing at time of arrest was waived where he voluntarily surrendered it to police officers upon request. *State v. Nelson*, 130 M 466, 304 P 2d 1110.

A search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, express or implied; state has burden of proving that such consent was given; where arrest of defendant for having no driver's license was a cover-up to enable officers to search defendant's car, the search was not incident to a lawful arrest. *State v. Tomich*, 332 F 2d 987.

#### Consent

One consenting to search of his premises without warrant cannot complain that it was illegal. *State ex rel. Muzzy v. Uotila*, 71 M 351, 229 P 724.

After officers stated they desired to look over defendant's place, defendant's statement, "All right; go ahead" held to warrant conclusion that search was with defendant's permission. *State ex rel. Muzzy v. Uotila*, 71 M 351, 229 P 724.

#### Incident to a Lawful Arrest

When an arrest is lawfully made, the person arresting may take from the possession of the arrestee articles of property which reasonably would be of use on the trial. *State ex rel. Wong You v. District Court*, 106 M 347, 351, 78 P 2d 353.

**95-702. Scope of search without warrant.** When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of:

- (a) Protecting the officer from attack, or
- (b) Preventing the person from escaping, or
- (c) Discovering and seizing the fruits of the crime, or
- (d) Discovering and seizing any persons, instruments, articles or things which may have been used in the commission of, or which may constitute evidence of, the offense.

**History:** En. 95-702 by Sec. 1, Ch. 196, L. 1967.

#### Incident to a Lawful Arrest

Officer lawfully making an arrest may not only search his prisoner and preserve for use on trial articles found on his person or in his immediate possession but may also, as an incident to the arrest, seize instrumentalities through which the crime was committed and other articles which will aid in proving prisoner committed the crime, particularly if such articles are in plain view and no search is required to uncover them; in prosecution for attempting to maim livestock with a shotgun, shoes, shotgun and shells found near where accused was arrested in bed were admissible. *State v. Benson*, 91 M 21, 5 P 2d 223.

Where defendant was arrested in bed for attempt to maim livestock, his shoes,

Marijuana seized under the authority of a void search warrant could not have been seized as an incident of a lawful arrest since the marijuana which served as the ground for arrest was discovered by means of a void process and illegal entry; thus the marijuana was secured as a result of an illegal search and seizure and was accordingly inadmissible in evidence. *State v. Langan*, 151 M 558, 445 P 2d 565.

#### Search Warrants for Narcotics

Provisions governing issuance of search warrants for narcotic drugs set forth in the formerly applicable Uniform Drug Act were the sole and exclusive provisions governing issuance of search warrants authorizing a lawful search and seizure of narcotic drugs as defined in the act, so that marijuana seized in private residence on authority of search warrant issued by a justice of the peace was unlawfully seized and the search warrant was void because in violation of the Uniform Drug Act (since repealed). *State v. Langan*, 151 M 558, 445 P 2d 565.

#### Law Review

**Search and Seizure: Seizure of Purely Evidentiary Items Held Constitutional** (*Warden, Maryland Penitentiary v. Hayden*, 387 U S 294, 18 L Ed 2d 782, 87 S Ct 1642) 29 Mont. L. Rev. 101 (1967).

gun, and shells, being in plain sight, were properly seized by officer as incident to arrest (const. art. III, sec. 7). *State v. Benson*, 91 M 21, 5 P 2d 223.

When an arrest is lawfully made, the arresting officer may take from the arrestee articles which reasonably would be of use at trial; lottery tickets and paraphernalia found by arresting officer in basement in which accused said lottery was being conducted were admissible. *State ex rel. Wong You v. District Court*, 106 M 347, 78 P 2d 353.

#### Probable Cause

Held, under former statute, that an officer may make a search and seizure without a warrant when he has probable cause to believe that an offense is being committed. *State ex rel. Wong You v. District Court*, 106 M 347, 352, 78 P 2d 353.



**95-703. Search warrant defined.** A search warrant is an order in writing, in the name of the state, signed by a judge, particularly describing the thing or place to be searched and the instruments, articles or things to be seized, directed to a peace officer, commanding him to search for personal property and bring it before the judge.

**History:** En. 95-703 by Sec. 1, Ch. 196, L. 1967.

#### **Actions Which Do Not Lie against Officer**

Where a sheriff seized oil well piping under a search warrant and subsequently released it by order of the same justice of the peace to the custody from which he seized it, incidentally enabling the person who procured the warrant to take it, under claim of ownership, claim and delivery does not lie against sheriff on theory of wrongful and negligent loss of possession; conversion does not lie where no facts are alleged that he instigated or assisted in the alleged wrongful taking; trespass and trespass on the case do not lie unless the injury is "proximate result" of sheriff's wrongful or negligent acts or defaults. *Harri v. Isaac*, 111 M 152, 156, 107 P 2d 137.

#### **Nature and Necessity**

The issuance of a search warrant by the district court is a judicial proceeding. *State v. Tesla*, 69 M 503, 223 P 107.

The process of search and seizure may be invoked only in furtherance of public prosecution. *State ex rel. King v. District Court*, 70 M 191, 224 P 862.

#### **Unreasonable Searches and Seizures**

In the prosecution for murder, the admission of evidence that shoes taken from defendant without his consent corresponded with tracks found near the scene of the killing, did not deprive defendant of the rights guaranteed to him by section 7, article III of the constitution, prohibiting unreasonable searches and seizures. *State v. Fuller*, 34 M 12, 85 P 369.

Searches and seizures which are not lawful and which are not conducted as the law prescribes are unreasonable within section 7, article III of the constitution. *State ex rel. King v. District Court*, 70 M 191, 224 P 862. (See also *State ex rel. Sadler v. District Court*, 70 M 378, 225 P 1000.) *State v. Mullaney*, 92 M 553, 16 P 2d 407.

The protection granted by section 7, article III of the constitution, from unreasonable searches and seizures reaches all alike, whether accused of crime or not, and the duty of enforcing it is obligatory upon all entrusted with the enforcement of the law. *State ex rel. King v. District Court*, 70 M 191, 224 P 862.

Search, unlawful at inception, does not become lawful by what is found. *State ex rel. King v. District Court*, 70 M 191, 224 P 862.

Constitutional provision against unreasonable search and seizure applies to person and baggage and personal belongings, and in search of person unlawfully arrested and seizure of his personal belongings. *State v. Mullaney*, 92 M 553, 16 P 2d 407.

An arrest, or search and seizure, made without a warrant is illegal and, therefore, unreasonable when it is made upon mere suspicion or belief unsupported by facts, circumstances or credible information calculated to produce such belief. *State ex rel. Wong You v. District Court*, 106 M 347, 354, 78 P 2d 353.

Search made upon consent of owner, freely given on officers' request is not an "unreasonable search." *United States v. Williams*, 295 F 219.

Peace officers should be encouraged, but evidence of crime must be lawfully obtained (const. amend. 4). *United States v. Clark*, 18 F 2d 442.

### **DECISIONS UNDER FORMER LAW**

#### **Prohibition Enforcement Act**

The general provisions of former sections relating to the issuance of search warrants, were not amended or modified

by the provisions of the Prohibition Enforcement Act. *State v. Tesla*, 69 M 503, 209, 223 P 107.

**95-704. Grounds for search warrant.** Any judge may issue a search warrant upon the written application of any person that an offense has been committed, made under oath or affirmation before him which:

(a) States facts sufficient to show probable cause for issuance of the warrant,

- (b) Particularly describes the place or things to be searched, and
- (c) Particularly describes the things to be seized.

**History:** En. 95-704 by Sec. 1, Ch. 196, L. 1967.

### Description of Place and Property

Where probable cause for issuance of search warrant was shown by deposition of complainant, disclosing time, place and manner of an alleged violation of the liquor law, warrant could validly issue, notwithstanding that complaint for warrant did not set forth the time of commission of offense. *State v. Tesla*, 69 M 503, 509, 223 P 107.

A search warrant as to the description of the premises to be searched must be complete in itself. *State ex rel. King v. District Court*, 70 M 191, 224 P 862.

A warrant must designate the premises to be searched and contain a description so specific as to avoid any unauthorized invasion of the right of privacy, and must identify the property in such manner as to leave to the officer no discretion as to the premises to be searched. There must be no obscurity nor uncertainty. *State ex rel. King v. District Court*, 70 M 191, 224 P 862.

Description of place to be searched as ranch with small buildings, located about five miles in westerly direction from town named, held insufficient. *Fall v. United States*, 33 F 2d 71.

### Judicial Examination

Where a deputy county attorney had presented a verified complaint for a search warrant based upon the affidavit of another, and the district judge examined the latter under oath, the fact that he did not also examine the complainant himself, as formerly required by statute, did not render the warrant illegal, since the only information the complainant had was that obtained from the affiant and an examination of the former would have been useless. *State v. English*, 71 M 343, 345, 346, 229 P 727.

### Deposition and Affidavit

Former section declared that a magistrate before issuing a search warrant must take the deposition of any witness in writing. Issuance of warrant upon an affidavit did not render the warrant illegal, the words "deposition" and "affidavit" having been used interchangeably in the chapter relating to search warrants. *State v. English*, 71 M 343, 345, 346, 229 P 727.

### Public Offense

Under former section authorizing issuance of search warrant when property was in possession of any person with intent to use as means of committing a

### Limited by Statute

The use of search warrants is not to be extended by construction to any case not clearly covered by statute. *State ex rel. Streit v. Justice Court*, 45 M 375, 382, 123 P 405.

### "Probable Cause"

A search warrant issued on a conclusion of the applicant, without any facts stated in the application on which the judicial officer to whom it is addressed may form his own conclusion, is not a showing of "probable cause supported by oath or affirmation," within the meaning of section 7, article III of the constitution. *State ex rel. Samlin v. District Court*, 59 M 600, 198 P 362.

An application for a search warrant must set forth sufficient facts to enable a judicial officer to see that probable cause for its issuance exists. *State ex rel. Thibodeau v. District Court*, 70 M 202, 224 P 866; *State ex rel. Baracker v. District Court*, 75 M 476, 244 P 280.

To obtain a search warrant under the liquor laws, the facts upon which its issuance is sought must be stated under oath and be sufficient to enable the magistrate to whom application is made to determine the existence of probable cause without reference to the opinion of the applicant. *State ex rel. Stange v. District Court*, 71 M 125, 219, 227 P 576.

The circumstances justifying issuance of a search warrant must create a reasonable belief that probable cause exists, and must be as strong as those which would warrant the institution of a criminal charge for an arrest on such charge without warrant. *State ex rel. Stange v. District Court*, 71 M 125, 227 P 576.

Evidence held to establish probable cause for search and seizure. *In re Herter*, 30 F 2d 968, modified in 33 F 2d 400.

## DECISIONS UNDER FORMER LAW

public offense, the alleged threatened violation of a town ordinance, by conducting a saloon without first obtaining a license, did not justify issuance warrant commanding that a designated building be searched for intoxicating liquors. *State ex rel. Streit v. Justice Court*, 45 M 375, 382, 123 P 405.

Violations of city ordinance were not included within meaning of "public offense," as those words were employed in former section, authorizing issuance of search warrant when property was in possession of any person with intent to use as means of committing a public offense. *State ex rel. Streit v. Justice Court*, 45 M 375, 381, 123 P 405.

**Test for Sufficiency of Affidavit**

Test to determine whether affidavit for search warrant stated facts sufficient to justify its issuance was whether affiant could be prosecuted for perjury if the

statement is false; affidavit stating only conclusions was insufficient. *State ex rel. Baracker v. District Court*, 75 M 476, 244 P 280.

**95-705. Scope of search with warrant.** A search warrant may authorize the seizure of the following:

(a) Contraband.

(b) Any instruments, articles or things which are the fruits of, have been used in the commission of, or which may constitute evidence of, any offense.

(c) Any person who has been kidnaped in violation of the laws of this state, or who has been kidnaped in another jurisdiction and is now concealed within this state.

**History:** En. 95-705 by Sec. 1, Ch. 196, L. 1967.

**95-706. Filing of application.** The application on which the warrant is issued shall be retained by the judge but need not be filed with the clerk of the court nor with the court if there is no clerk, until the warrant has been executed or has been returned "not executed."

**History:** En. 95-706 by Sec. 1, Ch. 196, L. 1967.

**95-707. By whom served.** A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person except in aid of the officer on his requiring it, he being present and acting in its execution.

**History:** En. 95-707 by Sec. 1, Ch. 196, L. 1967.

**95-708. Service and execution of search warrants.** Service of a search warrant is made by exhibiting the original warrant at the place to be searched. If the warrant is executed, a duplicate copy, and a receipt for all articles taken shall be left with any person from whom any instruments, articles or things are seized, or, if no person is available, the copy and receipt shall be left at the place from which the instruments, articles or things were seized. Failure to give or leave such a receipt shall not render the evidence inadmissible in a trial.

**History:** En. 95-708 by Sec. 1, Ch. 196, L. 1967.

**95-709. Use of force in execution of search warrant.** All necessary and reasonable force may be used to execute a search warrant or to effect an entry into any building or property or part thereof to execute a search warrant.

**History:** En. 95-709 by Sec. 1, Ch. 196, L. 1967.

**95-710. Detention and search of persons on premises.** In the execution of the warrant the person executing the same may reasonably detain and search any person in the place at the time:



- (a) To protect himself from attack, or
- (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.

**History:** En. 95-710 by Sec. 1, Ch. 196,  
L. 1967.

**95-711. When warrant may be executed.** The warrant may be executed at any time of any day or night. The warrant shall be executed within ten (10) days from the time of issuance. Any warrant not executed within such time shall be void and shall be returned to the court or the judge issuing the same as "not executed."

**History:** En. 95-711 by Sec. 1, Ch. 196,  
L. 1967.

**95-712. Return to court of things seized under search warrant.** The return of the warrant and all instruments, articles and things seized shall be made promptly before the judge who issued the warrant, or if he is absent or unavailable, before the nearest available judge and shall be accompanied by a written inventory of any property taken, verified by the person executing the warrant. The judge shall, upon request, deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

**History:** En. 95-712 by Sec. 1, Ch. 196,  
L. 1967.

**95-713. Custody and disposition of things seized under search warrant.** The judge before whom the instruments, articles or things are returned shall enter an order providing for their custody or appropriate disposition pending further proceedings.

**History:** En. 95-713 by Sec. 1, Ch. 196,  
L. 1967.

**95-714. Custody and disposition of things seized without search warrant.** Any peace officer seizing any instruments, articles or things must give a receipt to the person from whose possession they are taken, but failure to give such a receipt shall not render the evidence seized inadmissible upon a trial.

If an arrest has been made all instruments, articles or things seized on a search without warrant shall be delivered to the judge before whom the person arrested is taken, and thereafter handled and disposed of in accordance with sections 95-712, 95-713 and 95-715. If the person arrested is released without a charge being preferred against him, all instruments, articles or things seized from him, other than contraband, shall be returned to him upon release.

If no arrest has been made such instruments, articles or things may be retained in the custody of the officer making the seizure for a time sufficient for investigation of the supposed crime, after which they must be delivered to the proper judge for disposition in accordance with sections 95-712, 95-713 and 95-715, or returned to the person from whom they were taken.

**History:** En. 95-714 by Sec. 1, Ch. 196,  
L. 1967.

**95-715. Return of property seized.** Any person claiming the right to possession of property seized as evidence may apply to the judge to whom it has been delivered for its return. The judge shall give such notice as he deems adequate to the county attorney and all persons who have or may have an interest in the property and shall hold a hearing to hear all claims to its true ownership. If the right to possession is proved to the judge's satisfaction, he shall order the property, other than contraband, returned if:

(a) The property is not needed as evidence or, if needed, satisfactory arrangements can be made for its return for subsequent use as evidence, or

(b) All proceedings in which it might be required have been completed.

**History:** En. 95-715 by Sec. 1, Ch. 196, L. 1967.

**95-716. Disposition of unclaimed property.** If property seized as evidence is not claimed within six (6) months of completion of the case for which it was seized, and if, after proper inquiry, the judge cannot ascertain or locate any person entitled to its possession, he must order the property to be sold by the sheriff. The proceeds from such sale, after deduction of the costs of storage and preservation of the property, must be paid into the county treasury.

**History:** En. 95-716 by Sec. 1, Ch. 196, L. 1967.

**95-717. When search and seizure not illegal.** No search and seizure, whether with or without warrant, shall be held to be illegal as to a defendant if:

(a) The defendant has disclaimed any right to, or interest in the place or object searched or the instruments, articles or things seized, or

(b) No right of the defendant has been infringed by the search and seizure, or

(c) Any irregularities in the proceedings do not affect the substantial rights of the accused.

**History:** En. 95-717 by Sec. 1, Ch. 196, L. 1967.

#### **Disclaimer**

Suppression of evidence found in car in which defendant was riding at time of ar-

rest was not error where the vehicle belonged to defendant's companion and defendant disclaimed any ownership or right to possession of it or any of the property taken from it. State v. Nelson, 130 M 466, 304 P 2d 1110.

**95-718. Admissibility in other proceedings.** Instruments, articles or things lawfully seized are admissible as evidence upon any prosecution or proceeding whether or not the prosecution or proceeding is for the offense in connection with which the search was originally made.

**History:** En. 95-718 by Sec. 1, Ch. 196, L. 1967.

## **CHAPTER 8**

### **THE OFFICE OF THE CORONER**

- Section 95-801.** The office of the coroner.  
**95-802.** Coroner to have autopsy—when.  
**95-803.** Coroner to hold inquest—when.  
**95-804.** Jurors to be sworn.

- 95-805. Witnesses to be subpoenaed.
- 95-806. Witness compelled to attend.
- 95-807. Verdict of jury in writing, what to contain.
- 95-808. Testimony in writing and where filed.
- 95-809. Inquest shall be public.
- 95-810. Property found on body—to whom delivered.
- 95-811. Must keep register.
- 95-812. Jurisdiction of coroner.
- 95-813. Liability of a mortuary or physician.
- 95-814. The coroner shall have needed assistance.

**95-801. The office of the coroner.** When a coroner is informed that a death or stillbirth was caused by other than natural causes or that a death or stillbirth has occurred under circumstances such as to afford a reasonable ground to suspect that the death is the result of criminal conduct, or when no physician or surgeon, licensed in the state of Montana, will sign a death certificate, the coroner shall make an investigation thereof. It shall be the duty of every person acquiring knowledge of such a death to report the same forthwith to the coroner of the county in which death apparently occurred. In cases where criminal conduct is suspected, the coroner shall notify one or more law enforcement agencies having jurisdiction. The law enforcement agencies so notified shall have the responsibility to investigate the case.

**History:** En. 95-801 by Sec. 1, Ch. 196,  
L. 1967.

**Cross-References**

County coroner, Title 16, ch. 34.

**95-802. Coroner to have autopsy—when.** If in the opinion of the coroner an autopsy is advisable, he shall order one and shall retain a physician or pathologist to perform it. A full record of the facts found shall be made on a form provided by the Montana state board of health in duplicate, the coroner retaining one copy and delivering the other to the county attorney. The right to conduct an autopsy shall include the right to retain such specimens as the physician or pathologist performing the autopsy deems necessary. Performance of autopsies is within the discretion of the coroner except that the county attorney or attorney general may require one. In ordering an autopsy the coroner shall order the body to be exhumed if it has been interred.

**History:** En. 95-802 by Sec. 1, Ch. 196,  
L. 1967.

**95-803. Coroner to hold inquest—when.** An inquest is a formal inquiry into the causes of and circumstances surrounding the death of any person. The coroner shall hold an inquest only if requested to do so by the county attorney of the county in which death occurred or by the county attorney of the county in which the acts or events causing death occurred. The coroner shall conduct the inquest with the aid and assistance of the county attorney. For holding such inquest, the coroner must summon a jury of not more than nine (9) persons, qualified by law to serve as jurors. Such inquest is to be held in accordance with sections 95-804 through 95-809 of this chapter.

**History:** En. 95-803 by Sec. 1, Ch. 196,  
L. 1967.



**Cross-Reference**

Inquest at coal mines, sec. 50-524.

**Coroner Juror Serving as Trial Juror**

Where the voir dire examination of a trial juror in a murder case failed to reveal the fact that he had served on the coroner's jury which had investigated the occurrence, known to the county attorney who directed proceedings at the inquest, and discovered by defense counsel after trial jury had been sworn, it was the duty of both to advise the trial court at the earliest opportunity to prevent a mistrial instead of remaining silent until verdict of guilty returned when defense counsel presented the matter in affidavits on motion for new trial. *State v. Allison*, 116 M 352, 364, 153 P 2d 141.

**Introduction of Testimony at Trial**

Where one charged with homicide, without knowledge of his constitutional rights against self-incrimination, section 18 article III of the constitution, and without being informed of his right to counsel,

that he could refuse to testify, and that his statements might thereafter be used against him, was required to answer questions at the inquest put to him by the county attorney under the belief that he had to obey his orders, and the state at the trial in its case in chief introduced his entire testimony so given, the admission thereof was in violation of defendant's constitutional rights, necessitating reversal of the judgment of conviction. *State v. Allison*, 116 M 352, 355, 153 P 2d 141.

**Nature of Proceeding**

Defendant's admission at coroner's inquest that he drove at unlawful speed held admissible, as admission against interest, as part of plaintiff's case in chief. *Marinkovich v. Tierney*, 93 M 72, 17 P 2d 93.

In holding an inquest the coroner acts judicially, and although an inquest is essentially a criminal proceeding, it is not a trial involving the merits of a prosecution but rather a preliminary investigation only. *State v. Allison*, 116 M 352, 355, 153 P 2d 141.

**95-804. Jurors to be sworn.** When six (6) or more of the jurors attend, they must be sworn by the coroner to inquire who the person was, and when, where, and by what means he came to his death, and into the circumstances attending his death; and to render a true verdict thereon, according to the evidence offered to them, or arising from the inspection of the body.

**History:** En. 95-804 by Sec. 1, Ch. 196, L. 1967.

**95-805. Witnesses to be subpoenaed.** A coroner may issue subpoenas for witnesses, returnable forthwith; or at such time and place as he may appoint, which may be served by any competent person. He must summon and examine as witnesses every person who, in his opinion, or that of the jury, has any knowledge of the facts, and may summon a surgeon or physician to inspect the body, and give a professional opinion as to the cause of the death.

**History:** En. 95-805 by Sec. 1, Ch. 196, L. 1967.

**95-806. Witness compelled to attend.** A witness served with a subpoena may be compelled to attend and testify, or be punished as upon a subpoena issued by a justice of the peace.

**History:** En. 95-806 by Sec. 1, Ch. 196, L. 1967.

**95-807. Verdict of jury in writing, what to contain.** After inspecting the body and hearing the testimony, the jury must render its verdict which shall be by majority vote, and certify the same in writing, signed by them and setting forth who the deceased person is, and when, where, and

by what means he came to his death; and if he was killed, or his death occasioned by the act of another by criminal means, who committed the act.

**History:** En. 95-807 by Sec. 1, Ch. 196,  
L. 1967.

**95-808. Testimony in writing and where filed.** The testimony of the witnesses examined before the coroner's jury must be reduced to writing by the coroner, or under his direction, and forthwith filed by him, with the inquisition, in the office of the clerk of the district court of the county. The coroner must order the inquest proceedings recorded and transcribed by a qualified stenographer and such recording and transcribing expenses shall be paid by the county upon claims duly rendered and certified to by the coroner in the same manner as other claims against the county are paid.

**History:** En. 95-808 by Sec. 1, Ch. 196,  
L. 1967.

#### DECISIONS UNDER FORMER LAW

##### **Denial of Bill of Particulars**

Where inquest had been held a year prior to prosecution for manslaughter for killing of pedestrian by reckless driving, court could presume that coroner had complied with law as to transcript of testi-

mony available for defendant's inspection for desired information, held, denial of defendant's motion for bill of particulars not abuse of court's discretion. State v. Robinson, 109 M 322, 327, 96 P 265.

**95-809. Inquest shall be public.** If an inquest is held the proceedings shall be public.

**History:** En. 95-809 by Sec. 1, Ch. 196,  
L. 1967.

**95-810. Property found on body—to whom delivered.** Any property found with or upon the person of the deceased which is not needed as evidence shall be turned over by the county coroner to the public administrator, to be held until disposed of according to law. Any property needed as evidence shall be turned over to the appropriate investigative authority.

**History:** En. 95-810 by Sec. 1, Ch. 196,  
L. 1967.

**95-811. Must keep register.** The county coroner shall keep an official register, in which he must enter the date of holding all inquests, the cause and circumstances of death, if known, and the name of the deceased, when known, and when not, such description of the deceased as may be sufficient for identification.

**History:** En. 95-811 by Sec. 1, Ch. 196,  
L. 1967.

**95-812. Jurisdiction of coroner.** When death occurs as a direct result of acts or events which occurred in another county, the coroner of either county shall have jurisdiction. If a conflict of jurisdiction should arise, or should said coroners fail to act, the coroner of the county where the death occurred shall have the primary jurisdiction.

**History:** En. 95-812 by Sec. 1, Ch. 196,  
L. 1967.

**95-813. Liability of a mortuary or physician.** No person or firm owning a mortuary or any person employed in such a mortuary shall be

liable for the acts of the coroner performed in the removal of any body to a mortuary or during the course of an autopsy on such body. No criminal or civil action shall arise against a licensed physician for performing an autopsy authorized by this act.

**History:** En. 95-813 by Sec. 1, Ch. 196, L. 1967.

**95-814. The coroner shall have needed assistance.** The county commissioners are authorized to provide and pay for such laboratory facilities, and other technical and clerical assistance as may be required by the county coroner. The coroner, with the approval of the county commissioners, may appoint one or more deputy coroners.

**History:** En. 95-814 by Sec. 1, Ch. 196, L. 1967.

## CHAPTER 9

### INITIAL APPEARANCE OF ARRESTED PERSON

Section 95-901. Duty of person who has made an arrest.  
95-902. Duty of the court.

**95-901. Duty of person who has made an arrest.** (a) Any person making an arrest under a warrant shall take the arrested person without unnecessary delay before the judge issuing the warrant, or if he is absent or unable to act, before the nearest or most accessible judge of the same county. If an arrest is made in a county other than the one in which the warrant was issued the arrested person shall be taken without unnecessary delay before the nearest and most accessible judge in the county where the arrest was made.

(b) Any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest or most accessible judge in the same county and a complaint, stating the charges against the arrested person, shall be filed forthwith.

**History:** En. 95-901 by Sec. 1, Ch. 196, L. 1967.

#### Availability of Magistrate

In an action for false imprisonment brought by the plaintiff against a sheriff and surety on his official bond based on unnecessary delay in taking plaintiff before a magistrate, it was necessary for the plaintiff to prove that a magistrate was available on the particular day when the false imprisonment allegedly occurred. *Rounds v. Bucher*, 137 M 39, 349 P 2d 1026.

#### Damages for False Imprisonment

In an action against a sheriff and the surety on his official bond for false imprisonment after arrest without a warrant, based on officer's failure to take plaintiff before a committing magistrate or judicial officer, involving also transportation by federal postal inspectors to neighboring county and interpretation of section 591 of

Title 18 U. S. C., held, that evidence sufficient to show prima facie case of such imprisonment, but remanded for new trial unless plaintiff consents to reduction of damages. *Cline v. Tait*, 116 M 571, 574, 155 P 2d 752.

#### Purpose

The purpose of former statute requiring one arrested without warrant to be taken before magistrate without unnecessary delay was to ensure that the person arrested was advised of the charge made against him in order to enable him to prepare a defense, and to protect him from being held incommunicado for protracted periods of time. *State v. Nelson*, 139 M 180, 362 P 2d 224, 229.

#### Unlawful Detention

Defendant convicted of the crime of uttering and delivering a fictitious check was not entitled to a reversal of his conviction because he was detained for a period of



21 days without being taken before a magistrate where there was no confession and the detention did not prejudice him in presenting his defense on the merits at the trial. *State v. Johnston*, 140 M 111, 367 P 2d 891, 892.

#### **What Does Not Constitute Unnecessary Delay**

In an action against a sheriff and the surety on his official bond for false imprisonment because of failure to take the arrested person before a magistrate, held, that in the state of the record, the jury could not properly conclude that a delay to nine o'clock in the morning was unreasonable under section 25-306, fixing the hours for certain justices of the peace. *Cline v. Tait*, 113 M 475, 484, 129 P 2d 89.

Defendant's confession was not rendered inadmissible by reason of delay in taking him before a magistrate where he was requested at 8:55 p. m., Friday, November 7, 1958, to come voluntarily to jail for questioning; shortly after questioning by sheriff at about 10:00 p. m. he made an oral statement and at 11:50 p. m. wrote and signed a confession; he was booked at 12:07 a. m., Saturday, November 8; at 10:40 a. m. on Saturday a statement was taken from defendant in the county attorney's office in the presence of the sheriff and deputy county attorney; and at 11:45 a. m., Saturday, November 8, defendant was brought before the magistrate in the courthouse. *State v. Nelson*, 139 M 180, 362 P 2d 224, 229, 230.

#### **95-902. Duty of the court.** The judge shall inform the defendant:

- (a) Of the charge against him;
- (b) Of his right to counsel;
- (c) Of his right to have counsel assigned by a court of record, in accordance with the provisions of section 95-1001;
- (d) That he is not required to make a statement and that any statement made by him may be offered in evidence at his trial;
- (e) Admit the defendant to bail in accordance with the provisions of this code.

After the initial appearance a justice of the peace court shall, within a reasonable time, hold a preliminary examination unless the defendant waives a preliminary examination or the district court has granted leave to file an information or an indictment has been returned, or the case is triable in justice court.

**History:** En. 95-902 by Sec. 1, Ch. 196, L. 1967.

## **CHAPTER 10**

### **RIGHT TO COUNSEL**

- Section 95-1001. Right to counsel.
- 95-1002. Waiver of counsel.
- 95-1003. Duration of appointment.
- 95-1004. Appointment after trial.
- 95-1005. Remuneration of appointed counsel.
- 95-1006. Public defender's office.

**95-1001. Right to counsel.** Every defendant brought before the court must be informed by the court that it is his right to have counsel before proceeding and must be asked if he desires the aid of counsel. The defendant, if charged with a felony, must be advised that counsel will be furnished at state expense if he is unable to employ counsel. If the offense charged is a felony and if the defendant desires counsel and is unable to employ counsel a court of record must assign counsel to defend him. If the offense charged is a misdemeanor and if the defendant desires counsel and

is unable to employ counsel a court of record, in the interest of justice, may assign counsel to defend him.

**History:** En. 95-1001 by Sec. 1, Ch. 196, L. 1967.

### Cross-References

Rights of defendant in a criminal action, sec. 94-4806.

Right to counsel, Mont. Const. Art. III, § 16.

### Appointment of Counsel

On his arraignment defendant informed the court that he did not wish to employ counsel, and was admitted to bail, furnishing a \$10,000 cash bail bond. On the day of trial, four months thereafter, he stated to the court that he was without counsel to defend him, but did not ask for time to procure counsel. Held, under former section, that nothing short of refusal by the court, on application for time to procure counsel will justify a conclusion that defendant was denied his constitutional right to counsel. *State v. Fowler*, 59 M 346, 354, 196 P 992.

Where accused did not move to have the minutes of the court corrected to show, as he claimed, that he was arraigned before he was advised of his right to counsel, contrary to former section, his affidavit contradicting the court minutes in that regard, held insufficient, in the absence of a showing of prejudice, to overcome the presumption that the court performed its judicial duty seasonably and with due regularity. *State v. Murphy*, 68 M 427, 429, 219 P 629.

Accused was not entitled to habeas corpus on ground that district court did not advise him of his rights or appoint counsel for him, as required by former section, where there was no showing of prejudice sufficient to overcome presumption that court had performed its duty and where contention had not previously been raised before supreme court even though more than two years and ten months had elapsed since arraignment. In re *Diserly's* Petition, 140 M 219, 370 P 2d 763, 764.

**95-1002. Waiver of counsel.** A defendant may waive his right to counsel except that in all felony cases where the defendant is under eighteen (18) years of age the defendant shall be represented by counsel at every stage of the proceedings.

**History:** En. 95-1002 by Sec. 1, Ch. 196, L. 1967.

### Waiver of Right to Counsel

The right to counsel may be intelligently waived by an accused, and the determination of whether the waiver was intelligently made will depend upon the particular facts and circumstances sur-

### Confession in Absence of Counsel

Confession made after three hours' interrogation of accused who was advised of his right to counsel and his right to remain silent was not rendered inadmissible by absence of counsel where accused never requested assistance of counsel and confession was voluntarily given. *State v. White*, 146 M 226, 405 P 2d 761.

### Court-Appointed Counsel

Where counsel was appointed by the court, after withdrawal of defendant's original counsel, but trial was commenced three days after such appointment, such appointment was made purposeless as it is the duty of the court to make the appointment effective by giving a reasonable time for the preparation of the case. *State v. Blakeslee*, 131 M 47, 306 P 2d 1103, 1107.

### Justice Courts

Held, under former section, that since district courts lack supervisory control over justice courts, district court could not appoint counsel for indigent charged with crime of petit larceny and therefore compensation could not be awarded attorney who defended him. *State ex rel. Johnson v. District Court*, 147 M 263, 410 P 2d 933.

### Right To Appoint Counsel

Held, under former section, that as there is no provision for appointment of counsel in the supreme court, such appointments are made by the district courts. In re *Pelke's* Petition, 139 M 354, 365 P 2d 932, 935; *Brown v. State*, 140 M 289, 371 P 2d 262, 263.

### Law Reviews

Elison, Assigned Counsel In Montana: The Law and The Practice, 26 Mont. L. Rev. 1 (1964).

Right to Counsel During Police Interrogation: An Intrinsic Right? (*State v. White*, 146 M 226, 405 P 2d 761) 27 Mont. L. Rev. 84 (1965).

rounding each case, including the background, experience, and conduct of the accused. *Petition of Jones*, 143 M 19, 386 P 2d 747.

Right to counsel may be knowledgeably waived by a defendant competent to do so and who has been fully informed of his right by the court. *Nelson v. State*, 144 M 439, 397 P 2d 700.

**95-1003. Duration of appointment.** Where counsel has been assigned, such assignment shall be effective until final judgment, including any proceeding upon direct appeal, unless relieved by order of the court.

**History:** En. 95-1003 by Sec. 1, Ch. 196, L. 1967.

defendant having had no voice in the choice, in the interest of justice it was incumbent upon the supreme court to consider the contended errors although court-appointed counsel failed to timely file the notice of appeal. *State v. Frodsham*, 139 M 222, 362 P 2d 413, 418.

#### **Perfection of Appeal**

Where district court appointed counsel for the defendant and ordered preparation of the record for an appeal to the supreme court, all at public expense, de-

**95-1004. Appointment after trial.** Any court of record may assign counsel to defend any defendant, petitioner, or appellant in any post conviction criminal action or proceeding if he desires counsel and is unable to employ counsel.

**History:** En. 95-1004 by Sec. 1, Ch. 196, L. 1967.

**95-1005. Remuneration of appointed counsel.** Whenever, in a criminal action or proceeding, an attorney at law represents or defends any person by order of the court, on the ground that the person is financially unable to employ counsel, such attorney shall be paid for his services such sum as a district court or justice of the state supreme court certifies to be a reasonable compensation therefor and shall be reimbursed for reasonable costs incurred in the criminal proceeding. Such costs shall be chargeable to the county in which the proceeding arose.

**History:** En. 95-1005 by Sec. 1, Ch. 196, L. 1967.

not exceeding \$100 in a capital case, the court was not limited to the appointment of one attorney but might appoint more if the gravity of the offense warranted it, and if so each would be entitled to compensation. *Huntington v. Yellowstone County*, 80 M 20, 25, 257 P 1041.

#### **Appointment of More Than One Counsel**

Under former section providing that when an attorney by order of court defends an indigent, the county is liable for the attorney's fee to be fixed by the court

### **DECISIONS UNDER FORMER LAW**

#### **Justice Courts**

Held, under former section, that the payment of compensation to attorneys charged with defense of indigents is limited to actions "in the district court," which

clearly indicates that the legislature did not mean to provide counsel to the indigent in misdemeanor cases in justice courts. *State ex rel. Johnson v. District Court*, 147 M 263, 410 P 2d 933.

**95-1006. Public defender's office.** Any county through its board of county commissioners, may provide for the creation of a public defender's office and the appointment of a salaried public defender and such assistant public defenders as may be necessary to satisfy the legal requirements in providing counsel for defendants unable to employ counsel. The costs of such office shall be at county expense.

**History:** En. 95-1006 by Sec. 1, Ch. 196, L. 1967.

## **CHAPTER 11**

### **BAIL**

Section 95-1101. Purpose.

95-1102. Who may admit to bail.

95-1103. Setting and accepting bail in minor offenses.



- 95-1104. Setting and accepting bail under a warrant of arrest.
- 95-1105. Giving bail before another court or judge.
- 95-1106. Release on own recognizance.
- 95-1107. Issuance of warrant.
- 95-1108. Bailable offenses.
- 95-1109. Bail after conviction.
- 95-1110. Determining the amount of bail.
- 95-1111. Reduction, increase, revocation or substitution of bail.
- 95-1112. How bail is to be furnished.
- 95-1113. Qualifications of bail.
- 95-1114. Bail, how to justify.
- 95-1115. Surrender of defendant.
- 95-1116. Conditions of bail, when performed—when not performed.
- 95-1117. Disposition of judgment and execution.
- 95-1118. Conditions of bail.
- 95-1119. Bail on a new trial.
- 95-1120. Persons prohibited from furnishing bail security.
- 95-1121. Sureties for guaranteed arrest bond certificates—filing of undertaking—guaranteed arrest bond certificate.
- 95-1122. Violations of motor vehicle laws—posting of guaranteed arrest bond certificate in lieu of cash.
- 95-1123. Certification of names of sureties—withdrawal by surety company.

**95-1101. Purpose.** Bail is the security given for the purpose of insuring the presence of the defendant in a pending criminal proceeding.

**History:** En. 95-1101 by Sec. 1, Ch. 196, L. 1967.

**95-1102. Who may admit to bail.** (a) Any judge may admit any defendant properly appearing before him in such proceeding to bail. When bound over to any court or judge having jurisdiction of the offense charged, bail shall be continued provided the court or judge having jurisdiction may increase, reduce or substitute bail. On appeal, any judge before whom the trial was had, or any judge having the power to issue a writ of habeas corpus, may admit the defendant to bail.

(b) Upon allowance and acceptance of bail the defendant, if he is in custody, must be discharged.

**History:** En. 95-1102 by Sec. 1, Ch. 196, L. 1967.

#### **When Bail Proper**

Bail is properly allowed in a homicide

case, in absence of a showing, by the county attorney, that the proof of the defendant's guilt was evident or the presumption thereof great. State ex rel. Murray v. District Court, 35 M 504, 507, 90 P 513.

### **DECISIONS UNDER FORMER LAW**

#### **Construction**

Former section held to mean that committing magistrate might approve and accept the undertaking which he had himself required by his order made upon holding the defendant to answer. Any other construction would have, at times, infringed seriously upon a prisoner's right to bail. Magistrate had such power until the district court obtained final jurisdiction of the entire matter upon filing of information or presentment of indictment, or until district or supreme court judge fixed anew the prisoner's bail. State v. Lagoni, 30 M 472, 76 P 1044.

#### **Party Plaintiff in Action on Bond**

In action on bail bond in form prescribed by repealed section, running to the state, the state and not the county was the proper party plaintiff, though, under former statute, the money recovered went to county and not to state. County of Wheatland v. Van, 64 M 113, 116, 207 P 1003.

#### **Verbal Order of Release**

Fact that magistrate made verbal order of release, instead of signing order as required by former statute, was no defense to a surety in action on the bail bond. State v. Lagoni, 30 M 472, 481, 76 P 1044.

**95-1103. Setting and accepting bail in minor offenses.** A justice of the peace or police judge may in his discretion establish and post a schedule of cash bail for offenses not amounting to a felony. A peace officer may accept bail in behalf of the justice of the peace or police judge in accordance with the schedule. In the event the peace officer accepts bail, he shall give a signed receipt to the offender setting forth the bail received. The peace officer shall then deliver the bail to the justice of the peace or police judge before whom the offender is to appear, and the justice of the peace or police judge shall give a receipt to the peace officer for the bail delivered.

**History:** En. 95-1103 by Sec. 1, Ch. 196,  
L. 1967.

**Cross-References**  
Patrolmen, power to fix and accept bail,  
sec. 31-112.

**95-1104. Setting and accepting bail under a warrant of arrest.** A peace officer may accept cash bail in behalf of a judge where the warrant of arrest specifies the amount of bail. In the event the peace officer accepts bail, he shall give a signed receipt to the offender setting forth the bail received. The peace officer shall then deliver the bail to the justice of the peace or police judge before whom the offender is to appear, and the justice of the peace or police judge shall give a receipt to the police officer for the bail delivered.

**History:** En. 95-1104 by Sec. 1, Ch. 196,  
L. 1967.

**95-1105. Giving bail before another court or judge.** The defendant, when arrested for a bailable offense must be taken without unnecessary delay before the nearest or most accessible judge in order that bail may be fixed. If the defendant is brought before a judge other than the court in which the charge is pending, the judge must establish and accept bail and set the time for the appearance of the defendant in the court in which the charge is pending. Upon acceptance of bail, the judge must deliver the bail without delay to the court in which the charge is pending.

**History:** En. 95-1105 by Sec. 1, Ch. 196,  
L. 1967.

**95-1106. Release on own recognizance.** Any person in custody, if otherwise eligible for bail, may be released on his personal recognizance subject to such conditions as the court may reasonably prescribe to assure his appearance when required. Any person released as herein provided shall be fully apprised by the court of the penalty provided for failure to comply with the terms of his recognizance.

**History:** En. 95-1106 by Sec. 1, Ch. 196,  
L. 1967.

**95-1107. Issuance of warrant.** (a) Upon failure to comply with any condition of a bail or recognizance, the court having jurisdiction at the time of such failure may, in addition to any other action provided by law, issue a warrant for the arrest of the person at liberty on bail or on his own recognizance.

(b) On verified application by the state, setting forth facts or circumstances constituting a breach or threatened breach of any of the con-

ditions of the bail or a threat or an attempt to influence the pending proceeding, the court may issue a warrant for the arrest of the defendant.

(c) Upon the arrest, the defendant shall be brought before the court without unnecessary delay and the court shall conduct a hearing and determine bail in accordance with section 95-1111.

**History:** En. 95-1107 by Sec. 1, Ch. 196, L. 1967.

**95-1108 Bailable offenses.** (a) All persons shall be bailable before conviction, except when death is a possible punishment for the offense charged and the proof is evident or the presumption great that the person is guilty of the offense charged.

(b) On the hearing of an application for admission to bail made before or after indictment or information for a capital offense, the burden of showing that the proof is evident or the presumption great that the defendant is guilty of the offense is on the state.

**History:** En. 95-1108 by Sec. 1, Ch. 196, L. 1967.

disturbed unless a clear abuse of discretion appears. *State v. London*, 131 M 410, 310 P 2d 571, 580.

#### Cross-References

Bailable offenses, Mont. Const. Art. III, § 19.

#### Discretion of Trial Court

Bail is a matter within the discretion of the trial court and its ruling will not be

Denial of bail could not be claimed as showing prejudice by trial judge for such is a mere preliminary matter and has nothing to do with the trial on the merits. *State v. London*, 131 M 410, 310 P 2d 571, 580.

**95-1109. Bail after conviction.** After conviction of an offense not punishable by death, a defendant who intends to appeal may be admitted to bail:

(a) As a matter of right, from a judgment imposing a fine only; or any judgment rendered by a justice or police court.

(b) As a matter of discretion in all other cases.

**History:** En. 95-1109 by Sec. 1, Ch. 196, L. 1967.

#### Abuse of Discretion

District court did not abuse its discretion when it refused to fix bail on appeal of defendant sentenced to state prison. *Bubnash v. State*, 139 M 639, 366 P 2d 867.

**95-1110. Determining the amount of bail.** In all cases that bail is determined to be necessary, bail must be reasonable in amount and the amount shall be:

(a) Sufficient to assure compliance with the conditions set forth in the bail;

(b) Not oppressive;

(c) Commensurate with the nature of the offense charged;

(d) Considerate of the financial ability of the accused;

(e) Considerate of the defendant's prior record, employment status, and family background.

**History:** En. 95-1110 by Sec. 1, Ch. 196, L. 1967.

#### Amount of Bail

The trial judge, in determining the amount of bail to be fixed, should take into consideration the enormity of the crime charged; the maximum penalty which the law authorizes; the pecuniary condi-

#### Cross-References

Excessive bail prohibited, Mont. Const. Art. III, § 20.



tion of the defendant; the probability of the defendant's flight to avoid punishment; his general character and reputation; the apparent nature and strength of the proof as bearing upon the probability of his conviction; and other matters bearing upon the particular case. State v.

McLeod, 131 M 478, 311 P 2d 400, 407.

The amount of bail which the judge may fix is within his sound legal discretion, and is always to be a reasonable amount. State v. McLeod, 131 M 478, 311 P 2d 400, 407.

**95-1111. Reduction, increase, revocation or substitution of bail.** (a) Upon application by the state or the defendant the court before which the proceeding is pending may increase, or reduce the amount of bail, substitute one bail for another or alter the conditions of the bail, or revoke bail.

(b) Reasonable notice of such application must be given to the opposing parties or their attorneys by the applicant after verdict of guilty and before judgment.

**History:** En. 95-1111 by Sec. 1, Ch. 196, L. 1967.

#### Amount of Bail

Court did not err in refusing defendant's motion to reduce bail which was initially set at \$25,000, where the person

assaulted was in a very precarious condition and it was not known whether he would live or die. When the judge was advised that the victim would probably live, he reduced the bail to \$7,500 which was a very reasonable amount. State v. McLeod, 131 M 478, 311 P 2d 400, 407, 408.

**95-1112. How bail is to be furnished.** Bail may be furnished by the defendant in any of the following ways:

(a) By a deposit, with the clerk of the court, of an amount equal to the required bail, of cash, stocks, or bonds, or any combination thereof approved by the judge; or

(b) By real estate situated in this state with unencumbered equity not exempt owned by the accused or sureties worth double the amount of bail; or

(c) By written undertaking executed by the defendant and by two (2) sufficient sureties; or

(d) By a commercial surety bond executed by the defendant and by a qualified agent for and on behalf of such surety company.

**History:** En. 95-1112 by Sec. 1, Ch. 196, L. 1967.

#### Liberty Bonds as Bail

One depositing Liberty bonds as bail was estopped from claiming that their forfeiture was unauthorized, under former section stating that a "sum" might be deposited in lieu of giving bail, on theory that money only could be given when she had stipulated at the time bail was furnished that the bonds were substantially

the equivalent of the amount fixed as bail in money or cash. Kirschbaum v. Mayn, 76 M 320, 329, 246 P 953.

Where a prisoner for whom bail was furnished by plaintiff by a deposit of Liberty bonds was in court in the custody of the sheriff and released at once, the fact that a certificate of the deposit was not delivered to the officer as required by former section as authority for releasing him, was immaterial. Kirschbaum v. Mayn, 76 M 320, 329, 246 P 953.

**95-1113. Qualifications of bail.** (a) If the bail is stock or bonds or both, the accused or sureties shall file a sworn schedule which shall contain a list of the stocks and bonds deposited describing each in sufficient detail that it may be identified and the market value of each stock or bond and the total market value of the stocks or bonds listed.

(b) If the bail is real estate, the accused or sureties shall file a sworn schedule which shall contain a legal description of the real estate, a descrip-

tion of any and all encumbrances on the real estate including the amount of each and the holder thereof, and the market value of the unencumbered equity owned by the affiant.

A certified copy of the schedule of real estate shall be filed immediately by the court in the office of the clerk and recorder of the county in which the property is situated, and the state shall have a lien on such real estate from the time the copies are filed. The clerk and recorder shall enter, index and record such schedules without requiring any fee.

(c) If the bail is a written undertaking with sureties, each surety must be a resident or freeholder within the state.

They must each be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the court or magistrate, on taking bail, may allow more than two sureties to justify severally in amounts less than that expressed in the undertaking if the whole justification be equivalent to that of sufficient bail.

(d) If the bail is a commercial surety bond, it may be so done by any domestic or foreign surety company which is qualified to transact surety business in this state.

**History:** En. 95-1113 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968.

**95-1114. Bail, how to justify.** The sureties must, in all cases, justify by sworn affidavit that they each possess the qualifications provided in the preceding section. The court may further examine the sufficiency of the bail, upon oath, in such manner as it may deem proper. In all cases the state may challenge the bail or the sufficiency of the sureties.

**History:** En. 95-1114 by Sec. 1, Ch. 196, L. 1967.

**95-1115. Surrender of defendant.** At any time before the forfeiture of bail, the defendant may surrender himself to the officer to whose custody he was committed at the time of giving bail.

At any time before the forfeiture of bail, the sureties or surety company may surrender the defendant to the officer to whose custody he was committed and for this purpose may, themselves, arrest the defendant or by written authority endorsed on a certified copy of the undertaking may empower any person of suitable age and discretion to do so.

The officer must detain the defendant in his custody as upon commitment and shall file a certificate in the court having jurisdiction of the defendant, acknowledging the surrender. Such court may then order the bail exonerated.

**History:** En. 95-1115 by Sec. 1, Ch. 196, L. 1967.

**95-1116. Conditions of bail, when performed—when not performed.**

(a) When the conditions of bail have been performed and the accused has been discharged from his obligations in the cause, the court shall return to him or his sureties the deposit of any cash, stocks or bonds. If the bail is real estate, the court shall notify, in writing, the county clerk and recorder and the lien of the bail bond on the real estate shall be dis-

charged. If the bail is a written undertaking or a commercial surety bond, it shall be discharged and the sureties exonerated.

(b) If the accused does not comply with the conditions of the bail bond, the court having jurisdiction shall enter an order declaring the bail to be forfeited.

If such forfeiture is declared by a district court, notice of such order of forfeiture shall be mailed forthwith by the clerk of the court to the accused and his sureties at their last known address.

(c) If at any time within thirty (30) days after the forfeiture the defendant or his bail appear and satisfactorily excuse his negligence or failure to comply with the conditions of the bail, the court, in its discretion, may direct the forfeiture of the bail to be discharged upon such terms as may be just.

If such forfeiture is declared by a district court and if the forfeiture is not discharged as provided in this section, the court shall enter judgment for the state against the accused and his sureties for the amount of the bail and costs of the proceedings.

**History:** En. 95-1116 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968.

#### **Cross-Reference**

Penalty assessment on forfeiture of bail for traffic offenses, sec. 75-5304.

#### **Forfeiture**

In a suit to recover the amount of a bond for failure of a defendant to appear at the district court in accordance with the condition of the bond it is not necessary to allege in the complaint that the defendant made default of appearance "without excuse." *State v. Wrote*, 19 M 209, 47 P 898.

Where, in an action on a bail bond, it was shown that an information was filed

against the defendant, charging him with a crime, and that he failed to appear and answer, and that the court thereupon ordered the bond forfeited, former section governing forfeiture was sufficiently complied with. *State v. Lagoni*, 30 M 472, 480, 76 P 1044.

While the district court may summarily enter judgment against the person charged with crime who fails to appear according to the condition of his bond, it exceeds its jurisdiction when it goes further than to authorize proceedings by the county attorney against the sureties by proper action, and at once enters judgment against them for the amount of the bond. *State ex rel. Van v. District Court*, 54 M 577, 579, 172 P 540.

### **DECISIONS UNDER FORMER LAW**

#### **Failure to Record Default**

Under former statute providing that no action on bond would be barred by failure to record default, held that an averment in the complaint that the defendant was

called and failed to appear in the district court was equivalent to an averment that his default for not appearing was entered of record. *State v. Wrote*, 19 M 209, 47 P 898.

**95-1117. Disposition of judgment and execution.** (a) If judgment be rendered or the forfeiture not discharged, and the defendant has deposited money as bail, the court with whom it is deposited must, immediately after receiving notice of said judgment or order of forfeiture, pay over the money deposited to the treasury of the city or county wherein the bail was taken.

(b) When judgment is entered in favor of the state, or the order of forfeiture is not discharged on any bail, execution may be issued forthwith for levy on stocks or bonds deposited with the court or upon the real estate described in the bail schedule. Such stocks, bonds and real estate shall be



sold in the same manner as in execution sales in civil actions and the proceeds of such sale shall be used to satisfy all court costs and prior encumbrances, if any, and from the balance a sufficient sum to satisfy the judgment or forfeiture shall be paid into the treasury of the city or county wherein the bail bond was taken. The balance shall be returned to the owner. The real estate so sold may be redeemed in the same manner as real estate may be redeemed after execution sales in civil actions.

(c) When judgment is entered in favor of the state and against the sureties or the surety company or when the forfeiture has not been discharged, execution may be issued against the sureties or the surety company in the same manner as executions in civil actions.

**History:** En. 95-1117 by Sec. 1, Ch. 196,  
L. 1967.

**95-1118. Conditions of bail.** (a) If a person is admitted to bail before conviction, the conditions of bail bond shall be that he will appear to answer in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged on final order of the court and not depart this state without leave, and subject to any other conditions as the court may reasonably prescribe to assure his appearance when required.

(b) If the defendant is admitted to bail after conviction, the conditions of bail bond shall be that:

- (1) He will duly prosecute his appeal;
- (2) He will appear at such time and place as the court may direct;
- (3) He will not depart this state without leave of the court; and
- (4) If the judgment is affirmed or the cause reversed and remanded for a new trial, he will forthwith surrender to the officer from whose custody he was bailed.

**History:** En. 95-1118 by Sec. 1, Ch. 196,  
L. 1967.

**95-1119. Bail on a new trial.** If the judgment of conviction is reversed and the cause remanded for a new trial, the trial court may order that the bail stand pending such trial, substitute, reduce, or increase bail.

**History:** En. 95-1119 by Sec. 1, Ch. 196,  
L. 1967.

**95-1120. Persons prohibited from furnishing bail security.** No attorney at law and no official authorized to admit another to bail shall act as surety or furnish bail.

**History:** En. 95-1120 by Sec. 1, Ch. 196,  
L. 1967.

**95-1121. Sureties for guaranteed arrest bond certificates—filing of undertaking—guaranteed arrest bond certificate.** (a) Any domestic or foreign surety company which has qualified to transact surety business in this state may, in any year, become surety in an amount not to exceed one hundred dollars (\$100.00) with respect to any guaranteed arrest bond certificates issued in such year by an automobile club or association or by an insurance company authorized to write automobile liability insurance

within this state, by filing with the commissioner of insurance an undertaking thus to become surety.

(b) Such undertaking shall be in form to be prescribed by the commissioner and shall state the following:

(1) The name and address of the automobile club or clubs, automobile association, or insurance company or companies, or associations with respect to the guaranteed arrest bond certificates of which the surety company undertakes to be surety.

(2) The unqualified obligation of the surety company to pay the fine or forfeiture in an amount not to exceed one hundred dollars (\$100.00) of any person who, after posting a guaranteed arrest bond certificate with respect to which the surety company has undertaken to be surety, fails to make the appearance to guarantee which the guaranteed arrest bond certificate was posted.

(c) The term guaranteed arrest bond certificate, means any printed card or other certificate issued by an automobile club, association or insurance company, to any of its members or insureds, which said card or certificate is signed by such member or insured and contains a printed statement that such automobile club, association, or insurance company and a surety company, or an insurance company authorized to transact both automobile liability insurance and surety business in the state of Montana, guarantee the appearance of the person whose signature appears on the card or certificate and that will, in the event of failure of such person to appear in court at the time of trial, pay any fine or forfeiture imposed on such person in an amount not to exceed one hundred dollars (\$100.00).

**History:** En. 95-1121 by Sec. 1, Ch. 196, L. 1967.

#### **Cross-References**

Sureties for guaranteed arrest bond certificates, filing of undertaking, definition of guaranteed arrest bond certificate, sec. 94-8508.

**95-1122. Violations of motor vehicle laws—posting of guaranteed arrest bond certificate in lieu of cash.** Any guaranteed arrest bond certificate with respect to which a surety company has become surety or a guaranteed arrest bond certificate issued by an insurance company authorized to transact both automobile liability insurance and surety business within this state, as provided in section 95-1121, hereof, shall, when posted by the person whose signature appears thereon, be accepted in lieu of cash bail in an amount not to exceed one hundred dollars (\$100.00) as a bail bond to guarantee the appearance of such person, in any court, including municipal courts, in this state, at such time as may be required by the court, when such person is arrested for violation of any motor vehicle law of this state or ordinance of any municipality in this state (except for the offense of driving while intoxicated or for any felony) committed prior to the date of expiration shown on such guaranteed arrest bond certificate so posted as a bail bond in any court in this state shall be subject to the forfeiture and enforcement provisions with respect to bail bonds posted in criminal cases as provided by law, and that any such guaranteed arrest bond certificate posted as bail bond in any municipal court in this state shall be subject to

the forfeiture and enforcement provisions of the chapter or ordinance of the particular municipality pertaining to bail bonds posted.

**History:** En. 95-1122 by Sec. 1, Ch. 196,  
L. 1967.

**Cross-References**

Violations of motor vehicle laws, posting of guaranteed arrest bond certificate in lieu of cash, sec. 94-8509.

**95-1123. Certification of names of sureties — withdrawal by surety company.** The commissioner of insurance shall certify to each justice of the peace, police magistrate and district judge the names of surety companies who have become sureties with respect to guaranteed arrest bond certificates, and shall likewise immediately notify such official upon the withdrawal of such company as surety. No such withdrawal by any company shall be effective for thirty (30) days after the filing thereof with the state insurance commissioner.

**History:** En. 95-1123 by Sec. 1, Ch. 196,  
L. 1967.

**Cross-References**

Certification of names of sureties, withdrawal by surety company, sec. 94-8510.

## CHAPTER 12

### PRELIMINARY EXAMINATION

- Section 95-1201. Definition of preliminary examination.  
95-1202. Proceedings at the preliminary examination.  
95-1203. Exclusion and separation of witnesses.  
95-1204. Recognizance by or deposition of witness.

**95-1201. Definition of preliminary examination.** A preliminary examination is a hearing before a justice of the peace for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant.

**History:** En. 95-1201 by Sec. 1, Ch. 196,  
L. 1967.

cases of felony, Mont. Const. Art. VIII,  
§ 21.

**Cross-References**

Justices of the peace, examining court in

Prosecution of criminal offenses, Mont.  
Const. Art. III, § 8.

**95-1202. Proceedings at the preliminary examination.** (a) The defendant shall not enter a plea. The judge shall hear the evidence without unnecessary delay. All witnesses shall be examined in the presence of the defendant. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears that there is probable cause to believe that an offense has been committed by the defendant the judge shall hold him to answer to the court having jurisdiction of the offense; otherwise, the judge shall discharge him.

(b) If the defendant waives preliminary examination the judge shall hold him to answer to the court having jurisdiction of the offense.

(c) The judge may in his discretion and must upon the request of the defendant, exclude from the preliminary examination every person not officially associated with the case before the court.

(d) The testimony of each witness, in case of homicide, must be reduced to writing, as a deposition, by a court appointed stenographer; in cases other than homicide the testimony of each witness shall be taken



by a court appointed stenographer upon demand by the county attorney, or the defendant, or the defendant's counsel. After concluding the proceeding if the judge holds the defendant to answer he shall transmit forthwith to the clerk of the court having jurisdiction of the offense all papers in the proceeding and any bail taken by him.

**History:** En. 95-1202 by Sec. 1, Ch. 196, L. 1967.

#### **Evidence of Discharge**

The best evidence of plaintiff's discharge after preliminary examination on a charge of grand larceny was the endorsement on the warrant on which he was arrested, and not the entries on the magistrate's docket; but, upon proof of the loss of the warrant, parol evidence was admis-

sible to prove the fact of his discharge. *Hawley v. Richardson*, 60 M 118, 126, 198 P 450.

#### **Probable Cause**

On a preliminary examination, all that is required of the county attorney is to submit proof sufficient to show probable cause to believe the defendant to be guilty of the charge. In *re Jones*, 46 M 122, 126, 126 P 929.

**95-1203. Exclusion and separation of witnesses.** During the examination of any witness or when the defendant is making a statement or testifying the judge may, and on the request of the defendant or state shall, exclude all other witnesses. He may also cause the witnesses to be kept separate and to be prevented from communicating with each other until all are examined.

**History:** En. 95-1203 by Sec. 1, Ch. 196, L. 1967.

**95-1204. Recognizance by or deposition of witness.** If the defendant is held to answer after a preliminary examination or after the defendant has waived a preliminary examination or after the district court has granted leave to file an information or after an indictment has been returned, the judge may require:

(a) Any material witness for the state or defendant to enter into a written undertaking;

(1) To appear at the trial, and

(2) May provide for the forfeiture of a sum certain in the event the witness does not appear at the trial.

(b) Any witness who refuses to enter into a written undertaking may be remanded to custody but shall not be held longer than is necessary to take his deposition.

After the deposition is taken the witness must be immediately discharged.

(c) Such deposition must be taken in the presence of the county attorney and the defendant and his counsel, unless either the county attorney or the defendant and his counsel fail to attend after reasonable notice of the time and place set for taking the deposition.

**History:** En. 95-1204 by Sec. 1, Ch. 196, L. 1967.

#### **Cross-References**

Depositions in criminal proceedings, Mont. Const. Art. III, § 17.

#### **Effect upon Rights of Accused**

Accused's rights were not violated on theory that witness was intimidated into giving damaging testimony against accused by county attorney's threat to hold witness unless she gave a statement where the witness gave a statement, in which she alleged she had given defendant money to buy a six-shooter. *Petition of Gallagher*, 150 M 476, 436 P 2d 530.

## CHAPTER 13

## LEAVE TO FILE INFORMATION AND TIME FOR FILING INFORMATION

- Section 95-1301. Leave to file information.  
 95-1302. Time for filing the information.  
 95-1303. The county attorney not filing an information.

**95-1301. Leave to file information.** (a) The county attorney may apply directly to the district court for permission to file an information against a named defendant. The application must be by affidavit supported by such evidence as the judge may require. If it appears that there is probable cause to believe that an offense has been committed by the defendant the judge shall grant leave to file the information, otherwise the application shall be denied.

(b) When there has been granted leave to file an information against the defendant, a warrant may issue for his arrest and he must be brought before the court, unless the court orders otherwise.

(c) If the person against whom an information is sought to be filed is a district court judge, the county attorney shall apply directly to the supreme court for permission to file the information. The supreme court shall then proceed in the manner provided in section 95-1301 (a).

When leave is granted by the supreme court it shall designate and direct a judge of the district court of another district to preside at the trial of such information, and hear and determine all pleas and motions affecting the defendant thereunder before and after judgment. All necessary records shall be transferred to the clerk of the district court of the district in which the action arose.

**History:** En. 95-1301 by Sec. 1, Ch. 196, L. 1967.

Harrison v. District Court, 135 M 365, 340 P 2d 544.

**Cross-References**

Prosecution of criminal offenses, Mont. Const. Art. III, § 8.

**Bypassing Preliminary Hearing**

Leave to file an information directly, without a preliminary hearing, under the statute and constitution, was not error or abuse of the statutory privilege to bypass the preliminary hearing where the motion to file directly was supported by an affidavit and where a preliminary hearing would clearly serve no purpose nor secure an advantage to the defendant. State v. Johnson, 149 M 173, 424 P 2d 728.

**Examination before Leave To File**

The district court may grant leave to file an information without previous examination of defendant by a committing magistrate. State v. Vuckovich, 61 M 480, 491, 203 P 491.

Where a district judge assumed to act upon an application for leave to file an information, he should have directed an examination before himself as magistrate or some other magistrate. State ex rel.

**Granting Leave**

It is only where there has been no examination or commitment by a magistrate that the county attorney must move for leave to file an information. State v. Byrd, 41 M 585, 591, 111 P 407.

Where a deputy county attorney appeared in open court and orally moved for leave to file an information presenting at the same time a written request signed by the county attorney which was filed immediately upon granting of the request, the court properly overruled defendant's motion to quash the information based upon the ground that leave to file had been granted on oral request, contrary to former section. State v. Kacar, 74 M 269, 273, 240 P 365.

**Sufficiency of Facts in Information**

Where the motion for leave to file the information disclosed that decedent was shot at close range with a high powered rifle and killed on defendant's farm, that the coroner's jury verdict was that the killing was intentional, that evidence of the commission of the crime and guilt

of the defendant was introduced at a habeas corpus hearing, that the county attorney had made a complete investigation, and that as a result he believed the de-

fendant was guilty, the motion was sufficient to grant leave to file information. *State v. London*, 131 M 410, 310 P 2d 571, 581.

### DECISIONS UNDER FORMER LAW

#### Discretion of Court

Under former section providing that court might grant leave, require examination, or order filing of information, the requiring of an examination presupposed the right to grant or deny the application on examination; but the statute did not provide for findings of fact and conclusions of law. The section contemplated a requirement of sufficient evidence to move the court's discretion, but did not contemplate an unlimited discretion with finality of decision that discharged or excused a defendant from any further proceedings. *State ex rel. Harrison v. District Court*, 135 M 365, 340 P 2d 544.

#### Issuance of Warrant

Held, under former statute, that a warrant may issue on an information filed by the county attorney by leave of court on a motion in writing not verified, and the information verified only on information and belief. *State v. Shafer*, 26 M 11, 15, 66 P 463.

#### Motion for Leave

Held, under former statute, that a motion by the county attorney for leave to file an information need not set forth with technical accuracy the facts constituting a formal charge, nor, since the statements made therein are made under his official oath, is it necessary that the motion be accompanied by an affidavit. *State v. Kacar*, 74 M 269, 273, 240 P 365.

#### Secrecy

Former statute forbade, prior to arrest, not only disclosure of fact that an in-

formation had been filed, but even the fact that leave to file had been granted and also contemplated that, if the defendant was at large, the minutes of the court should be silent as to order granting leave to file the information. *State v. Bowser*, 21 M 133, 138, 53 P 179.

#### Showing Necessary To Obtain Leave To File

The matter of obtaining leave to file an information, without a previous examination of the accused by a committing magistrate, was authorized by both constitution and former statute; it was not to be considered as a merely perfunctory one, and though the county attorney was not required by former statute to support the application by affidavit or set forth therein the facts constituting the charge with technical accuracy, the showing was required to be sufficient to move the discretion of the court. In instant case, held that the motion was required to be complete in itself and not dependent on any former information which had become functus officio and not "as charged in the information as originally filed." *State ex rel. Juhl v. District Court*, 107 M 309, 316, 84 P 2d 979.

#### Writing

Where the information is filed by leave of court, it need not be entered in writing before the filing of the information; but, after the arrest of the defendant, the minutes of the court may be corrected so as to amend the order. *State v. Bowser*, 21 M 133, 137, 53 P 179.

**95-1302. Time for filing the information.** After the defendant has been examined and held to answer, or has waived preliminary examination as provided in section 95-1202 of this code, or after leave of court has been granted as provided in section 95-1301 of this code, the county attorney must file, within thirty (30) days, in the proper district court an information charging the defendant with the offense for which he is held to answer, or any other offense disclosed by the evidence. If the county attorney fails to file the information within the time specified he may be found guilty of contempt, and may be prosecuted for neglect of duty.

**History:** En. 95-1302 by Sec. 1, Ch. 196, L. 1967.

#### Waiver of Irregularity

Where the county attorney fails to comply with this section, any advantage there-

of must be taken by defendant by motion to set aside the information, which must be done before demurrer or plea, and failure to so take advantage of the irregularity waives it. The negligence of the county attorney in this respect cannot be



taken advantage of by the sureties on defendant's bail bond. *State v. Lagoni*, 30 M 472, 480, 76 P 1044.

The objection to failure to timely file information must be made in writing and before demurrer or plea, or it is waived; hence, where defendant did not raise such an objection to the jurisdiction of the court until after plea, and then orally, he was not in a position to complain of the action of the court in overruling his objection. *State v. Chevigny*, 48 M 382, 384, 138 P 257.

#### Writ of Supervisory Control

No leave of court is necessary to file an information after commitment on preliminary examination, and a writ of supervisory control will not issue to compel

the granting of leave. *State ex rel. Donovan v. District Court*, 26 M 275, 278, 67 P 943.

Leave to file an information without a preliminary examination may be granted or refused, within the sound discretion of the court, when no statement is made to the court of the evidence upon which the state relies for a conviction, and a writ of supervisory control to revise such discretion will be denied. *State ex rel. Donovan v. District Court*, 26 M 275, 278, 67 P 943.

#### Collateral References

Indictment and Information—42.

42 C.J.S. Indictments and Informations § 75.

**95-1303. The county attorney not filing an information.** If the county attorney determines an information ought not to be filed after the defendant has been held to answer following a preliminary examination or waiver thereof, or after leave to file has been granted, he must within thirty (30) days make, subscribe, and file with the clerk of the court a statement in writing containing his reasons in fact and in law for not filing an information. The court must examine such statements together with the evidence filed in the case, and if upon such examination, the court is not satisfied with the statement, the county attorney shall be directed and required by the court to file the proper information and bring the case to trial.

**History:** En. 95-1303 by Sec. 1, Ch. 196, L. 1967.

## CHAPTER 14

### GRAND JURY

- Section 95-1401. Summoning grand juries.  
 95-1402. Objections to grand jury and to grand jurors.  
 95-1403. Foreman.  
 95-1404. Charge by court.  
 95-1405. Powers and duties of grand jury.  
 95-1406. When and from whom they may ask advice and who may be present during their sessions.  
 95-1407. Subpoena of witnesses—issuance.  
 95-1408. Reception of evidence.  
 95-1409. Secrecy of proceedings and disclosure.  
 95-1410. Finding and presentment of the indictment.

**95-1401. Summoning grand juries.** A grand jury must only be drawn and summoned when the district judge in his discretion considers a grand jury necessary and shall so order. The grand jury must consist of seven (7) persons, of whom five (5) must concur to find an indictment. The district judge may direct the selection of one (1) or more alternate jurors who shall sit as regular jurors before an indictment is found or a grand jury investigation is concluded. If a member of the jury becomes unable to perform his duty he may be replaced by an alternate. The composition and

drawing of a grand jury shall be in accordance with the provisions of sections 93-1801 to 93-1804.

**History:** En. 95-1401 by Sec. 1, Ch. 196,  
L. 1967.

**Cross-References**

Composition and drawing of grand jury,  
secs. 93-1801 to 93-1804.

Prosecution of criminal offenses, Mont.  
Const. Art. III, § 8.

**95-1402. Objections to grand jury and to grand jurors.** (a) The state may challenge the panel of a grand jury on the grounds that the grand jury was not selected, drawn or summoned according to law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges may be oral or in writing and shall be tried and decided by the court. At any time for cause shown the court may excuse or discharge a juror or jurors either temporarily or permanently and in the latter event the court may impanel another person or persons in place of the juror or jurors discharged.

(b) Motion to Dismiss. A motion to dismiss the indictment may be based on the grounds that the grand jury was not selected, drawn or summoned according to law, or that an individual juror was not legally qualified. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to section 95-1403 of this code that five (5) or more jurors after deducting those not legally qualified, concurred in finding the indictment.

**History:** En. 95-1402 by Sec. 1, Ch. 196,  
L. 1967.

**95-1403. Foreman.** The court shall appoint one (1) of the jurors to be foreman. The foreman shall have the power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of court, but the record shall not be made public except on order of the court.

**History:** En. 95-1403 by Sec. 1, Ch. 196,  
L. 1967.

**95-1404. Charge by court.** (a) When the grand jury is impaneled and sworn, it shall be charged by the judge who summoned it. In doing so, the court shall give the grand jurors such information as it deems proper, or as is required by law, as to their duties, and as to any charges of public offenses known to the court and likely to come before the grand jury.

(b) When the grand jury has been impaneled, sworn and charged, it shall retire to a private room, and inquire into the offenses cognizable by it. When the grand jury certifies completion of business before it and the court concurs, it shall be discharged by the court.

**History:** En. 95-1404 by Sec. 1, Ch. 196,  
L. 1967.

**DECISIONS UNDER FORMER LAW**

**"Final Adjournment" When Court Always Open**

Under former section providing that grand jury is discharged by final adjourn-

ment of court, whether or not their business is completed, the beginning of each district court term constituted a "final adjournment" of the preceding term, al-

though district court was always open and each term continued until succeeding term, the terms as fixed by the court limited

the existence of the grand jury. State ex rel. Adami v. Lewis and Clark County, 124 M 282, 220 P 2d 1052.

**95-1405. Powers and duties of grand jury.** (a) The grand jury may inquire into all public offenses committed or triable within the county and present them to the court by indictment.

(b) If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he shall declare it to his fellow jurors, who shall thereupon investigate it.

(c) The grand jury may inquire into:

(1) The case of every person imprisoned in the jail of the county on a criminal charge and not indicted, or against whom an information or complaint has not been filed.

(2) The condition and management of the public prisons within the county.

(3) The willful or corrupt misconduct in office of public officers of every description within the county.

(d) The grand jury is entitled to free access, at all reasonable times, to the public prisons and to the examination without charge, of all public records within the county.

(e) If, in the judgment of the grand jury, the services of an expert are necessary, the grand jury may employ one or more at an agreed compensation, to be first approved by the court. If, in the judgment of the grand jury, the services of assistants to such experts are required, the grand jury may employ such assistants, at a compensation to be agreed upon and approved by the court.

(f) All expenses of the grand jury, including special counsel and investigators, if any, shall be paid by the treasurer of the county out of the general fund of the county upon warrants drawn by the county auditor or the clerk of the district court upon the written order of the judge of the district court of the county.

**History:** En. 95-1405 by Sec. 1, Ch. 196, L. 1967.

**95-1406. When and from whom they may ask advice and who may be present during their sessions.** (a) The grand jury may, at all times, ask the advice of the court, or the judge thereof, or the attorney general or of the county attorney. Unless such advice is asked, the judge of the court shall not be present during the sessions of the grand jury.

(b) The county attorney of the county or the attorney general may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by the grand jury, and may interrogate witnesses before the grand jury whenever he thinks it necessary. When a charge against or involving the county attorney, or deputy county attorney, or anyone employed by or connected with the office of the county attorney, is being investigated by the grand jury, such county attorney, or deputy county attorney or all or any one or more of them, shall not be allowed to be present before such grand jury when such charge is being



investigated, in an official capacity but only as a witness, and he shall only be present while a witness and after his appearance as such witness shall leave the place where the grand jury is holding session.

(c) When requested to do so by the grand jury of any county, the attorney general or county attorney may employ special counsel and investigators, whose duty it shall be to investigate and present the evidence in such investigation to such grand jury.

(d) The grand jury or county attorney may require by subpoena the attendance of any person before the grand jury as interpreter. While his services are necessary, such interpreter may be present at the examination of witnesses before the grand jury. The compensation for services of such interpreter constitutes a charge against the county, and shall be fixed by the grand jury, in an amount to be approved by the court and paid out of the county treasury on a warrant of the county auditor upon an order of the judge of the district court.

(e) **Transcript of Testimony.**

(1) The grand jury may appoint a stenographer to take in shorthand the testimony of witnesses or the testimony may be taken by a recording device, but the record so made shall include the testimony of all witnesses on that particular investigation. The shorthand notes or the recordings and transcript of the same, if any, shall be delivered to and retained by the clerk of the district court.

(2) The stenographer and any typist who transcribes the stenographer's notes or recordings shall be sworn by the foreman not to disclose any testimony or the names of any witnesses except when so ordered by the court. The stenographic reporter shall certify and file with the clerk of the district court an original transcription of his shorthand notes and a copy thereof and as many additional copies as there are defendants. The reporter shall complete such certification and filing within ten (10) days after the indictment has been found or the accusation presented unless the court for good cause makes an order extending the time. The clerk of the district court shall deliver the original of the transcript so filed with him to the county attorney immediately upon his receipt thereof, shall retain one (1) copy for use only by judges in proceedings relating to the indictment or accusation, and shall deliver a copy of such transcript to each such defendant or his attorney.

**History:** En. 95-1406 by Sec. 1, Ch. 196, L. 1967.

**Construction**

The objects of former section, which was substantially the same as subsection (a), except that attorney general was not mentioned, were to preserve to the body alone clothed with authority of indicting for public offenses—the grand jury—a right to have witnesses interrogated by official counsel at its sessions, and to keep the proceedings of that body as secret as possible by excluding therefrom those not vested with official authority. It did not affect the right of the attorney general to

be present before the grand jury. State ex rel. Nolan v. District Court, 22 M 25, 31, 55 P 916.

**Special Prosecutor — Appearance before Grand Jury**

County attorney cannot delegate to unofficial counsel his right to advise the grand jury, assist them in their investigations and examine witnesses, and an order of the district judges appointing such special prosecutor when the county attorney was present and able to act could not give such authority. State ex rel. Porter v. District Court, 124 M 249, 220 P 2d 1035, 1051.

The appearance of "special prosecutor" before the grand jury was ground for setting aside the indictment. *State ex rel. Porter v. District Court*, 124 M 249, 220 P 2d 1035, distinguished in 131 M 254, 261, 309 P 2d 316, 320.

The press of business in the office of district attorney does not justify the appointment of a "special prosecutor" to appear before the grand jury. *State ex rel. Porter v. District Court*, 124 M 249, 220 P 2d 1035, 1051, distinguished in 131 M 254, 261, 309 P 2d 316, 320.

**95-1407. Subpoena of witnesses—issuance.** A subpoena requiring the attendance of a witness before the grand jury may be signed and issued by the county attorney, by the grand jury or by the judge of the district court, for witnesses in the state, in support of the prosecution, for those witnesses whose testimony, in his opinion is material in an investigation before the grand jury, and for such other witnesses as the grand jury upon investigation pending before them may direct.

**History:** En. 95-1407 by Sec. 1, Ch. 196, L. 1967.

**95-1408. Reception of evidence.** (a) In the investigation of a charge, the grand jury shall receive no other evidence than that given by witnesses produced and sworn before the grand jury, furnished by legal documentary evidence, or the deposition of a witness in the cases mentioned in section 95-1802.

(b) The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the county attorney to issue process for witnesses.

(c) The grand jury shall find an indictment when all the evidence before it, taken together, if unexplained or uncontradicted, would, in its judgment, warrant a conviction by a trial jury.

**History:** En. 95-1408 by Sec. 1, Ch. 196, L. 1967.

**95-1409. Secrecy of proceedings and disclosure.** Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the county attorney for use in the performance of his duty. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury under section 95-1402 (b). No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

**History:** En. 95-1409 by Sec. 1, Ch. 196, L. 1967.

**95-1410. Finding and presentment of the indictment.** (a) An indictment cannot be found without the concurrence of at least five (5) grand

jurors. When so found it must be indorsed, "a true bill," and the endorsement must be signed by the foreman of the grand jury.

(b) **Indictment. How Presented and Filed:**

(1) An indictment, when found by the grand jury, must be presented by the foreman, in their presence, to the court, and must be filed with the clerk.

(2) When an indictment is filed against a district court judge, it must be transmitted directly to the supreme court, who shall thereupon designate and direct a judge of the district court of another district to preside at the trial of such indictment and hear and determine all pleas and motions affecting the defendant thereunder before and after judgment.

(c) If the defendant is in custody or has given bail and five (5) jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

(d) When an indictment is found against a defendant, a warrant must issue for his arrest and he must be brought before the court, unless the court orders otherwise.

**History:** En. 95-1410 by Sec. 1, Ch. 196, L. 1967.

#### DECISIONS UNDER FORMER LAW

##### **Endorsement of Witnesses' Names**

Under former statute requiring that names of witnesses examined before grand jury be inserted at foot of indictment, witnesses whose names were not so endorsed might testify at the trial where the indictment was not found upon their testimony. But if the names of all of the witnesses upon whose testimony the indictment was found were not endorsed, the indictment would be set aside upon timely motion. *State v. McDonald*, 51 M. 1, 6, 149 P. 279. See section 95-1503 (d).

Under former statute requiring that names of witnesses examined before grand jury be inserted at foot of indictment, held that if there were no witnesses it was the duty of the prosecution, on objection of defendant, to so state, either by a verified pleading or under oath. *State ex rel. Porter v. District Court*, 124 M. 249, 220 P. 2d 1035, 1043. See section 95-1503 (d).

Former statute requiring that names of witnesses examined before grand jury be

inserted at foot of indictment required the endorsement of names of all witnesses, not merely the names of witnesses the state believed to be important; on timely motion, indictment would be set aside for failure to comply. *State ex rel. Porter v. District Court*, 124 M. 249, 220 P. 2d 1035, 1041. See section 95-1503 (d).

Under former statute requiring that names of witnesses examined before grand jury be inserted at foot of indictment, held that if there were witnesses identified as John Doe and Richard Roe, it was indefensible for prosecution to conceal their identity from accused merely because prosecutor believed that disclosure of their true names was not vital or necessary to prepare a defense; on appeal, supreme court would be required to sustain conviction if possible and burden would be on accused to show prejudice. *State ex rel. Porter v. District Court*, 124 M. 249, 220 P. 2d 1035. See section 95-1503 (d).

## CHAPTER 15

### CHARGING AN OFFENSE

- Section 95-1501. Methods of prosecution.  
 95-1502. Commencement of prosecutions.  
 95-1503. Form of charge.  
 95-1504. Joinder of offenses and of defendants.  
 95-1505. Amending the charge.  
 95-1506. Prior conviction.

**95-1501. Methods of prosecution.** When authorized by law a prosecution may be commenced by:



- (a) A complaint;
- (b) An information following a preliminary examination, or waiver thereof;
- (c) An information after leave of court has been granted;
- (d) An indictment upon a finding by a grand jury.

**History:** En. 95-1501 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

Prosecution of criminal offenses, Mont. Const. Art. III, § 8.

#### Capital Crime May Be Charged Without Presentment or Indictment

Charges made by informations filed after a hearing before a magistrate, or by leave of the district court have long been sanctioned by statute and constitution so that a person may be held to answer for a capital crime without presentment or indictment by a grand jury. *State v. Corliss*, 150 M 40, 430 P 2d 632.

#### Filing of Information Without Preliminary Examination Permissible

The right of the court to grant leave to file an information without previous examination by a committing magistrate is settled law in this state. It is authorized

by section 8, article III of the constitution, confirmed by numerous decisions of the court, and there can be no interpretation put upon any statute which will take it away. *State v. Brett*, 16 M 360, 40 P 873; *State v. Bowser*, 21 M 133, 53 P 179, 180; *State v. Foot*, 100 M 33, 39, 48 P 2d 1113.

#### Language of Statute—Bill of Particulars

Ordinarily, an information charging a public offense in the language of the statute is sufficient; if deemed insufficient as to details and facts, the remedy of defendant was formerly by way of a request for a bill of particulars. *State v. Hahn*, 105 M 270, 273, 72 P 2d 459.

#### Unverified Information

The fact that an information is not verified does not deprive the court of jurisdiction to try the case. *State ex rel. Nolan v. Brantly*, 20 M 173, 178, 50 P 410.

### DECISIONS UNDER FORMER LAW

#### Initiation of Prosecution

Prosecutions in the district court may be either by information, in cases where there has been an examination and commitment or admission to bail by magistrate, in which case an order of the court is not

necessary; or by information filed by order of the court upon the written motion of the county attorney, which may be done without such examination. *State v. Bowser*, 21 M 133, 134, 53 P 179. See *State v. Vinn*, 50 M 27, 32, 144 P 773.

**95-1502. Commencement of prosecutions.** (a) All prosecutions of offenses triable in the district courts shall be by indictment or information except as otherwise provided by chapter 55, Title 94, R. C. M. 1947.

(b) All other prosecutions of offenses may be by complaint.

**History:** En. 95-1502 by Sec. 1, Ch. 196, L. 1967.

#### Extent of the Term "Prosecution"

"Prosecution" as used in section 8, article III and section 27, article VIII of the constitution and former section providing that all public offenses triable in

district courts must be prosecuted by indictment or information (unless within statutory exception) meant that prosecution commenced with the filing of the information or indictment, and not before. *Rosebud County v. Flinn*, 109 M 537, 541, 98 P 2d 330.

**95-1503. Form of charge.** A charge shall:

(a) Be in writing and in the name of the state of Montana, or in the name of a municipality if a violation of a municipal ordinance is charged, and

(b) Specify the name of the court in which the charge is filed, and

(c) Charge the commission of an offense by:

(1) stating the name of the offense;

(2) citing in customary form the statute, rule, regulation or other provision of law which the defendant is alleged to have violated;

(3) stating the facts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended;

(4) stating the time and place of the offense as definitely as can be done; and

(5) stating the name of the accused, if known, and if not known, designate the accused by any name or description by which he can be identified with reasonable certainty.

(d) If the charge is by information or indictment, it shall include endorsed thereon, the names of the witnesses for the state, if known.

(e) If the charge is by complaint it shall be signed on oath by a person having knowledge of the facts or by the county attorney; if by information, it shall be signed by the county attorney or by his deputy; if by indictment, it shall be signed by the foreman of the grand jury.

(f) If the charge is by information or indictment it must be recorded by the clerk within five (5) days after the same is filed, in a book to be kept for that purpose. The judge must compare the record with the original indictment or information and certify the correctness thereof. In case the original is lost or destroyed, the defendant may be tried upon a copy taken from the record, and certified by the clerk.

**History:** En. 95-1503 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

Forgery, where instrument has been destroyed or withheld by defendant, pleading for, sec. 94-6418.

Form of information and indictment, allegation as to partnership property, sec. 94-6429.

Larceny or embezzlement, pleading for, sec. 94-6420.

Libel, pleading for, sec. 94-6417.

Perjury or subornation of perjury, pleading for, sec. 94-6419.

Presumptions of law, etc., need not be stated in indictment or information, sec. 94-6414.

Private statutes, how pleaded, sec. 94-6416.

Selling, exhibiting, etc., lewd and obscene books, pleading for, sec. 94-6421.

#### Bill of Particulars

In a criminal case no bill of particulars may be required or ordered. *State v. Bosch*, 125 M 566, 242 P 2d 477, 487. (This case expressly overrules any statement or holding to the contrary in *State v. Gondeiro*, 82 M 530, 268 P 507; *State v. Shannon*, 95 M 280, 26 P 2d 360; *State v. Stevens*, 104 M 189, 65 P 2d 612; *State v. Hahn*, 105 M 270, 72 P 2d 459; *State v. Robinson*, 109 M 322, 86 P 2d 265, and any other such statements or holdings by this court.)

#### Common Understanding Rule

The test of the sufficiency of an information is: would a person of common understanding know what is intended to be charged? *State v. Board*, 135 M 139, 337 P 2d 924.

The test of the sufficiency of an information is whether the defendant is apprised of the charges brought against him and whether he will be surprised. *State v. Bogue*, 142 M 459, 384 P 2d 749, overruling *State v. Hale*, 129 M 449, 291 P 2d 229.

#### Essentials in General

An information stating the proper title of court and cause and containing a statement of the facts constituting the offense, charged in ordinary and concise language so as to enable a person of common understanding to know what was intended, is sufficient. *State v. Paine*, 61 M 270, 273, 202 P 205.

#### Operation in General

An information need not necessarily contain a specific allegation that the prosecution is conducted in the name and by authority of the state, as required by the constitution, where it appears from the record that it is so conducted, is in the proper form and is otherwise sufficient. *State v. Barry*, 45 M 582, 584, 124 P 774.

#### Sufficiency of Charge

An information not objectionable on the ground that it did not contain a statement of facts constituting the offense in ordi-

nary and concise language, or that it was not direct and certain in its statements. *State v. Phillips*, 36 M 112, 118, 92 P 299.

Stating facts, charging a crime, in the form of participial clauses, though that is a method of pleading not to be commended, does not render an information abortive. The proper way, however, to make the charge is by direct allegation. *State v. Pemberton*, 39 M 530, 532, 104 P 556.

An information must charge the crime alleged to have been committed with certainty and precision, setting forth all the affirmative facts which constitute a *prima facie* case under the statute charged to have been violated. *State v. Hem*, 69 M 57, 62, 63, 220 P 80.

#### **Sufficiency of Charge—Attempted Rape**

Information charging defendant willfully, unlawfully and feloniously attempted to have sexual intercourse with prosecutrix, and forcibly and violently, without her consent and contrary to her wishes and expressed protest, demanded that she submit to sexual intercourse and by force attempted to overcome her and accomplish the act of intercourse, held sufficient against objections that no overt act was charged and intent insufficiently alleged. *State v. Stevens*, 104 M 189, 195, 65 P 2d 612, overruled on other grounds in *State v. Bosch*, 125 M 566, 589, 242 P 2d 477.

#### **Sufficiency of Charge—Attempting To Influence Jurors**

A consolidated information which charged the defendant with attempting to influence two named jurors in a named action was sufficient. *State v. Bogue*, 142 M 459, 384 P 2d 749.

#### **Sufficiency of Charge—Clerical Mistake Not Vital**

Information inadvertently charging that defendant on a certain day in the year "19122" sold intoxicating liquor held not to have prejudiced him in any substantial right, where evidence of a sale made on that day in the year 1922 was admitted without objection by defendant and he was prepared to meet the charge on the assumption that that was the correct date, introduced evidence tending to establish an alibi and offered no objection to an instruction advising the jury that if they found that the sale was made on that day they must find him guilty. *State v. Polich*, 70 M 523, 526, 226 P 519.

#### **Sufficiency of Charge—Date of Offense**

A conviction for burglary will not be disturbed because it appears it was committed on a day prior to that alleged in the information, where defendant was not prejudiced. *State v. Rogers*, 31 M 1, 5, 77 P 293.

Unless time is a material ingredient in the offense or in charging the same, it is only necessary to prove that it was committed prior to the finding or filing of the information or indictment. *State v. Rogers*, 31 M 1, 4, 77 P 293.

In a prosecution for homicide, where all the evidence showed that, if committed at all, the offense was committed on the day alleged in the information, the court was warranted in charging the jury that it was not necessary that the homicide should have been committed on the precise date laid in the pleading, but it was sufficient if it appeared that it had been committed prior to the filing of the information. *State v. Vanella*, 40 M 326, 342, 106 P 364.

If a crime is charged as having been committed on one date, while the evidence shows that it was done at another time, but within the statute of limitations, the prosecution does not fail, but there is a variance which may be material enough to justify a continuance. *State v. Gaimos*, 53 M 118, 124, 162 P 596.

If the information charging rape fixes a definite date, and the evidence discloses that a mistake occurred in the pleading, and that the identical crime charged was committed upon another date, but before the information was filed, the prosecution will not necessarily fail, though defendant may be entitled to a continuance because of the variance. *State v. Gaimos*, 53 M 118, 123, 162 P 596.

Defendant, convicted of unlawful possession of intoxicating liquor, was not prejudiced by the variance between the allegation in the information that the offense was committed on the tenth of December and the state's proof of its commission on the twelfth of the same month. *State v. Sorenson*, 65 M 65, 210 P 752.

An allegation in an information charging murder that the offense was committed "on or about" a certain date of a given year, held sufficient, such date being prior to the date of filing, and since time was not an essential ingredient of the offense, and the exact time is not claimed to have been a material ingredient. *State v. Heaston*, 109 M 303, 307, 97 P 2d 330.

#### **Sufficiency of Charge—False Pretenses**

An information charging an attempt to obtain money by false pretenses, though defective in form and containing immaterial averments, is sufficient to sustain a conviction, when it is apparent that the defendant has suffered no prejudice. *State v. Phillips*, 36 M 112, 118, 92 P 299.

#### **Sufficiency of Charge—Forgery**

An information which, after charging forgery of a promissory note, added that defendant, knowing that the instrument was false, uttered, passed, and published



the same as true and genuine, with intent to defraud, etc., was not fatally defective. *State v. Mitten*, 36 M 376, 381, 92 P 969.

#### **Sufficiency of Charge—Illegal Transportation of Liquor**

Neither the time of day, the means of conveyance, the particular brand of liquor transported nor the termini of the route over which it is carried are made constituent elements of the completed offense of illegal transportation, and therefore an information charging that crime is sufficient without allegations to that effect. *State v. Dow*, 71 M 291, 298, 229 P 402.

#### **Sufficiency of Charge—Larceny**

Information charging defendant, president of a brokerage firm, with larceny as bailee of a sum of money, couched substantially in the language of subdivision 2 of section 94-2701, was sufficient and not vulnerable to a general demurrer. *State v. Lake*, 99 M 128, 136, 43 P 2d 627.

#### **Sufficiency of Charge—Lewd and Lascivious Act on Child**

An information under section 94-4106 for committing a lewd and lascivious act on a child was sufficient although it did not allege the age of the defendant. *State v. Davis*, 141 M 197, 376 P 2d 727, 729.

#### **Sufficiency of Charge—Liquor Laws**

An information charging defendant with having permitted a female to be or remain in his saloon for the purpose of being there supplied with liquor, which alleged that defendant was "then and there" the owner and manager having charge and control, was sufficient to apprise him that he was accused of being in control "for the time being," the words used in the statute under which the prosecution was brought, and was therefore sufficient under former section. *State v. Conway*, 38 M 42, 43, 98 P 654.

Where the information charged defendant with a sale of "certain spirituous liquid containing more than one-half of one per centum of alcohol by volume which was fit for beverage purposes," but the proof showed the sale of moonshine whisky, a liquor different from that described in the information, there was a variance which, however, was not fatal, it appearing that defendant was as fully prepared to meet the proof made by the state as he would have been to meet that of the charge contained in the information. *State v. Sedlacek*, 74 M 201, 208, 239 P 1002.

The information in a prosecution charging sale of intoxicating liquor to a minor, need not specify the particular kind of liquor; the allegation that defendant sold "certain intoxicating liquor," etc., was sufficient to advise defendant of the charge

against him. *State v. Baker*, 87 M 295, 298, 286 P 1113.

#### **Sufficiency of Charge—Manslaughter**

Information which charged the defendant with manslaughter in the form established in former section and used the words "did then and there willfully, wrongfully, unlawfully, knowingly and feloniously kill one Duane Leslie Egge, a human being of the age of five years, contrary" was sufficient. *State v. Duncan*, 130 M 562, 305 P 2d 761, 763.

Information for manslaughter was sufficient. *State v. Haley*, 132 M 366, 318 P 2d 1084, 1085.

#### **Sufficiency of Charge—Murder**

An information for murder should directly allege that death resulted from the mortal wounds inflicted by defendant. *State v. Keerl*, 29 M 508, 511, 75 P 362.

If a person of common understanding would, from the reading of an information, know that the defendant in a given case was charged with murder in the first degree, the defendant will be presumed to have had a like knowledge, and be held not to have been prejudiced by the use of peculiar phraseology in it. *State v. McGowan*, 36 M 422, 425, 93 P 552.

Allegations sufficient for a common-law indictment for murder are sufficient for an information under the code. *State v. Hayes*, 38 M 219, 221, 99 P 434.

An information alleging that at a specified time and place defendant did "willfully, unlawfully, feloniously, premeditatedly, and of his malice aforethought kill and murder" a designated person, is sufficient to charge murder, though it does not set forth facts showing how and by what means the actual killing was accomplished. *State v. Hayes*, 38 M 219, 221, 99 P 434. See also *State v. Nielson*, 38 M 451, 454, 455, 100 P 229; *State v. Guerin*, 51 M 250, 257, 152 P 747.

An information alleging that accused assaulted deceased, violently threw her to the ground, and otherwise assaulted her until she became unconscious, and then permitted her to lie exposed to inclement weather, and neglected to provide her with necessary clothing and protection, by reason of which assault and exposure she died, charged murder, and the state was not bound to elect whether it would proceed on the theory of assault, or exposure, or both. *State v. Rees*, 40 M 571, 575, 107 P 893.

An information charging murder in the first degree, otherwise sufficient, was not rendered insufficient by the absence of the words "a felony," after the words "murder in the first degree," hence the insertion of the two words by order of court upon complaint that the copy served

upon defendant did not contain them did not render the information subject to a motion to quash. *State v. Vuckovich*, 61 M 480, 491, 203 P 491.

Where two defendants, tried separately, had entered into a conspiracy to commit robbery by taking incriminating evidence from the possession of an officer in the perpetration of which the latter was killed by one of them, the information against the other charging a premeditated killing need not set forth the facts constituting the crime of robbery or allege that in the attempt to commit the latter crime the homicide was committed. *State v. Bolton*, 65 M 74, 80, 212 P 504.

#### **Sufficiency of Charge—Name of County**

Where, in an information for murder, the only mention of the county in which the crime was committed appeared in the caption describing the court in which, and the officer by whom, the charge was preferred, while in the charging part of the document the word "county" was not used at all, and the only reference words found there were in the expression "then and there," the first of which referred to a preceding date alleged as the date of the crime, while the latter indicated some place, not described, where the defendant then was, it was held that, in the absence of an expression such as "in the county aforesaid" or "said county," thus referring to the caption, the information did not allege the county in which the offense had been committed, and was fatally defective. *State v. Beeskove*, 34 M 41, 50, 85 P 376.

The charge in the information that the seditious language alleged to have been used by defendant was uttered in M. county was a sufficient allegation of the place. *State v. Fowler*, 59 M 346, 352, 196 P 992.

An information which charged that defendant at the county of M., state of Montana, "then and there being, then and there did willfully, etc., possess" certain liquor, etc., was not open to the objection that it failed to allege that the act was committed in M. county, "then" referring to the time and "there" to that county. *State v. Polich*, 70 M 523, 526, 226 P 519.

#### **Sufficiency of Charge—Name of Parties**

An information against one George Howard, alias James Howard, alias Joe Kirby was sufficient, the information having charged his prior conviction, and the different names being for purpose of identifying him as the person previously convicted. *State v. Howard*, 30 M 518, 520, 77 P 50.

#### **Sufficiency of Charge—Name of Victim**

Where a defendant was convicted of crime upon an information stating the name of the injured person as "Frank

Rex," whereas his own testimony showed that it was "Frank Rock," and there was not any showing that he was named or had been known as Frank Rex, it was held that, the names being unlike in sound or spelling, and the information having failed to disclose any description which made it at all certain that "Frank Rex" and "Frank Rock" were one and the same person, the variance was fatal to conviction. *State v. Lee*, 33 M 203, 205, 83 P 223.

#### **Sufficiency of Charge—Officer Signing**

A deputy county attorney may present an information in his own name; hence the fact that an information was signed by him instead of by the county attorney did not render it invalid; at most his act, while perhaps improper from an ethical standpoint, was no more than an irregularity which could not affect appellant's substantial rights and was therefore insufficient to warrant reversal. *State v. Larson*, 75 M 274, 276, 243 P 566.

#### **Sufficiency of Charge—Perjury**

If an information for perjury sets forth the substance of the matter in respect to which the offense was committed, in what court and before whom the oath alleged to have been false was taken, and that the court or the person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which perjury is assigned, it is sufficient. *State v. Jackson*, 88 M 420, 428, 293 P 309.

#### **Sufficiency of Charge—Person Injured**

While a mistake in the name of the person injured is not to be deemed material, if the injury is so described in other respects as to identify it, yet if it is not so identified by the evidence as that it can be said to be the same, there is such a variance as amounts to a failure of proof, and the conviction cannot be sustained. *State v. Moxley*, 41 M 402, 409, 110 P 83.

#### **Sufficiency of Charge—Robbery**

It is sufficient in an information for robbery, to charge that the taking was accomplished "with" force and fear, instead of "by means of force and fear." The word "with," in this connection, is equivalent to the expression "by means of." *State v. Pemberton*, 39 M 530, 532, 104 P 556.

An information for robbery is sufficient, with respect to the crime, if it enables a person of ordinary understanding to know what is intended to be charged. *State v. Pemberton*, 39 M 530, 532, 104 P 556.

#### **Sufficiency of Charge—Sedition**

An information charging sedition, in that defendant knowingly, unlawfully, etc.,

uttered and published disloyal, profane, violent, scurrilous, contemptuous, and abusive language concerning the soldiers and the uniform of the United States army, was defective for failure to set out the specific words characterizing his remarks as disloyal, contemptuous, etc. *State v. Wolf*, 56 M 493, 499, 185 P 556.

An information charging a violation of the sedition act is sufficient in stating that the defendant had said that the American soldiers "would act in the same way and commit the same atrocities as have been reported of the German soldiers," without setting out the atrocities reported to have been committed by the German soldiers. *State v. Wyman*, 56 M 600, 607, 186 P 1.

An information in charging the crime of sedition is fatally defective on the ground of uncertainty where it is alleged that the offense consists of the statement that "she wished the people would revolt and that she would shoulder a gun and get the president the first one," for the reason that a presumption must be indulged in to determine whether the defendant meant the people or the president of the United States or the people or president of some other country. *State v. Smith*, 58 M 567, 572, 194 P 131.

An information charging one with seditious utterances should set forth the fact whether the words were uttered in private conversation with a single person or from a public platform, or were disseminated through the medium of printed articles. *State v. McGlynn*, 60 M 416, 420, 199 P 708.

#### Sufficiency of Charge—Theft

Under provision that an information charging a criminal offense must contain a statement of the facts constituting the crime in ordinary and concise language so as to enable a person of common understanding to know what is intended, held, that an information charging defendant with stealing "five Ford wire wheels and tires" was sufficient to advise him that five wire wheels and tires for a Ford automobile were the articles charged to have been stolen, and therefore sufficient to enable him to prepare for his defense. *State v. Dimond*, 82 M 110, 112, 265 P 5.

#### Sufficiency of Charge—Time of Offense

An indictment for rape, which charges the commission of the offense "on or about" a certain day, sufficiently states the time. *State v. Thompson*, 10 M 549, 557, 27 P 349.

#### Sufficiency of Charge—Unlawful Sale of Drug

Information charging unlawful sale of morphine hydrochloride held sufficient. *State v. Brennan*, 89 M 479, 487, 300 P 273.

#### Superfluous Words or Sentences Held Immaterial

Superfluous words or sentences inserted in an information charging crime may be treated as surplusage and disregarded, if, without such words and sentences, it sufficiently charges the offense alleged to have been committed. *State v. McGowan*, 36 M 422, 427, 93 P 552.

#### Technical Error

Query, as to whether the rule, that "error appearing, prejudice will be presumed," as announced prior to the adoption of the codes in 1895 was abrogated by sections declaring that no judgment shall be held invalid for mere technical errors not affecting the substantial rights of the defendant. *State v. Gordon*, 35 M 458, 466, 90 P 173.

Where, under the evidence submitted at a trial for assault in the second degree, the defendant might have been convicted of assault in either the second or third degree, but was found guilty of the lower degree, the judgment will not be reversed for a purely technical error in giving an instruction. *State v. Tracey*, 35 M 552, 555, 90 P 791.

A judgment of conviction will not be reversed for error in the trial proceedings, unless it has prejudiced, or tended to prejudice, the defendant in respect to a substantial right. *State v. Rhys*, 40 M 131, 134, 105 P 494.

#### When It Is Proper To Allow Endorsement After Filing

Where defendant's attorney knew of a witness against defendant, but failed to discover the nature and extent of his potential testimony, assuming he would not be discovered, it was not reversible error to permit the witness' name to be endorsed on the information the day of the trial, nor to permit the witness to testify, since the elements of surprise and unfair advantage were lacking under the circumstances. *State v. Cooper*, 146 M 336, 406 P 2d 691.

#### When Refusal of Continuance not Prejudicial

Where defendant, charged with committing lewd and lascivious acts upon a female child of the age of nine years, had been notified by the county attorney after plea and the day before the trial that he intended to prove that the offense was committed about a week later than charged in the information and the court denied his motion for continuance, such refusal was not prejudicial error since time is not a material ingredient of the offense. *State v. Koche*, 112 M 511, 518, 119 P 2d 35.



**When Variance Not Reversible Error**

While defendant was furnished a bill of particulars showing that while the information charged the violation of the liquor law on a certain date, the state would rely on proof of a sale made on a different date and during the trial the court inquired of him whether he had been taken by surprise, and he declined to state that he was surprised and did not ask for a continuance, he was in no position to claim prejudice by the introduction of proof relating to a sale made on the latter date, he not having been injured by the

variance, if any. *State v. Knilians*, 69 M 8, 13, 220 P 91.

**Where Offense Incorrectly Named, Not Fatal to Pleading**

The general rule is that when the facts, acts and circumstances are set forth with sufficient certainty to constitute an offense, it is not a fatal defect that the complaint gives the offense an erroneous name; the name of the crime is controlled by the specific acts charged, and an erroneous name of the charge does not vitiate the complaint. *State v. Schnell*, 107 M 579, 585, 88 P 2d 19.

**DECISIONS UNDER FORMER LAW****Bill of Particulars**

Where one charged with crime deems the information too indefinite or uncertain he has the privilege of demanding a bill of particulars to supply the deficiency. Modern tendency of criminal procedure has been toward simplification. *State v. Summers*, 107 M 34, 35, 79 P 2d 560.

Where an inquest had been held a year prior to trial in a prosecution for manslaughter for the killing of a pedestrian by reckless driving, the court could presume that the coroner had complied with the law as to the transcript of the testimony, which was available for defendant's inspection for the desired information, held, denial of defendant's motion for a bill of particulars not an abuse of the court's discretion. *State v. Robinson*, 109 M 322, 327, 96 P 2d 265.

As against the contention that a bill of particulars may not be resorted to for the purpose of perfecting a defective information, held, that such is the rule, but the bill may be resorted to for the purpose of clarifying the general terms of the information. A bill of particulars performs a function for the information similar to that of a definition for a word; it is designed for use where the information is sufficient, on demurrer, and, in the sound discretion of the court and in furtherance of justice, to give accused fair notice of what he is called on to defend, a bill of particulars may, on motion of accused, be required. *State v. Wong Sun*, 114 M 185, 192, 133 P 2d 761.

**Declaratory of the Common Law**

Former section stating what indictment or information must contain was but a paraphrase of the common-law rules covering the requisites of criminal pleading. *State v. Wolf*, 56 M 493, 496, 185 P 556.

**Endorsement of Witnesses' Names**

Where the name of a witness known to the county attorney at the filing of the information was omitted, but there was no

evidence of bad faith, the court properly permitted it to be endorsed on the day before trial. *State v. Calder*, 23 M 504, 506, 59 P 903. See also *State v. Biggs*, 45 M 400, 403, 123 P 410.

The act of the county attorney in endorsing, under the directions of the court, the names of other witnesses on the information is not error, as such witnesses were subject to be examined whether their names were endorsed on the information or not. *State v. Schnepel*, 23 M 523, 524, 59 P 927. See also *State v. Newman*, 34 M 434, 437, 87 P 462; *State v. Biggs*, 45 M 400, 403, 123 P 410.

It is error to deny the county attorney the right to examine witnesses because their names do not appear on the information, in the absence of a showing on the part of the defendant that the county attorney did in fact know of their existence at the time the information was filed. *State v. Schnepel*, 23 M 523, 525, 59 P 927.

A witness in a criminal prosecution may not be prevented from testifying because his name was not endorsed on the information, where it does not appear from the record that the county attorney knew of the witness at the time he filed the information. *State v. Newman*, 34 M 434, 437, 87 P 462. See also *State v. Biggs*, 45 M 400, 403, 123 P 410.

Omission by the county attorney to endorse the names of material witnesses for the state upon an information, as required by former statute, either because not known to him at the inception of the prosecution, or through negligence or ignorance, is not sufficient reason to make their testimony inadmissible. *State v. McDonald*, 51 M 1, 4, 149 P 279.

Where a county attorney violated the express statutory injunction by endorsing the name of a witness as "John Doe Mitchell," whereas he knew his true name to be "James Mitchell," defendant was not entitled to a new trial in the absence of a showing that he had been prejudiced

by the officer's delinquency. *State v. McDonald*, 51 M 1, 7, 149 P 279.

Even though a county attorney knew of witnesses whose names he did not endorse upon the information at the time of its filing, it was still within the discretion of the trial court to allow them to be examined. *State v. McDonald*, 51 M 1, 4, 149 P 279.

Provision requiring endorsement of witness' names on information was intended as a safeguard to the accused against surprise and unfair advantage by the prosecuting officer, and to serve the same purpose as a like provision relating to the disclosure of the names of witnesses upon whose testimony an indictment is found and returned by a grand jury. *State v. McDonald*, 51 M 1, 5, 149 P 279.

The purpose of former section requiring endorsement of witnesses' names on information was to advise the defendant, so far as reasonably possible, of the witnesses known to the county attorney when the information was filed, whom the state intended to call against him, in order that he might have the opportunity to make inquiry with respect to them and prepare himself to meet their testimony. *State v. McDonald*, 51 M 1, 4, 149 P 279. See also *State v. Gaimos*, 53 M 118, 121, 162 P 596.

While section, requiring the county attorney to endorse the names of all witnesses known to him upon an information at the time of its filing, did not require the names of subsequently discovered witnesses to be so endorsed, he should, under former law, have done so, to avoid complaint that the accused did not have sufficient opportunity to meet the testimony of witnesses of whom he had no knowledge; concealment of names of material witnesses might, on a proper showing, have constituted prejudice. *State v. Harkins*, 85 M 585, 281 P 551.

Where a county attorney at the time of filing an information did not know that a certain person would be a witness and therefore did not endorse his name thereon, his application to permit him to make the endorsement at the beginning of the trial, held to have been properly granted. *State v. Harkins*, 85 M 585, 281 P 551; *State v. Gaffney*, 106 M 310, 313, 77 P 2d 398.

Former statute requiring county attorney to endorse names of state's witnesses on an information at the time it was filed, if they were known, did not prevent state from using witnesses whose names were not so endorsed. Held, in the instant case, that defendant could not have been prejudiced because of previous showing, and situation was not one wherein there had been a concealment of incriminating evidence, but designed for rebuttal and

corroboration. *State v. Akers*, 106 M 43, 54, 74 P 2d 1138.

Reason for former statutory requirement that names of witnesses be endorsed on the information was to safeguard defendant against surprise and unfair advantage. There was no unfair advantage taken of defendant when the county attorney endorsed the name of a witness after impaneling a jury because he did not know of the existence of the witness at the time when the information was filed and gave notice to the defendant's attorney at that time and offered to agree to a reasonable delay in the trial in order that the defendant could examine the witness and secure evidence to meet his testimony. *State v. Phillips*, 127 M 381, 264 P 2d 1009, 1015.

Purpose of former section requiring endorsement of witnesses' names on information at time of filing was to protect accused from surprise and unfair advantage and to afford him a fair opportunity to defend himself adequately. *State v. Cooper*, 146 M 336, 406 P 2d 691.

Under former statute requiring endorsement of witnesses' names on information at time of filing, it was not reversible error to permit endorsement on day of trial and to allow the witness to testify where defense attorney knew of the witness but failed to discover the nature and extent of his potential testimony; under the circumstances the elements of surprise and unfair advantage were lacking. *State v. Cooper*, 146 M 336, 406 P 2d 691.

#### Endorsement of Witnesses' Names—Defendant's Wife

Where the name of defendant's wife was endorsed on the information among the names of the witnesses for the state, over his objection that she was incompetent, but on the trial she was excluded from testifying, on a renewal of the objection, defendant was not prejudiced by being compelled to object to her competency before the jury. *State v. Sloan*, 22 M 293, 297, 56 P 364. See also *State v. Biggs*, 45 M 400, 403, 123 P 410.

#### Language of Statute—Bill of Particulars

Ordinarily, an information charging a public offense in the language of the statute is sufficient; if deemed insufficient as to details and facts, the remedy of defendant was formerly by way of a request for a bill of particulars. *State v. Hahn*, 105 M 270, 273, 72 P 2d 459.

#### Larceny

Former provision that indictment or information was sufficient if it could be understood therefrom that offense was committed or triable within court's jurisdiction had no application to an informa-

tion charging larceny. *State v. De Wolfe*, 29 M 415, 422, 74 P 1084, overruled on other grounds in *State v. Penna*, 35 M 535, 546, 90 P 787.

#### Purpose

Former sections governing forms and rules of pleading and sufficiency and form of indictments and informations were intended to relax the technical rules which prevailed at the common law, and to simplify the procedure to the end that regard to substance rather than form should be the rule of interpretation. *State v. Brown*, 38 M 309, 312, 99 P 954.

#### Sufficiency of Charge

An information charging illegal transportation of intoxicating liquor in the language of the statute, that defendant "at the county of M. did willfully, wrongfully and unlawfully transport certain intoxicating liquors," etc., was sufficient as against the contention that it was fatally defective for failure to charge that the offense was committed within the jurisdiction of the court; if deemed insufficient it was the duty of defendant to apply for a bill of particulars in advance of the trial. *State v. Redmond*, 73 M 376, 378, 237 P 486.

#### Sufficiency of Charge—Secreting Public Record

Where an indictment for secreted a public record alleged that defendant, being an officer and having in his custody a certain public record, and which said record came into and was in his hands, and was by him feloniously secreted, and defendant contended that the charging part was an unfinished sentence, and that the allegation respecting secretion was merely descriptive of the record, the offense was

charged with "such a degree of certainty" that judgment might be pronounced according to the right of the case, under former section governing sufficiency. *State v. Bloor*, 20 M 574, 582, 52 P 611.

#### Sufficiency of Charge—Time of Offense

Under the Prohibition Act it was a public offense to possess liquor unlawfully at any time, hence time was not an ingredient of the offense within the meaning of former section, providing that the precise time at which it was committed need not be stated in the information, it being sufficient if it is alleged that its commission occurred at any time before filing thereof, except where the time is a material ingredient in the offense. *State v. Terry*, 77 M 297, 299, 250 P 612.

#### Technical Error

A remark of the trial judge in passing upon an objection to a question asked a witness for the defense in a criminal cause to the effect: "I don't think that is very material; let him answer," while improper, held technical error under former statute, and nonprejudicial when considered in connection with the particular circumstances. *State v. Cassill*, 71 M 274, 283, 229 P 716.

#### When Bill of Particulars Available

Where defendant charged with crime deems the information too indefinite and uncertain he has the privilege of applying for a bill of particulars, and where it is apparent that by reason of the too general character of the charge defendant may have difficulty in preparing his defense, the trial court should incline toward granting the motion for such a bill. *State v. Stevens*, 104 M 189, 198, 65 P 2d 612.

**95-1504. Joinder of offenses and of defendants.** (a) An indictment, information, complaint or accusation may charge two (2) or more different offenses connected together in their commission, or different statements of the same offense or two (2) or more different offenses of the same class of crimes or offenses, under separate counts, and if two (2) or more indictments, informations, complaints or accusations are filed in such cases in the same court, the court may order them to be consolidated. Allegations made in one count may be incorporated by reference in another count. The prosecution is not required to elect between the different offenses or counts set forth in the indictment, information, complaint or accusation, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which the case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the indictment, information, complaint and accusation be tried separately or divided into two (2) or more groups and each of



said groups tried separately. An acquittal of one (1) or more counts shall not be deemed an acquittal of any other count.

(b) Two (2) or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one (1) or more counts together or separately and all of the defendants need not be charged in each count.

(c) If it appears that a defendant or the state is prejudiced by a joinder of related prosecutions or defendants in a single charge or by joinder of separate charges or defendants for trial the court may order separate trials, grant a severance of defendants, or provide any other relief as justice may require.

**History:** En. 95-1504 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

Discharging defendant that he may be a witness for the state or for his co-defendant, effect of such discharge, secs. 94-7206 to 94-7208.

#### Former Jeopardy

Where the defendant was charged with twenty-two counts of statutory rape and convicted on nine of the counts, it was proper that each charge be set forth in a separate count in the information and there was no violation of state or federal constitutional guaranty against double jeopardy. *State v. Boe*, 143 M 141, 388 P 2d 372.

Information in five counts, three of which alleged larceny of more than one

cow, did not violate "former jeopardy" provision of constitution in that each count states a separate offense and in view of grand larceny statute which makes the theft of each separate animal a separate and distinct offense and in view of statute providing for joinder of offenses which permits an information to charge more than one offense in separate counts. *State v. Johnson*, 149 M 173, 424 P 2d 728.

#### Waived by Failure To Demur

Any objection to the inclusion in one count of the statement of different forms of the same offense must be made in the district court, and before plea. The objection that the information charges two offenses is waived by a failure to demur. *State v. Mahoney*, 24 M 281, 285, 61 P 647.

### DECISIONS UNDER FORMER LAW

#### What Constitutes Two Offenses

An information charging forgery in two counts, the first by the false making of the instrument, and the second by uttering it, is not vulnerable to attack by demurrer for charging two offenses, the inhibition of former section that the indictment or information must charge but one offense, being directed to pleadings which charge more than one distinct offense and not to one which in each of two counts charges the same offense. *State v. Mitton*, 37 M 366, 370, 96 P 926. See *First Nat. Bank of Miles City v. Barrett*, 52 M 359, 365, 157 P 951.

Former provision permitted only one offense to be charged in information, and conviction could be had for that offense only; different acts of the same sort might be proved for purpose of corroboration. *State v. Gaimos*, 53 M 118, 124, 162 P 596.

An information against a defendant for knowingly and without consideration taking or receiving from a prostitute any of her earnings, and also with living upon the earnings of a prostitute, charged two distinct offenses in violation of former statute. *State v. Kanakaris*, 54 M 180, 182, 169 P 42.

**95-1505. Amending the charge.** (a) A charge may be amended in matters of substance at any time before the defendant pleads, without leave of court.

(b) The court may permit any charge to be amended as to form at any time before verdict or finding if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced.

(c) No charge shall be dismissed because of a formal defect which does not tend to prejudice a substantial right of the defendant.

**History:** En. 95-1505 by Sec. 1, Ch. 196, L. 1967.

#### **Amendment of Information**

Under former section, an information could be amended in matter of substance or form at any time before the defendant pleaded, without leave of court, but after plea it could be amended as to form only when it could be done without prejudice to the rights of defendant, and as to substance not at all. *State v. Fisher*, 79 M 46, 49, 254 P 872.

Under former statute held, that where defendant was charged by information with a misdemeanor (liquor violation) and some four months after plea of not guilty the county attorney was permitted, over objection, to amend the information by adding a charge of prior conviction thereby changing the grade of the offense from a misdemeanor to a felony—a matter of substance—the action of the court in allowing the amendment constituted error, the fact that defendant after amendment was arraigned and pleaded over not changing the rule. *State v. Fisher*, 79 M 46, 49, 254 P 872.

When the new trial was granted after defendant was convicted and served about a month in the state prison in a prosecution for the larceny of one of four colts, held that, the information could have been amended by leave of court to charge the same offense, without violating any right of defendant and without the right of defendant to plead former jeopardy. *State v. Aus*, 105 M 82, 87, 69 P 2d 584.

Where court allowed state to amend information charging defendant with incest by changing "fornication" to "adultery" there was no substantial change in the charge and only touched a matter of form. Whether the defendant was married or unmarried at the time is not a material ingredient of the offense. In either event the defendant is guilty, if the intercourse charged is proved. *State v. Kuntz*, 130 M 126, 295 P 2d 707, 710.

The filing of second information, alleging same facts as contained in first information, was in fact an amendment in a matter of substance of the first information in violation of defendant's rights under statute proscribing amendments in a matter of substance, which defendant, represented by competent counsel, waived for failure to raise timely objection and which defect could have been rectified in the first instance if the prosecuting attorney had availed himself of the statute providing for the dismissal of information by having the first information dismissed

and then filing a second information. *Gransberry v. State*, 149 M 158, 423 P 2d 853.

#### **Amendment of Information—Name of Victim**

An information for the crime of robbery may be amended at the close of the testimony for the state, so as to change the name of the person from whom it is alleged the property was feloniously taken. *State v. Oliver*, 20 M 318, 321, 50 P 1018.

#### **Apex Juris Not Sufficient To Reverse**

Where no substantial right of the defendant has been disregarded, a mere apex juris is not sufficient cause for the reversal or modification of the judgment. *State v. Connors*, 27 M 227, 229, 70 P 715.

#### **Clerical Error**

Information inadvertently charging that defendant on a certain day in the year "19122" sold intoxicating liquor held not to have prejudiced him in any substantial right, where evidence of a sale made on that day in the year 1922 was admitted without objection by defendant and he was prepared to meet the charge on the assumption that that was the correct date, introduced evidence tending to establish an alibi and offered no objection to an instruction advising the jury that if they found that the sale was made on that day they must find him guilty. *State v. Polich*, 70 M 523, 526, 226 P 519.

#### **Form**

The statute authorizes an information to be amended as to form; thus, an information charging "the malicious destruction of property" may properly be amended by substituting the word "burning" for the word "destruction." *State v. Sieff*, 54 M 165, 168, 168 P 524.

#### **Prior Conviction Charged**

Where the state on the day of trial filed an amended information changing the charge from robbery to robbery and a prior conviction of forgery, and the defendant was given no opportunity to either admit or deny the previous conviction, such amendment was substantive, increased the minimum penalty, and was reversible error. *State v. Knight*, 143 M 27, 387 P 2d 22.

#### **Sufficiency of Charge**

The fact that an amendment was in fact made does not affect the sufficiency of the information, if the same was sufficient before the addition was made. *State v. Davis*, 141 M 197, 376 P 2d 727, 729.

**Sufficiency of Charge—Misspelling**

An information alleging that defendant feloniously, willfully, and of his "deliberately" premeditated malice aforethought committed the homicide in question, was not fatally defective because of the mere misspelling of the word "deliberately." *State v. Lu Sing*, 34 M 31, 35, 85 P 521.

**Technical Error**

A technical error in pleading a prior conviction in another state will not work a reversal if the punishment imposed does not exceed the proper limit. *State v. Paisley*, 36 M 237, 248, 92 P 566.

**Time and Place Are Essential**

While in this state much of the particularity required at the common law has

been dispensed with, and no defect or imperfection in form, which does not prejudice the substantial rights of the defendant, can affect a judgment of conviction, still time and place are essential elements, and must be so alleged as to enable a person of common understanding to know what is intended by the charge. *State v. Beeskove*, 34 M 41, 50, 85 P 376.

**Waiver of Objection**

Where, after plea of not guilty, county attorney asked permission to amend information and counsel for defendant stated there was no objection, any objection to the amendment of the information to include a prior conviction was waived. *State ex rel. Treat v. District Court*, 122 M 249, 200 P 2d 248.

**DECISIONS UNDER FORMER LAW****Amendment of Information**

Former statute permitting amendment of indictment or information on trial where variance as to time, place, person or thing appeared was constitutional and conferred power on court to grant permission to the county attorney in a prosecution under the liquor law to amend the information at the close of the state's case by changing the date on which the offense was charged to have been committed. *State v. Terry*, 77 M 297, 298, 250 P 612.

**Sufficiency of Charge**

Under former section making all forms of pleading and rules by which sufficiency of pleadings is to be determined those prescribed by code, an information was sufficient where it conformed substantially to statutory form and rules and where there was no imperfection in matter or form thereof tending to the prejudice of a substantial right of the defendant on its merits. *State v. Stickney*, 29 M 523, 528, 75 P 201.

**95-1506. Prior conviction.** When the state seeks increased punishment of the accused as a prior convicted felon under section 94-4713, notice of that fact must be given in writing to the accused or his attorney before the entry of a plea of guilty by the accused, or before the case is called for trial upon a plea of not guilty. Such notice must conform to the following provisions:

(a) The notice must specify the prior convictions alleged to have been incurred by the accused.

(b) The notice and the charges of prior convictions contained therein shall not be made public nor in any manner be made known to the jury before the jury's verdict is returned upon the felony charge provided that if the defendant shall testify in his own behalf he shall nevertheless be subject to impeachment as provided in section 93-1901-11, R. C. M. 1947, as amended.

(c) If the accused is convicted upon the felony charge, the notice, together with proper proof of timely service, shall be filed with the court before the time fixed for sentence. The court shall then fix a time for hearing with at least three (3) days' notice to the accused.

(d) The hearing shall be held before the court alone. If the court finds any of the allegations of prior conviction true, the accused shall be sentenced under the provisions of section 94-4713.

**History:** En. 95-1506 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968.

**Cross-References**

Second offense, how punished after conviction of former offense, sec. 94-4713.



**Amended Information**

Where the state on the day of trial filed an amended information changing the charge from robbery, to robbery and a prior conviction of forgery, and the defendant was given no opportunity to either admit or deny the previous conviction, such amendment was substantive, increased the minimum penalty, and was

reversible error. *State v. Knight*, 143 M 27, 387 P 2d 22.

**Not Retroactive**

The statute precluding disclosure to the jury, in a criminal proceeding, of any prior convictions does not apply retroactively to a criminal trial prior to the effective date of the statute. *State v. Gray*, — M —, 447 P 2d 475.

## DECISIONS UNDER FORMER LAW

**Plea of Guilty**

Former statute providing that jury should determine whether accused has been previously convicted contemplated that the answer to charge or allegation of prior conviction should be an admission or denial, but a plea of guilty was an admission of the charge. *State ex rel. Treat v. District Court*, 122 M 249, 200 P 2d 248, 249.

**Plea of Not Guilty**

Contention of petitioner for writ of habeas corpus that his confinement was illegal because information was amended

before trial to charge a previous conviction of a felony and that while he entered a plea of not guilty to such charge of previous conviction the jury made no reference to it in their verdict, as required by statute, was completely false, where the verdict stated that the jury found defendant guilty of lewd and lascivious act upon a child, as alleged in the information, and found the charge of previous lewd and lascivious acts upon a child as alleged in the information true and left the fixing of his punishment to the court. In *re Davis' Petition*, 139 M 622, 365 P 2d 948, 949.

## CHAPTER 16

## ARRAIGNMENT OF DEFENDANT

- Section 95-1601. Arraignment defined.  
 95-1602. Place of arraignment.  
 95-1603. Presence of defendant.  
 95-1604. Bringing defendant into court.  
 95-1605. Joint defendants.  
 95-1606. Procedure on arraignment.  
 95-1607. Time allowed to answer.  
 95-1608. Irregularity of arraignment.

**95-1601. Arraignment defined.** Arraignment is the formal act of calling the defendant into open court to answer the charge against him.

**History:** En. 95-1601 by Sec. 1, Ch. 196, L. 1967.

**95-1602. Place of arraignment.** The defendant shall be arraigned in the court in which the indictment, information or complaint is filed, unless before arraignment the cause has been removed to another court, in which case he shall be arraigned in that court.

**History:** En. 95-1602 by Sec. 1, Ch. 196, L. 1967.

**95-1603. Presence of defendant.** If the offense charged is a felony, the defendant must be personally present for arraignment; but if a misdemeanor, he may appear by counsel.

**History:** En. 95-1603 by Sec. 1, Ch. 196, L. 1967.

**95-1604. Bringing defendant into court.** The court may direct any official who has custody of the defendant to bring him before the court to be arraigned.

**History:** En. 95-1604 by Sec. 1, Ch. 196, L. 1967.

**95-1605. Joint defendants.** Defendants who are jointly charged may be arraigned separately or together, in the discretion of the court.

**History:** En. 95-1605 by Sec. 1, Ch. 196, L. 1967.

**95-1606. Procedure on arraignment.** The arraignment in any court in this state must be conducted in the following manner:

(a) The arraignment must be in open court.

(b) The court must inquire of the defendant or his counsel the defendant's true name and if the defendant's true name be given as any other than that used in the charge, the court must order the defendant's name to be substituted for the name under which he is charged, and the subsequent proceedings must be conducted with the defendant charged under that name, but in the discretion of the court the defendant may also be referred to by the name by which he was first charged.

(c) The court must determine whether the defendant is under any disability which would prevent the court in its discretion from proceeding with the arraignment. The arraignment may be continued until such time as the court determines the defendant is able to proceed.

(d) The defendant shall be advised by the court as follows:

(1) Of the nature of the crime charged against him;

(2) Of the punishment as set forth by statute for the crime charged;

(3) If the defendant appears for arraignment without counsel the court shall advise him of his right to counsel and of his right to assigned counsel if he is unable to employ counsel. If counsel is or has been waived by the defendant the court shall ascertain if the waiver is or was voluntary before proceeding;

(4) Of the time prescribed by statute to enter a plea;

(5) Of his right to secure bail to release him from custody.

(e) The court, or the clerk or county attorney under its direction must deliver to the defendant a true copy of the indictment, information or complaint, including the endorsements thereon and the list of witnesses, when required, and read the indictment, information or complaint to the defendant, unless the defendant or his counsel waives such reading, and ask him whether he pleads guilty or not guilty to the indictment, information or complaint.

The defendant shall enter a plea of guilty or not guilty to the indictment, information or complaint. If the defendant refuses to plead to the indictment, information or complaint a plea of not guilty must be entered.

The court may refuse to accept a plea of guilty and shall not accept the plea of guilty without first determining that the plea is voluntary with an understanding of the charge.

(f) The court must prepare and keep a written record of all arraignment proceedings. In district courts a verbatim record of all arraignment proceedings must be made, preserved and filed with the court.

**History:** En. 95-1606 by Sec. 1, Ch. 196, L. 1967.

#### Conditional Pleas Not Authorized

Held, under former statutes, that since the codes make no provision permitting one charged with a criminal offense to enter a conditional plea to the effect that he pleads guilty provided the punishment imposed be not greater than that designated, the court has no authority to receive such a plea and its entry is a nullity. *State v. Dow*, 71 M 291, 299, 229 P 402.

#### Copy of Information

Where defendant raised objection that copy of information furnished him was materially different from the information on which he was about to be tried, which objection court sustained, and required defendant to be furnished with a true copy, as required by former statute, a refusal of the request constituted reversible error under this section, the record showing that no plea was entered at the trial; former provision requiring that accused, on arraignment, be given a copy of the information meant a true copy. *State v. De Wolfe*, 29 M 415, 74 P 1084, overruled on other grounds in *State v. Penna*, 35 M 535, 546, 90 P 787.

#### Defendant's Refusal To Plead

Where the record discloses that the defendant refused to plead to any charge contained in the indictment, statute is sufficiently complied with by the action of the court in ordering a plea of "not guilty to all charges contained in the indictment." *State v. Clancy*, 20 M 498, 502, 52 P 267.

Where time for entering plea arrived, requiring defendant to plead to information, even though in absence of counsel, was not error and where defendant stood mute, court properly entered a plea of not guilty for him. *State v. Stevens*, 119 M 169, 172 P 2d 299, 301.

#### Endorsements on Information

It would appear from former section that the endorsements on the information are not considered part of the information. *State v. De Lea*, 36 M 531, 533, 93 P 814.

#### Mandatory Duties on Arraignment

The provisions of predecessor section were mandatory, and it was the duty of the district court to inform the defendant that he had a right to counsel, that if he was without means to employ counsel that counsel would be provided for him by the state without cost and to inform him of the extent of the penalty provided by law; the record was required to show that statutory provisions as to period of time between plea and sentence were complied with. *State ex. rel. Biebinger v. Ellsworth*, 147 M 512, 415 P 2d 728.

#### Pleas

Former provision authorizing four kinds of pleas to an indictment or information were not applicable in an action for death by wrongful act where a violation of the statute requiring the use of safety-cages in mines was charged. *Maronen v. Anaconda Copper Min. Co.*, 48 M 249, 261, 136 P 968.

Defendant was charged with liquor violations in four counts; he entered a plea of not guilty "to the offense charged." Two counts were dismissed and he was found guilty on the remaining two. Held, as against the contention that the conviction cannot be sustained because defendant never pleaded to the charges contained in the two counts on which conviction was had but had pleaded only to one offense, not ascertained, that his plea to the information as a whole was authorized, and therefore sufficient. *State v. Grasswick*, 77 M 326, 328, 250 P 613.

#### When Motion To Change Plea to Not Guilty Properly Denied

Quaere: Is there a plea of "not guilty by reason of insanity"? Where defendant pleaded guilty on two charges of murder, was sentenced to life imprisonment on each, and three years later filed motions for leave to withdraw his pleas of guilty and substitute pleas of not guilty by reason of insanity caused by alcoholism, held, under the facts and circumstances presented, that the motions were properly denied. *State v. Hukoveh*, 115 M 125, 131, 139 P 2d 538.

### DECISIONS UNDER FORMER LAW

#### Once in Jeopardy

The plea of "once in jeopardy," authorized by former statute, included the plea of former conviction or acquittal,

also authorized by same statute. *State v. Keerl*, 33 M 501, 515, 85 P 862, affirmed 213 US 135, 53 LEd 734, 29 Sct 469.



**95-1607. Time allowed to answer.** If, on the arraignment, the defendant requires it, he must be allowed a reasonable time, not less than one (1) day, to answer or otherwise plead to the indictment, information or complaint. The answer may include appropriate pretrial motions.

**History:** En. 95-1607 by Sec. 1, Ch. 196,  
L. 1967.

#### Cross-Reference

Defendant's right to reasonable time for preparation of trial after plea, sec. 95-1907.

#### Time for Entering Plea

Where time for entering plea arrived, requiring defendant to plead to information, even though in absence of counsel, was not error and where defendant stood mute court properly entered a plea of not guilty for him. *State v. Stevens*, 119 M 169, 172 P 2d 299, 301.

**95-1608. Irregularity of arraignment.** No irregularity in the arraignment which does not affect the substantial rights of the defendant shall affect the validity of any proceeding in the cause if the defendant pleads to the charge or proceeds to trial without objecting to such irregularity.

**History:** En. 95-1608 by Sec. 1, Ch. 196,  
L. 1967.

## CHAPTER 17

### PRETRIAL MOTIONS

- Section 95-1701. Defenses and objections which may be raised before trial.  
 95-1702. Defenses and objections which must be raised before trial.  
 95-1703. Dismissal on motion of court or application of attorney prosecuting.  
 95-1704. Time of making motion.  
 95-1705. Hearing on motion.  
 95-1706. Effect of determination.  
 95-1707. Transfer of trial.  
 95-1708. Motion for continuance.  
 95-1709. Substitution of judge.  
 95-1710. Change of place of trial.

**95-1701. Defenses and objections which may be raised before trial.** Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion to dismiss or for other appropriate relief. The motion shall state with particularity the grounds therefor and the order or relief sought.

**History:** En. 95-1701 by Sec. 1, Ch. 196,  
L. 1967.

#### Compiler's Notes

A number of cases involving former statutes having no specific counterpart

in the new Code of Criminal Procedure have been annotated under this chapter. Only those points which would be decided differently under the new code or which construe a repealed statute are designated as Decisions Under Former Law.

**95-1702. Defenses and objections which must be raised before trial.** Defenses and objections based on defects in the institution of the prosecution or in the complaint, indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only before trial by motion to dismiss or for other appropriate relief. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the

indictment, information, or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

**History:** En. 95-1702 by Sec. 1, Ch. 196, L. 1967.

#### **Amendment of Information**

There was no error in permitting information to be amended to allege prior conviction when there was no objection by defendant and defendant's attorney consented to its filing. *State ex rel. Treat v. District Court*, 122 M 249, 200 P 2d 248.

#### **Attacking Charge on Remand**

When a first conviction is set aside the defendant is not precluded upon a remand for a new trial from attacking the indictment or information. *State v. Hale*, 129 M 449, 291 P 2d 229, 230, overruled on another point in 142 M 459, 462, 384 P 2d 749. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236.)

#### **Demurrer**

The objection that the facts stated in an information do not constitute a public offense may be taken either by demurrer or at the trial, under a plea of not guilty, or after the trial, in arrest of judgment. *State v. Smith*, 58 M 567, 570, 194 P 131.

Defendant's demurrer to the information charging him with the crime of obtaining money by false pretenses on the ground that it failed to state a public offense was properly overruled by the trial court for the reason that the information contained all of the elements of the offense of obtaining money by false pretenses. *State v. Lagerquist*, — M —, 445 P 2d 910.

#### **Demurrer Because Uncertain and Indirect**

If a charge of crime is not direct and certain, it is open to attack on special demurrer. *State v. Pemberton*, 39 M 530, 533, 104 P 556.

#### **Demurrer on the Grounds That the Action Is Barred by the Statute of Limitations**

Where an information for a misdemeanor was filed more than one year and ten months after alleged offense, and it alleged that, on or about that time, the defendant left the state and afterwards resided without the state, the defendant could properly demur to the information on ground that prosecution was barred by the statute of limitations. *State v. Clemens*, 40 M 567, 571, 107 P 896.

Defendant was charged with taking and using an automobile without the consent

of the owner, under section 94-3305, which makes the offense punishable by fine or imprisonment in the county jail, or by imprisonment in the state penitentiary not exceeding five years. The information was not filed until fourteen months after the commission of the offense. Held, that the district court erred in sustaining a demurrer to the pleading on the ground that, the offense being a misdemeanor, the limitation of one year fixed by section 94-5703, within which the information could be filed had expired, and holding that it was without jurisdiction to proceed. *State v. Atlas*, 75 M 547, 549, 244 P 477.

#### **Dismissal as a Bar**

Dismissal of an information before defendant is called upon to plead or before the jury is impaneled and sworn does not bar a subsequent prosecution for the same offense. *State v. Knilians*, 69 M 8, 15, 220 P 91.

#### **Dismissal Not Bar in Contempt Proceedings**

While a contempt proceeding is criminal in its nature it is not a criminal prosecution, and where such a proceeding was dismissed before hearing without prejudice, and a new one was thereafter instituted by an attorney as relator, dismissal of the first citation did not constitute a bar to any further prosecution under former statute, and contemnor's special plea in bar was insufficient either to constitute a bar or a defense to the proceeding in contempt. *State ex rel. Hall v. Niewoehner*, 116 M 437, 449, 155 P 2d 205.

#### **Facts Stated Do Not Constitute a Public Offense**

Information charging a violation of section 94-1805 (obtaining money under false pretenses) which only avers that the defendant made a "false" or "fraudulent" representation is not sufficient. It must expressly allege the facts which made the stated pretense false. *State v. Hale*, 129 M 449, 291 P 2d 229, 232, distinguished in 135 M 449, 453, 340 P 2d 157, 160, overruled on another point in 142 M 459, 462, 384 P 2d 749. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236.)

#### **Former Jeopardy**

Former section providing that the dismissal of a prosecution for felony is not a bar to a second prosecution was not decisive of the question of former jeopardy. *State v. Gaimos*, 53 M 118, 121, 162 P 596.

Defendant charged with sale of intoxicating liquor to a minor was not placed in former jeopardy in violation of section 18, article III of the Montana constitution, by a dismissal of the complaint upon his demurrer in justice court without any further proceedings. *State v. Moore*, 138 M 379, 357 P 2d 346, 347.

#### **How To Object to Information on the Grounds of Duplicity**

An objection to an information on the grounds of duplicity is addressed to the jurisdiction of the court rather than to the form of the information and may be raised by an objection to the introduction of evidence and a motion to compel on election. *State v. Mjelde*, 29 M 490, 75 P 87.

#### **Improper Joinder of Counts**

The objection that several offenses are improperly united under separate counts in an information cannot be raised by a motion to require the prosecution to elect upon which one count it would rely for conviction, but must be taken by demurrer. *State v. Marchindo*, 65 M 431, 435, 211 P 1093.

#### **Motion In Arrest of Judgment**

A motion in arrest of judgment must be founded on some defect in the information, and extrinsic evidence cannot be received at a hearing of such motion. *State v. Tully*, 31 M 365, 371, 78 P 760. See *State v. Van*, 44 M 374, 383, 120 P 479; *State v. Caterni*, 54 M 456, 458, 171 P 284.

Resort to evidence extrinsic to the information to show that it does not accurately state the facts is not permissible on motion in arrest. *State v. Caterni*, 54 M 456, 458, 171 P 284.

The motion in arrest of judgment challenges the jurisdiction of the state to enact, and of the court to enforce, the act under consideration. That question was raised, elaborated upon and decided against the contention here made in *State v. Kahn*, 56 M 108, 182 P 107; *State v. Schaffer*, 59 M 463, 467, 197 P 986.

The objection that the information does not state facts constituting a public offense is not waived by failure to demur, but may be raised by motion in arrest of judgment. *State v. Wehr*, 57 M 469, 188 P 930.

A motion in arrest of judgment lies only for certain defects on the face of the information not waived by failure to demur; hence where there was no demurrer filed and the information was sufficient, assignment of error that the trial court erred in denying the motion need not be considered. *State v. Wong Sun*, 114 M 185, 199, 133 P 2d 761.

#### **Motion Proper Remedy When Information Has Been Filed Without Leave of Court**

When an information has been filed without leave of court and before the examination and commitment of the defendant, an appropriate remedy is by motion to quash, upon the ground that the information was not presented as prescribed by law. *State v. McCaffery*, 16 M 33, 37, 40 P 63.

#### **Order Sustaining Demurrer to Information Constitutes Judgment**

Under former section, an order sustaining a demurrer to an information constituted a judgment. *State v. Safeway Stores, Inc.*, 106 M 182, 197, 76 P 2d 81.

#### **Presence of Unauthorized Person**

Under former statute, the very appearance of an unauthorized person before the grand jury is sufficient to set aside the indictments, without a showing of prejudice. *State ex rel. Porter v. District Court*, 124 M 249, 220 P 2d 1035, 1051, distinguished in 131 M 254, 261, 309 P 2d 316, 320.

#### **Presence of Unauthorized Person—Special Prosecutor Before Grand Jury**

The appearance of "special prosecutor" before the grand jury was ground for setting aside the indictment under former statute. *State ex rel. Porter v. District Court*, 124 M 249, 220 P 2d 1035, distinguished in 131 M 254, 261, 309 P 2d 316, 320.

#### **Presence While Indictment under Consideration**

Under former section requiring indictment to be set aside when a person was present during session of grand jury and charge was under consideration, the case was "under consideration" when witnesses were being examined. *State ex rel. Porter v. District Court*, 124 M 249, 220 P 2d 1035, 1044, distinguished in 131 M 254, 261, 309 P 2d 316, 320.

#### **Special Plea in Bar**

A special plea in bar to a criminal proceeding is but a preliminary matter in nowise connected with the trial, since the plea must be entered before the accused pleads to the merits. *State ex rel. Odenwald v. District Court*, 98 M 1, 6, 38 P 2d 269.

#### **Waiver**

If a defendant, on a second trial, does not ask to withdraw the plea of not guilty, interposed at the first trial, and have another and different plea substituted, it is



a waiver of any grounds of objection to the information which might have been properly raised by motion to quash. *State v. McCaffery*, 16 M 33, 37, 40 P 63.

Failure to move to set aside information on ground that it had not been subscribed by the county attorney waived the objection to the action of the court in permitting the information to be subscribed before demurrer or plea. *State v. Peterson*, 24 M 81, 85, 60 P 809.

Defendant's failure to raise, by special demurrer, the question that an information charged two distinct offenses, contrary to former statute, constituted a waiver of such objection. *State v. Mahoney*, 24 M 281, 285, 61 P 647; *State v. Rodgers*, 40 M 248, 251, 106 P 3.

By entering his plea without a written motion to set aside the information, and consenting to go to trial, defendant waived his right to question the propriety of proceedings prior to the filing of the information. *State v. Vinn*, 50 M 27, 32, 144 P 773.

By pleading to the information without interposing a demurrer that the facts stated did not constitute a public offense, defendant waived objections to its sufficiency. *State v. Fowler*, 59 M 346, 352, 196 P 992.

By his failure to object to the information charging him with a violation of the Prohibition Act, before demurrer or plea, on the ground that it was filed prior to a

preliminary hearing, defendant waived his right to challenge the foundation of the information. *State v. Sorenson*, 65 M 65, 70, 210 P 752.

#### **What Is Waived by Motion in Arrest of Judgment**

Where an information is attacked in the trial court by motion in arrest of judgment, all questions arising upon alleged defects in the information, except that of want of jurisdiction and the sufficiency of the facts to state a public offense, are waived. *State v. Pemberton*, 39 M 530, 533, 104 P 556; *State v. Fowler*, 59 M 346, 352, 196 P 992.

#### **When Failure To Object by Motion Waives Objection**

Where an accused person pleads to an information, without interposing the objection, by motion, that, having already been prosecuted by indictment, he cannot be prosecuted by information, that objection is waived. *State v. Vinn*, 50 M 27, 33, 144 P 773.

#### **When Insufficiency Does Not Warrant Dismissal**

Insufficiency of the information does not warrant a dismissal of the action if in the opinion of the court the objection may be avoided by an amended information. *State ex rel. Freebourn v. District Court*, 105 M 77, 81, 69 P 2d 748.

### **DECISIONS UNDER FORMER LAW**

A number of cases involving former statutes having no specific counterpart in the new Code of Criminal Procedure have been annotated under this chapter. Only those points which would be decided differently under the new Code or which construe a repealed statute are designated as Decisions Under Former Law.

#### **Attorney General's Presence before Grand Jury**

Former statute providing that indictment must be set aside when a person is permitted to be present during session of grand jury did not affect right of the attorney general to be present before the grand jury. *State ex rel. Nolan v. District Court*, 22 M 25, 31, 55 P 916.

#### **Bill of Particulars**

Former section providing that the only pleading on part of defendant was either a demurrer or a plea was exclusive and there is no section of the former Criminal Code directing or requiring a bill of particulars to be furnished to a defendant charged with a criminal offense. *State v. Bosch*, 125 M 566, 242 P 2d 477, 487.

#### **Demurrer**

Section stating when a demurrer, if allowed, would bar another prosecution was intended to safeguard the rights of the accused against an altogether unwarranted prosecution, or the possible malice of the prosecuting officer, but was not intended to shield an offender against prosecution merely because of some technical defect, irregularity, or insufficiency in the original information or indictment. *State v. Vinn*, 50 M 27, 34, 144 P 773; *In re Palm*, 52 M 558, 560, 160 P 348.

Under former law providing for the filing of demurrers, a defendant could wait until the ruling upon the demurrer before entering his plea. *State ex rel. Sullivan v. District Court of Second Judicial Dist.*, 150 M 203, 433 P 2d 146.

#### **Dismissal as a Bar**

Under former statute making dismissal a bar to subsequent prosecution except if offense was a felony, dismissal of second information filed with leave of court, charging the same offense, burglary, upon which a prior information had been dismissed one month previous for failure to bring the cause to trial within six months after

filing, held erroneous under this section, burglary being a felony. *State v. McGowan*, 113 M 591, 593, 131 P 2d 262.

Under former statute, held that in a justice of the peace proceeding where a complaint is dismissed upon request by the state so that a new complaint may be issued which is substantially the same as the first complaint but amends it as to the time the offense was committed, such dismissal is not a bar to the prosecution for the misdemeanor. *State ex rel. Borberg v. District Court*, 125 M 481, 240 P 2d 854, 857, 859 to 861, distinguished in 130 M 299, 302, 300 P 2d 952, 953 and in 138 M 379, 381, 357 P 2d 346.

Defense of bar arising under former statute from dismissal of misdemeanor could properly be raised by a plea of not guilty, and all matters in proof thereof were admissible under the plea. *State v. Porter*, 130 M 299, 300 P 2d 952, 954.

Former statute making dismissal a bar to subsequent prosecution except if offense was a felony applied only to offenses for which an information was filed or an indictment found. *State v. Moore*, 138 M 379, 357 P 2d 346, 347.

#### **Failure To Endorse Names on Indictment**

Indictment must be set aside where witnesses' names on indictment were Richard Roe and John Doe and witnesses' real names were not supplied to defendant and if there were no witnesses that fact should be shown by the prosecution either by a verified pleading or under oath. *State ex rel. Porter v. District Court*, 124 M 249, 220 P 2d 1035, 1043. (In this case it was said that if other grounds had not required setting aside of indictment, court would have been disposed to return case to trial court to permit defendant to interrogate prosecutor and grand jury foreman as to whether there were witnesses whose names were not endorsed on indictment.)

If person has gone to trial under indictment on which witnesses' names were designated as Richard Roe and John Doe and convicted the supreme court would be required to sustain the conviction if possible and burden would be on defendant to show prejudice. *State ex rel. Porter v. District Court*, 124 M 249, 220 P 2d 1035, 1043.

Where timely motion was made before trial former statute required the indictment to be set aside when names of witnesses were not endorsed on indictment. *State ex rel. Porter v. District Court*, 124 M 249, 220 P 2d 1035, 1043.

Where district court was ordered to set aside indictment because witnesses' names were not endorsed thereon, prosecution

for the offenses charged was not barred but the cases were ordered resubmitted to the county attorney for filing of such information as he believed necessary. *State ex rel. Porter v. District Court*, 124 M 249, 220 P 2d 1035, 1051, distinguished in 131 M 254, 261, 309 P 2d 316, 320.

#### **Grounds Exclusive**

The grounds for setting aside an indictment of a grand jury as set forth in former statute are exclusive. *State ex rel. Porter v. District Court*, 124 M 249, 220 P 2d 1035, 1037.

#### **More than One Offense**

Where an information charges two distinct offenses, as prohibited by former statute, the remedy is not by motion to compel the county attorney to elect, as between the two offenses charged, the one upon which he will seek conviction; the objection can only be taken by demurrer; and the objection, so far as any question of pleading is concerned, is waived by pleading over and failing to demur. *State v. Kanakaris*, 54 M 180, 182, 169 P 42.

The objection that the information states more than one offense, as prohibited by former statute, can only be made by demurrer, and when not made before plea is waived. *State v. Toy*, 65 M 230, 233, 211 P 303.

#### **Motion in Arrest of Judgment**

A motion in arrest of judgment was required to be founded on some defect in the information mentioned in former section setting forth grounds of demurrer and extrinsic evidence could be received on the hearing of such motion. *State v. Tully*, 31 M 365, 371, 78 P 760. See *State v. Van*, 44 M 374, 383, 120 P 479; *State v. Caterni*, 54 M 456, 458, 171 P 284.

Under former statute stating grounds for demurrer a motion in arrest lay only for certain defects appearing on the face of the indictment or information, not waived by failure to demur. *State v. Caterni*, 54 M 456, 458, 171 P 284.

#### **Motion Must Be in Writing**

Motion to set aside indictment or information was required to be in writing, subscribed by the defendant or his counsel, and to specify the particular ground of objection. *State v. Chevigny*, 48 M 382, 384, 138 P 257.

#### **Setting aside Information**

Former section stating when indictment or information must be set aside was construed, not as prescribing one indispensable method of procedure, and one only, but as pertaining to the two constitutional methods of procedure where an information was filed, neither one of



which was indispensable, yet either of which was correct, as the conditions and facts of the case might warrant. *State v. Bowser*, 21 M 133, 136, 53 P 179.

#### Sufficiency of Information

An information which charges defendant with an infamous act against nature and then in describing the manner in which the crime was committed alleges an assault is not open to the charge that it is duplicitous. Allegations with respect to the assault are merely descriptive of the means of accomplishing the infamous crime against nature which never could be perpetrated against an unwilling participant without an assault. *State v. McSloy*, 127 M 265, 261 P 2d 663, 664.

#### Waiver

The objection that the information states more than one offense, as prohibited by former statute, can only be made by de-

murrer, and when not made before plea is waived. *State v. Toy*, 65 M 230, 233, 211 P 303.

#### Where More Than One Offense Not Stated

In prosecution for embezzlement of city water rentals, information alleging that employee did on a certain day in 1931 "and from thence continuously" on divers dates to a given date two years later receive public funds aggregating a given amount which he failed to pay over to the city treasurer, held not open to objection of stating more than one offense nor being duplicitous, under the rule that in such case there is no duplicity where the embezzlement is accomplished by a continuous series of acts, which the state might treat as constituting one embezzlement, irrespective of ordinance requiring daily accounting. *State v. Kurth*, 105 M 260, 262, 72 P 2d 687.

**95-1703. Dismissal on motion of court or application of attorney prosecuting.** The court may, either on its own motion or upon the application of the attorney prosecuting, and in furtherance of justice, order an action, complaint, information, or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes.

**History:** En. 95-1703 by Sec. 1, Ch. 196, L. 1967.

#### Dismissal on Application of Prosecutor

The filing of second information, alleging same facts as contained in first information, was in fact an amendment in a matter of substance of the first information in violation of defendant's rights under statute proscribing amendments in a matter of substance, which defendant, represented by competent counsel, waived for failure to raise timely objection, and which defect could have been rectified in the first instance if the prosecuting attorney had availed himself of the statute providing for the dismissal of information by having the first information dismissed and then filing a second information. *Gransberry v. State* 149 M 158, 423 P 2d 853.

#### "In Furtherance of Justice"

Since the legislature did not define the phrase "in furtherance of justice" as used in predecessor to this section, it is left for the court's judicial discretion, exercised in view of a defendant's constitutional rights and the interests of society, to determine what particular grounds warrant dismissal of a pending criminal action, and mandamus will not issue to control the court's discretion. *State ex rel. Anderson v. Gile*, 119 M 182, 172 P 2d 583, 585.

#### Operation and Effect

After dismissal of an indictment because of substantial defects therein, the district court may, but is not required to, submit the case to another grand jury, or permit, or order, the county attorney to file an information charging the defendant with the same offense ineffectually sought to be charged against him by the indictment. *State v. Vinn*, 50 M 27, 33, 144 P 773.

#### Prompt Trial

Under former statute providing that court shall dismiss charges against a defendant who is not brought to trial within six months after the filing of the information unless the trial has been postponed upon application of defendant, defendant was entitled to dismissal, even though defendant had demurred to the information and had not entered a plea, since county attorney had failed to call up the demurrers for a hearing as he was entitled to do before the six-month period had expired. *State ex rel. Sullivan v. District Court of Second Judicial Dist.*, 150 M 203, 433 P 2d 146.

Although the defendant was not brought to trial within six months after the filing of the information as required under former law, the defendant was not denied his right to a speedy trial because trial had originally been set for a date within the six-month period and was removed from the trial calendar only when the defend-



ant sought supervisory control on an original procedure filed in the supreme court, even though the cause was not set for trial until two months after the supreme

court had denied defendant's petition for supervisory control and returned the matter to the trial court. *State v. Lagerquist*, — M —, 445 P 2d 910.

### DECISIONS UNDER FORMER LAW

#### Prompt trial

Under former section one charged with crime was entitled to a dismissal of the information whether he was imprisoned in the county jail or at liberty upon bail, if not brought to trial within six months after its filing, unless the state could show good cause why dismissal should not follow. *State v. Arkle*, 76 M 81, 86, 245 P 526.

That trial judge deemed it unwise, inexpedient and unnecessary to call a jury during the term at which a defendant should have been tried in order to come within the limitation of six months prescribed by former statute for bringing him to trial, held not "good cause" justifying denial of motion for dismissal. *State v. Arkle*, 76 M 81, 86, 245 P 526.

A defendant was not entitled, under former statute, to a dismissal of charge against him on ground that he was not brought to trial within six months after the information was filed if the delay was caused by a mistrial. *State v. Turlok*, 76 M 549, 558, 248 P 169.

Where defendant was tried within a week after the offense was committed, section 16, article III of the constitution, providing for a speedy trial was complied with, but where, after conviction, he appealed to the district court for a trial de novo, he did not have the benefit of former section providing for dismissal of prosecution when not postponed on defendant's application if not brought to trial within six months, the section having no application under such facts. *State v. Schnell*, 107 M 579, 582, 88 P 2d 19.

Statutes providing for the discharge of one accused of crime unless trial is had within a stated time after filing of information or indictment, are enacted for the purpose of enforcing the constitutional right to a speedy trial, section 16, article III of the constitution. *State v. McGowan*, 113 M 591, 594, 131 P 2d 262.

Under former section whether motion to dismiss information because of delay

in trial should be granted depended on whether or not "good cause" was shown for delay. *State v. Saginaw*, 124 M 225, 220 P 2d 1021, 1025; *State v. McRae*, 124 M 238, 220 P 2d 1025, 1027, distinguished in 130 M 299, 301, 300 P 2d 952, 953.

Under former statute permitting dismissal for failure to bring accused to trial within six months, time elapsing between the date the demurrer to the information was erroneously sustained and date of the remittitur of the supreme court reversing the decision was to be excluded from six months' period. *State v. Israel*, 124 M 152, 220 P 2d 1003, 1013.

In determining that defendants' right to a speedy trial had not been violated, under the constitution provision that an accused shall have the right to a speedy public trial and under former statute providing for the dismissal of an action not brought to trial within six months after the filing of an information so long as the trial has not been postponed upon the application of defendant, the court counted the days of delay which had not been caused by defendants, the sum total of which was less than six months, notwithstanding the fact that more than six months had passed after the filing of the information. *State ex rel. Thomas v. District Court of Thirteenth Judicial Dist.*, 151 M 1, 438 P 2d 554.

#### Waiver

Under former statute providing for dismissal if accused is not brought to trial within six months after filing of information, it was only by making timely objection before actively participating in the trial that defendant could avail himself of the right to have the prosecution dismissed; hence where motion to dismiss on that ground was not made until the trial had commenced and the jury had been sworn, he waived the right. *State v. Test*, 65 M 134, 136, 211 P 217.

**95-1704. Time of making motion.** The motion shall be made before the plea is entered, but the court for cause may permit it to be made within a reasonable time thereafter.

**History:** En. 95-1704 by Sec. 1, Ch. 196, L. 1967.

**95-1705. Hearing on motion.** A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue.

**History:** En. 95-1705 by Sec. 1, Ch. 196, L. 1967.

**95-1706. Effect of determination.** If a motion is determined adversely to the defendant he shall plead if he has not previously pleaded. A plea previously entered shall stand. If the court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom; or, if admitted to bail, his bail exonerated, or money deposited instead of bail must be refunded to him. However, if the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, or when it appears at any time before judgment that a mistake has been made in charging the proper offense, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new complaint, indictment or information.

**History:** En. 95-1706 by Sec. 1, Ch. 196, L. 1967.

**95-1707. Transfer of trial.** If the court determines that the motion to dismiss, based upon the grounds of lack of jurisdiction or improper place of trial, is well founded it may, instead of dismissal, order the cause transferred to a court of competent jurisdiction or to a proper place of trial.

**History:** En. 95-1707 by Sec. 1, Ch. 196, L. 1967.

**95-1708. Motion for continuance.** (a) The defendant or the state may move for a continuance. If the motion is made more than thirty (30) days after arraignment or at any time after trial has begun the court may require that it be supported by affidavit.

(b) The court may upon the motion of either party or upon the court's own motion order a continuance if the interests of justice so require.

(c) All motions for continuance are addressed to the discretion of the trial court and shall be considered in the light of the diligence shown on the part of the movant.

(d) This section shall be construed to the end that criminal cases are tried with due diligence consonant with the rights of the defendant and the state to a speedy trial.

**History:** En. 95-1708 by Sec. 1, Ch. 196, L. 1967.

#### **Absence of Witnesses**

An affidavit, filed on the day set for trial, in support of a motion for a continuance on the ground of the absence of witnesses, which fails to disclose the date upon which such witnesses left the state, is insufficient. *State v. Showen*, 60 M 474, 476, 199 P 917.

An affidavit in support of continuance on ground of absence of witnesses must disclose specifically the facts expected to

be proved by the absent witnesses, and set forth that if such witnesses were present they would testify to those facts; the general statement that, if present, they would testify to facts material to affiant's defense being insufficient. *State v. Showen*, 60 M 474, 476, 199 P 917.

An affidavit in support of continuance on ground of absence of witnesses must disclose that the facts which defendant expects to prove by the absent witnesses cannot be proved by other witnesses available at the trial; since a continuance for the purpose of obtaining evidence which

would be merely cumulative need not be granted. *State v. Showen*, 60 M 474, 476, 199 P 917.

#### **Prejudice of Potential Jurors**

In the absence of a showing of abuse

of discretion an order refusing continuance of a criminal trial, asked for on the grounds that a large portion of the persons qualified for jury duty in the county were prejudiced, will be affirmed. *State v. Collins*, 88 M 514, 519, 294 P 957.

**95-1709. Substitution of judge.** (a) The defendant or the prosecution may move the court in writing for a substitution of judge on the ground that he cannot have a fair and impartial hearing or trial before said judge. The motion shall be made at least fifteen (15) days prior to the trial of the case, or any retrial thereof after appeal, except for good cause shown. Upon the filing of such a motion the judge against whom the motion is filed shall be without authority to act further in the criminal action, motion or proceeding but the provisions of this section do not apply to the arrangement of the calendar, the regulation of the order of business, the power of transferring the criminal action or proceeding to some other court, nor to the power of calling in another judge to sit and act in such criminal action or proceeding, providing that no judge shall so arrange the calendar as to defeat the purposes of this section. Not more than one (1) judge can be disqualified in the criminal action or proceeding, at the instance of the prosecution and not more than one (1) judge at the instance of the defendant or defendants.

If either party in any matter above-mentioned shall file the motion as herein provided such party may not complain of any reasonable delay as the result thereof.

The provision of this section shall be inapplicable to any person in any cause involving a direct contempt of court.

(b) In addition to the provision of subsection (a) any defendant may move at any time for substitution of judge for cause, supported by affidavit. Upon the filing of such motion the court shall conduct a hearing and determine the merits of the motion.

**History:** En. 95-1709 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968.

#### **Right to Disqualify Judge**

Section 93-901, which applies only to civil cases, is inapplicable to disqualification of judge in a criminal proceeding. In re *Larocque's* Petition, 139 M 405, 365 P 2d 950, 951.

The right to disqualify a judge in a criminal proceeding is purely statutory. It has no constitutional nor common-law basis. Therefore, statutory conditions precedent must be followed. In re *Larocque's* Petition, 139 M 405, 365 P 2d 950, 951.

Where defendant filed no affidavit for disqualification of judge in criminal proceeding he waived the provisions of predecessor section. In re *Larocque's* Petition, 139 M 405, 365 P 2d 950, 951.

#### **Second Arraignment**

Where affidavit of disqualification was presented after time set for arraignment,

but quashed because of untimeliness, arraignment was "irregular" but not unlawful or wrongful, and in view of defendant's rights to due process possibly being violated, new judge, before whom trial had been set, was ordered to hold another arraignment. *State ex rel. McNeal v. District Court*, 144 M 550, 399 P 2d 997.

#### **Timely Motion**

Predecessor section required affidavit of disqualification to be made fifteen days before trial on the merits, and a motion by the state to disqualify made after the trial and pending a motion for new trial was not timely. *State ex rel. Wilson v. District Court*, 143 M 543, 393 P 2d 39.

#### **Law Review**

*Affidavit for Disqualification of a District Judge for Imputed Bias In a Criminal Case Not Timely After Verdict* (*State ex rel. Wilson v. District Court*, 143 M 543, 393 P 2d 39) 26 Mont. L. Rev. 128 (1964).



**95-1710. Change of place of trial.** (a) The defendant or the prosecution may move for a change of place of trial on the ground that there exists in the county in which the charge is pending such prejudice that a fair trial cannot be had in such county. The motion shall be made at least fifteen (15) days prior to trial, unless, for good cause shown, it may be made thereafter.

(b) The motion shall be in writing and supported by affidavit which shall state facts showing the nature of the prejudice alleged. The defendant or the state may file counteraffidavits. The court shall conduct a hearing and determine the merits of the motion.

(c) If the court determines that there exists in the county where the prosecution is pending such prejudice that a fair trial cannot be had it shall transfer the cause to any other court of competent jurisdiction in any county where a fair trial may be had.

**History:** En. 95-1710 by Sec. 1, Ch. 196, L. 1967.

In re Larocque's Petition, 139 M 405, 365 P 2d 950, 951.

#### Application

Trial court was in error for refusing to grant a change of venue where evidence disclosed that local newspapers had fanned the feeling of the community against the defendant and that county officials themselves felt that feeling against the defendant was so high that they moved him for safety to the state prison. *State v. Dryman*, 127 M 579, 269 P 2d 796, 800. (Dissenting opinion, 127 M 579, 269 P 2d 796, 801.)

Where supreme court ordered a new trial and that it be had in some county not adjacent to Toole county because of the prejudice of the people in Toole county, trial court erred in directing that the new trial take place in Teton county. Although Teton county is not adjoining Toole county but is separated by some twenty miles, yet the word adjacent has no arbitrary meaning or definition; the term is a relative and not an absolute one, and the exact meaning of which, in any particular case, is determinable principally by the context in which it is used. *State ex rel. Dryman v. District Court*, 128 M 402, 276 P 2d 969, 970.

#### Application Necessary

Defendant in a criminal proceeding was not entitled to a change of venue where files did not contain any application for a change of place of trial. In *re Larocque's Petition*, 139 M 405, 365 P 2d 950, 951.

#### Discretion

An application for a change of place of trial is addressed to the sound discretion of the trial court and a clear abuse of discretion must be shown, or the ruling of the trial court will not be disturbed. *State v. Bischert*, 131 M 152, 308 P 2d 969, 971;

#### Opinion of Defendant

Where the affidavits of defendant's motion for a change of venue stated that "in the opinion" of the defendant he would not receive a fair trial in the county of the alleged crime and set forth reasons for that opinion but failed to show compelling evidence in support of the motion, it was not an abuse of discretion for the trial court to deny the motion. *State v. Barick*, 143 M 273, 389 P 2d 170.

#### "Place" Defined

In the expression "place of trial," the word "place" primarily means county, and not the immediate place where the trial court sits. In this connection it is equivalent to neighborhood or place of a crime, or a cause of action, or the political division within which a jury must be gathered for the trial, and is synonymous with the word "venue." *State ex rel. Sackett v. Thomas*, 25 M 226, 237, 64 P 503.

#### Prejudice of Judge

In support of an application for change of place of trial a denial of bail could not be claimed as showing prejudice by the trial judge for such is a mere preliminary matter and has nothing to do with the trial on the merits. *State v. London*, 131 M 410, 310 P 2d 571, 580.

Action of a judge in refusing to set bond pending appeal from a manslaughter conviction is not an act which prejudices a defendant during a trial. *State v. Bischert*, 131 M 152, 308 P 2d 969, 971.

#### Law Review

Criminal Law: Extensive Publicity May Prevent a Fair Trial (*People v. Jacobson*, 46 Cal. Rptr. 515, 405 P. 2d 555) 27 Mont. L. Rev. 205 (1966).

## CHAPTER 18

## PRODUCTION AND SUPPRESSION OF EVIDENCE

Section	95-1801.	Subpoenas.
	95-1802.	Depositions.
	95-1803.	Discovery, inspection, and notice.
	95-1804.	Motion to produce confession or admission.
	95-1805.	Motion to suppress confession or admission.
	95-1806.	Motion to suppress evidence illegally seized.

**95-1801. Subpoenas.** (a) Upon the request of the prosecuting attorney or the defendant or his attorney, the court or the clerk of the court shall issue subpoenas. The subpoena shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony and produce objects and documents at the time and place specified therein.

(b) **Indigent Defendants.** When the defendant is indigent a court order must be obtained if more than six (6) witnesses are to be subpoenaed. If a witness is to be paid more than the regular fee, or there are more than six (6) witnesses to be paid an order of the court or judge is needed; such order may be made upon proper showing by affidavit or otherwise.

(c) **Expenses of Witness.** When a person attends before a magistrate, grand jury, or court, as a witness in a criminal case, upon a subpoena or in pursuance of an undertaking, the judge, at his discretion, by a written order, may direct the clerk of the court to draw his warrant upon the county treasurer in favor of such witness for a reasonable sum, to be specified in the order, for the necessary expenses of the witness.

(d) In all criminal cases originally triable in the district court the following rules shall apply:

(1) Upon motion of either party and upon showing of good cause, the court may issue a subpoena prior to the trial directing any person other than the defendant to produce books, statements, papers and objects before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and the court may, upon their production, permit the books, statements, papers or objects or portions thereof to be inspected, copied, or photographed by the parties and their attorneys.

(2) Upon motion of the defendant, within a reasonable time before trial, the court may, upon a showing of good cause, at a time and place designated by the court, order the prosecution to produce prior to trial for inspection, photographing or copying by the defendant, designated books, statements, papers, or objects obtained from the defendant or others by the prosecution which are material, relevant and necessary to the preparation of the defendant's case.

(e) **Service.** A subpoena may be served by a peace officer or by any other person who is not a party and who is not less than eighteen (18) years of age, but a peace officer must serve in his county any subpoena delivered to him for service, either on the part of the state or of the defendant. The person making the service must without delay, make a written return of the service, subscribed by him, stating the time and

place of service. Service of a subpoena shall be made by delivering a copy thereof to the person named, and if ordered by the court, by tendering to those residing outside the county of trial the fee for one (1) day's attendance and the mileage allowed by law.

(f) Place of Service. A subpoena requiring attendance of a witness at a hearing or trial may be served anywhere within the state of Montana.

**History:** En. 95-1801 by Sec. 1, Ch. 196, L. 1967.

standing former section providing for temporary removal of imprisoned witnesses by order of trial court. *United States v. Schultz*, 37 F 2d 619.

#### Cross-References

Examination of witnesses on commission, Title 94, ch. 92.

Fees of witnesses, sec. 25-404.

Mileage of witnesses, sec. 59-801.

Right to process to compel attendance of witnesses, Mont. Const. Art. III, § 16.

Subpoena for witness defined, sec. 93-1501-3.

Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases, Title 94, ch. 90.

Witnesses' fees, sec. 25-404.

#### More than Six Witnesses

It is proper for the court to require the defendant, upon request for a subpoena for additional witnesses, to disclose the materiality of their testimony. *State v. O'Brien*, 18 M 1, 12, 43 P 1091, 44 P 399.

Former statute providing that clerk should not subpoena more than six witnesses for each party except upon order of court was to control the expenses of the county and is a limitation upon the clerk of the court and not upon the judge. Where the court allows more than six witnesses to testify for the state the defendant is not prejudiced by the absence of an express order made by the court. *State v. Cockrell*, 131 M 254, 309 P 2d 316, 321.

#### Imprisoned Witnesses

Where state court desired that prisoner be produced for use as witness, and custodian was not sheriff of county in which court requiring prisoner sat, writ of habeas corpus held necessary, notwith-

### 95-1802. Depositions. (a) Grounds for Taking Depositions:

(1) If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing or is or may become a nonresident of the state, or is unwilling to provide relevant information to a requesting party, and that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court, at any time after the preliminary hearing or the filing of the indictment or the information, may upon motion and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents, or tangible objects, not privileged, be produced at the same time and place.

(2) If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court must direct that his deposition be taken at the expense of the state. After the deposition has been subscribed the court shall discharge the witness.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(c) How Taken. A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a



deposition be taken on written interrogatories in the manner provided in civil actions.

(d) Filing Deposition. The court shall transmit the deposition to the clerk of the court making the order, there to be filed and held until the action shall come on for trial.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the state of Montana unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts. For the purposes of this section, the word "deposition" shall in addition include any sworn testimony previously given by a witness which has been recorded and transcribed by a qualified stenographer and given in the presence of the defendant and cross-examined by him or his attorney on matters relevant to the trial or hearing where such deposition is sought to be used.

(f) Objections to Admissibility. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

(g) At Instance of the State or Witness. The following additional requirements shall apply if the deposition is taken at the instance of the state or a witness. The officer having custody of a defendant shall be notified of the time and place set for examination and keep him in the presence of the witness during the examination. A defendant not in custody shall be given notice and shall have the right to be present at the examination. The state shall pay to the defendant's attorney and to a defendant not in custody expenses of travel and subsistence for attendance at the examination.

**History:** En. 95-1802 by Sec. 1, Ch. 196, L. 1967.

#### Accused's Rights

Accused's rights were not violated on theory that witness was intimidated into giving damaging testimony by county attorney's threat of hold witness unless she gave a statement when witness gave a statement in which she alleged she had given defendant money to buy a six-shooter. *Petition of Gallagher*, 150 M 476, 436 P 2d 530.

#### When Taken

There is not any limitation as to the time when depositions in criminal cases may be taken; former statutes providing for conditional examination of witnesses, before or after charge is filed, and for deposing of material witnesses who could not give security for appearance at least implied that depositions might be taken at any time after the defendant had been held to answer the charge, even before an information had been filed against him. *State v. Vanella*, 40 M 326, 337, 106 P 364.

**95-1803. Discovery, inspection, and notice.** In all criminal cases originally triable in district court the following rules shall apply:

(a) List of Witnesses:

(1) For the purpose of notice only and to prevent surprise, the prosecution shall furnish to the defendant and file with the clerk of the court

at the time of arraignment, a list of the witnesses intended to be called by the prosecution. The prosecution may, any time after arraignment, add to the list the names of any additional witnesses, upon a showing of good cause. The list shall include the names and addresses of the witnesses.

(2) The requirement of subsection (a) (1), of this section, shall not apply to rebuttal witnesses.

(b) Subpoenas may be used as a discovery device as provided for under section 95-1801 (d).

(c) On motion of any party within a reasonable time before trial all parties shall produce at a reasonable time and place designated by the court all documents, papers or things which each party intends to introduce in evidence. Thereupon any party shall, in the presence of a person designated by the court, be permitted to inspect or copy any such documents, papers or things. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just. If the evidence relates to scientific tests or experiments the opposing party shall, if practicable, be permitted to be present during the tests and to inspect the results thereof. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make other appropriate orders. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested which is subject to discovery or inspection under the rule he shall promptly notify the other party or his attorney or the court of the existence of the additional material. The court shall exclude any evidence not presented for inspection or copying pursuant to this rule, unless good cause is shown for failure to comply. In the latter case the opposing party shall be entitled to recess or a continuation during which it may inspect or copy the evidence in the manner provided for above.

(d) For purpose of notice only and to prevent surprise, the defendant shall furnish to the prosecution and file with the clerk of the court at the time of entering his plea of not guilty or within ten (10) days thereafter or at such later time as the court may for good cause permit, a statement of intention to interpose the defense of insanity, self-defense or alibi. If the defendant intends to interpose any of these defenses, he shall also furnish to the prosecution and file with the clerk of the court, the names and addresses of all witnesses to be called by the defense in support thereof. The defendant may, prior to trial, upon motion and showing of good cause, add to the list of witnesses the names of any additional witnesses. After the trial commences, no witnesses may be called by the defendant in support of these defenses, unless the name is included on such list, except upon good cause shown.

(e) All matters which are privileged upon the trial, are privileged against disclosure through any discovery procedure.

**History:** En. 95-1803 by Sec. 1, Ch. 196,  
L. 1967.

**95-1804. Motion to produce confession or admission.** (a) On motion of a defendant in any criminal case made prior to trial the court shall

order the state to furnish the defendant with a copy of any written confession or admission and a list of the witnesses to its making. If the defendant has made an oral confession or admission a list of the witnesses to its making shall be furnished.

(b) The list of witnesses may upon notice and motion be amended by the state prior to trial.

(c) No such confession or admission shall be received in evidence which has not been furnished in compliance with subsection (a) of this section unless the court is satisfied that the prosecutor was unaware of the existence of such confession or admission prior to trial and that he could not have become aware of such in the exercise of due diligence.

**History:** En. 95-1804 by Sec. 1, Ch. 196, L. 1967.

**95-1805. Motion to suppress confession or admission.** (a) A defendant may move to suppress as evidence any confession or admission given by him on the ground that it was not voluntary.

(b) The motion shall be made before the trial unless for good cause shown the court shall otherwise direct.

(c) The defendant shall give at least ten (10) days' notice of such motion to the attorney prosecuting or such other time as the court may direct. The defendant shall serve a copy of the notice and motion upon the attorney prosecuting.

(d) The motion shall be in writing and state facts showing wherein the confession or admission was involuntary.

(e) If the allegations of the motion state facts which if true, show that the confession or admission was not voluntarily made the court shall conduct a hearing into the merits of the motion.

(f) The burden of proving that a confession or admission was involuntary shall be on the defendant.

(g) The issue of the admissibility of the confession or admission shall not be submitted to the jury. If the confession or admission is determined to be admissible the circumstances surrounding the making of the confession or admission may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession or admission.

(h) If the motion is granted the confession or admission shall not be admissible in evidence against the movant at the trial of the case.

**History:** En. 95-1805 by Sec. 1, Ch. 196, L. 1967.

facto, make it inadmissible. *State v. Noble*, 142 M 284, 384 P 2d 504.

Truth or falsity of a confession is not to be considered in determining its voluntariness; before a confession may be admitted into evidence, the state must show to satisfaction of trial court that it was voluntary. *State v. White*, 146 M 226, 405 P 2d 761.

#### **Test of Voluntariness**

Before admitting a confession into evidence, it is necessary to determine whether it was made voluntarily and of defendant's free will; fact that a sedative was administered to defendant within an hour before his first confession did not, ipso

**95-1806. Motion to suppress evidence illegally seized.** (a) A defendant aggrieved by an unlawful search and seizure may move the court to suppress as evidence anything so obtained.



(b) The motion shall be made before trial unless for good cause shown the court shall otherwise direct.

(c) The defendant shall give at least ten (10) days' notice of such motion to the attorney prosecuting or such other time as the court may direct. The defendant shall serve a copy of the notice and motion upon the attorney prosecuting.

(d) The motion shall be in writing and state facts showing wherein the search and seizure were unlawful.

(e) If the allegations of the motion state facts which if true show that the search and seizure were unlawful the court shall conduct a hearing into the merits of the motion.

(f) The burden of proving that the search and seizure were unlawful shall be on the defendant.

(g) If the motion is granted the evidence shall not be admissible against the movant at any trial of the case.

**History:** En. 95-1806 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

Unreasonable searches and seizures prohibited, Mont. Const. Art. III, § 7.

#### Timeliness of Motion

If accused has had opportunity to suppress illegally obtained evidence before trial and fails to do so, objection to the evidence at trial will not avail him; where accused knew from time information was filed on May 7 that state was accusing him of illegally transporting liquor on basis of an earlier search and seizure

and knew that state could not make a prima facie case against him without the evidence obtained by that search and seizure but did not take any action to suppress the evidence until trial on April 11 of following year, his objection was not timely and admission of the evidence was not error even if it had been obtained in violation of accused's constitutional rights. State v. Gotta, 71 M 288, 229 P 405.

#### Law Review

Procedure for Suppressing Illegally Seized Evidence, 20 Mont. L. Rev. 225 (1959).

## CHAPTER 19

### TRIAL IN DISTRICT COURT

Section	95-1901.	Method of trial.
	95-1902.	Plea of guilty.
	95-1903.	Failure of the county attorney to attend.
	95-1904.	Presence of defendant—mistrial for absence.
	95-1905.	Formation of trial jury.
	95-1906.	Order of prosecutions.
	95-1907.	Time to prepare for trial.
	95-1908.	Motion to discharge jury panel.
	95-1909.	Trial jurors.
	95-1910.	Order of trial.
	95-1911.	When order of trial may be departed from.
	95-1912.	View of place of offense or property.
	95-1913.	Conduct of jury after submission of case.
	95-1914.	Court may adjourn during absence, but deemed open.
	95-1915.	Verdict.
	95-1916.	Defendant, when to be discharged.

**95-1901. Method of trial.** (a) All prosecutions except on a plea of guilty, deciding issues of fact shall be tried by the court and jury.

(b) Questions of law shall be decided by the court and questions of fact by the jury except on a trial for libel the jury shall determine both questions of law and of fact.

(c) Defendants in all criminal cases shall have a right to trial by jury not to exceed twelve (12) in number. However, if no capital offense is involved, the parties may agree in writing, at any time before the verdict, with the approval of the court that the jury shall consist of any number less than twelve (12).

(d) The plea of not guilty puts in issue every material allegation of the indictment, information or complaint.

**History:** En. 95-1901 by Sec. 1, Ch. 196, L. 1967.

### Cross-References

Jury decides questions of law and fact in suits for libel, Mont. Const. Art. III, § 10.

Right of trial by jury, Mont. Const. Art. III, § 23.

### Directed Verdict in Criminal Case

In a prosecution for unlawfully driving a truck with an overload which is a misdemeanor, it was error for the court to instruct and direct the jury to return a verdict of guilty where the evidence as to the true weight of the truck was in conflict as shown by two different state police scales. *State v. Baillarger*, 126 M 310, 249 P 2d 799, 801.

### Double Jeopardy Question of Fact

The pleas of former acquittal and once in jeopardy involve an issue of fact, and cannot be determined without a finding by a jury. *State v. O'Brien*, 19 M 6, 47 P 103.

### Former Jeopardy

The mere pendency of a prior information does not sustain the plea of former jeopardy; where there are two informations pending charging the same offense, until there has been a trial or defendant is placed in jeopardy under one information, the plea of former jeopardy is not available as against the other. *State v. Aus*, 105 M 82, 86, 69 P 2d 584.

### Jury of Twelve

Conviction of first degree murder by jury of eleven violated constitution and was a nullity even though defendant consented to jury of eleven when one juror was excused during trial because of sickness in his family. *Territory v. Ah Wah*, 4 M 149, 1 P 732.

### New Trial Not Double Jeopardy

In a prosecution for the larceny of one of four colts, all stolen at the same time and place, defendant was convicted and served about a month in the state prison when a new trial was granted him for want of proper proof of ownership of the colt. Thereupon a new information was filed charging the theft of one of the other

three colts, and defendant interposed a plea of once in jeopardy, which was properly denied, not because of a different offense, theft of four colts at the same time constituting but one offense, but because in the granting of a new trial he is in the same jeopardy. *State v. Aus*, 105 M 82, 86, 69 P 2d 584.

Where one convicted of crime is granted a new trial he is not placed in new jeopardy by the second trial, but is in the same jeopardy he was in when the first trial was had. *State v. Aus*, 105 M 82, 86, 69 P 2d 584.

### Plea of Not Guilty

The plea of not guilty of the offense charged in the information puts in issue allegations of prior convictions, as well as the other allegations therein contained, and there is no merit in the contention that defendant, never having pleaded to the charge of prior convictions, no issue was raised as to that allegation. *State v. Gordon*, 35 M 458, 464, 90 P 173.

The bar to a prosecution for misdemeanor where defendant is not brought to trial within time allowed may properly be raised by a plea of not guilty. *State v. Porter*, 130 M 299, 300 P 2d 952, 954.

### Test for Determination of Former Jeopardy

The test to be applied in determining whether, in a criminal prosecution, the plea of former jeopardy should be sustained is whether the matter set out in the second information was admissible as evidence and would have sustained a conviction under the first information. Held, that a second information filed charging defendant with embezzlement of city funds, dismissed, and that it was error to refuse to entertain defendant's plea. *State v. Parmenter*, 112 M 312, 315, 116 P 2d 879.

### Waiver of Jury Trial

Under constitution, one charged with felony cannot waive jury trial in favor of one by court; however, he may waive trial entirely by pleading guilty. *State v. Sealise*, 131 M 238, 309 P 2d 1010.

### When Only One Transaction Rule Applicable

The rule that there is but one larceny if several articles are stolen at different

times and from different places under a single design, impulse or purpose, is applicable only if the different subjects involved are so related in point of time and location as to make it physically possible for actual control to be exercised over both at the same time. Held, that the taking of a bunch of horses a mile east of a ranch, and another bunch three quarters of a mile south, though corralled at the same place, but belonging to different persons, were independent offenses. *State v. Akers*, 106 M 105, 107, 109, 76 P 2d 638.

#### Where Conviction Set Aside

One whose conviction has been set aside may be tried anew on the same or another information for the same offense of which he was convicted. *State v. Aus*, 105 M 82, 86, 69 P 2d 584.

#### Where Jury Disregards the Law

The jury have the power to disregard the law as declared and acquit defendant, however convincing the evidence may be, and the court has no power to punish them for such conduct. *State v. Koch*, 33 M 490, 497, 85 P 272.

**95-1902. Plea of guilty.** Before or during trial a plea of guilty may be accepted when:

- (a) the defendant enters a plea of guilty in open court; and
- (b) the court has informed the defendant of the consequences of his plea and of the maximum penalty provided by law which may be imposed upon acceptance of such plea.

At any time before or after judgment the court may for good cause shown permit the plea of guilty to be withdrawn and a plea of not guilty substituted.

**History:** En. 95-1902 by Sec. 1, Ch. 196, L. 1967.

#### Circumstances Under Which Motion To Change Plea Granted

Defendant, a Mexican without education and unfamiliar with court procedure, stood charged with murder in the first degree. When he asked for a jury trial his first attorney asked to be relieved of his assignment; the second advised defendant to plead guilty and take a life sentence, whereas if he were tried by jury the sentence would be one of death. Defendant's plea was guilty, and the court imposed the death sentence. Held, that trial court abused its discretion in refusing to grant defendant's motion for permission to change his plea to one of not guilty. *State v. Casaras*, 104 M 404, 413, 66 P 2d 774.

#### Denial of Motion To Withdraw

Denial of motion to withdraw plea of guilty will not be reversed where chief contention was that he was misled by the erroneous advice of counsel as to his guilt under the law, when from the record there was evidence which would have justified a finding of guilty, regardless of the correctness of the counsel's interpretation of the law. *State v. Nance*, 120 M 152, 184 P 2d 554, 561, distinguished in 121 M 459, 479, 194 P 2d 651, 662.

#### Discretion of Court

The granting or refusal of permission to withdraw a plea of guilty and substitute a plea of not guilty rests in the dis-

cretion of the trial court and is subject to review only where an abuse of discretion is shown. *State v. Nance*, 120 M 152, 184 P 2d 554, 560, distinguished in 121 M 459, 479, 194 P 2d 651, 662.

#### Guilty Plea Under Agreement with Prosecutor

While the supreme court will not encourage the making of bargains with persons charged of crime, where a defendant has changed his plea of not guilty to a plea of guilty on an agreement with the prosecuting attorney as to recommendation for sentences which were carried out, the supreme court, will not, after he obtained the benefits of the agreement, aid him in escaping its obligations, by ordering a withdrawal of the guilty plea. *State v. Nance*, 120 M 152, 184 P 2d 554, 561, distinguished in 121 M 459, 479, 194 P 2d 651, 662.

#### In Cases of Doubt That Plea Voluntary, Application To Change Plea Should Be Granted

On hearing of an application of defendant, accused of crime, for permission to change his plea of guilty to not guilty, any doubt that the first plea was not voluntary should be resolved in his favor and in favor of a trial on the merits; plea should be entirely voluntary by one competent to know the consequences and should not be induced by fear, persuasion, promise or ignorance. *State v. Casaras*, 104 M 404, 413, 66 P 2d 774.



**Motion To Withdraw—Time for Filing**

In order to receive favorable consideration, an application to withdraw a plea of guilty should be made within a reasonable time. *State v. Nance*, 120 M 152, 184 P 2d 554, 561, distinguished in 121 M 459, 479, 194 P 2d 651, 662.

**Waiver of Jury Trial**

The entering of a plea of guilty by a defendant waives his right to a jury trial. *State v. Peters*, 140 M 162, 369 P 2d 418, 419.

**When Plea of Guilty May Be Withdrawn After Judgment**

Although former section provided that the district court at any time before judgment might permit a plea of guilty to be withdrawn and a plea of not guilty to be substituted, the court was not prohibited by statute from permitting this to be done after judgment; the power to permit the latter was inherent and might be exercised in the court's discretion to rectify an injustice, especially where occasioned through ignorance or lack of understanding of the gravity of the offense charged against the petitioner and its discretion in that behalf might not be disturbed on appeal except on a showing of abuse. *State ex rel. Foot v. District Court*, 81 M 495, 501, 263 P 979.

Where the evidence discloses that there was a grave doubt that the defendant had the mental capacity to appreciate and understand what he was doing and the consequences thereof, when, without benefit of counsel, he pleaded guilty to the charge of murder, defendant should have been allowed to withdraw his plea of guilty

and enter a plea of not guilty. *State v. Dryman*, 125 M 500, 241 P 2d 821, distinguished in 131 M 152, 156, 308 P 2d 969, 971.

Held, on the facts of the particular case, that where the defendant at the time of entering his plea of guilty thought that he had an understanding as to what his sentence would be; that no direct commitment was made to him by any of the officers but the officers had made statements to others who were in contact with the defendant and upon whose advice he relied, the ends of justice would be best served by permitting the defendant to change his plea. *State v. Morgan*, 131 M 58, 307 P 2d 244, distinguished in 134 M 301, 304, 330 P 2d 968, 970.

District court did not abuse its discretion in entering order denying defendant's motion to withdraw plea of guilty and substitute plea of not guilty where the record disclosed that defendant entered his plea of "guilty" on December 30, 1960; sentence was pronounced on January 23, 1961; and the motion was not filed in the district court until July 24, 1961, six months after imposition of the sentence and six months and twenty-four days after entry of the plea. *State v. Peters*, 140 M 162, 369 P 2d 418, 419.

**Written "Special Plea in Bar" Not Authorized**

Justice of the peace was acting within his jurisdiction and in accordance with the law in overruling the defendant's written special plea in bar and ordering the defendant to answer to the complaint. *State ex rel. Borberg v. District Court*, 125 M 481, 240 P 2d 854, 857, 861.

**95-1903. Failure of the county attorney to attend.** If the county attorney fails to attend the trial, the court may appoint some attorney at law to perform his duties.

**History:** En. 95-1903 by Sec. 1, Ch. 196, L. 1967.

**Attorney's Compensation**

An attorney appointed to perform the duties of a county attorney in a proceeding in which the latter was sought to be removed upon the accusation of a taxpayer charging neglect of duty, may not demand or receive compensation for his services out of the county treasury, the statute not making any provision therefor, and the county not being liable as upon an implied contract to pay what the services are reasonably worth. *State ex rel. Mc-*

*Grade v. District Court*, 52 M 371, 374, 375, 157 P 1157.

**Court's Power**

The district court is vested with the power of appointment of some attorney in any criminal case when the emergency contemplated by this section arises, and of removal, where a disqualification of the attorney appointed appears, and while the court will usually choose someone from among the local attorneys, it is not required to do so. *State ex rel. McGrade v. District Court*, 52 M 371, 374, 375, 157 P 1157.

**95-1904. Presence of defendant—mistrial for absence.** (a) The defendant must be personally present at the trial and rendition of judgment in all cases tried in the district court. If the defendant fails to appear

at any time during the course of the trial and before the jury has retired for its deliberations or the case has been finally submitted to the judge, and if after the exercise of reasonable diligence, his presence cannot be procured, the court shall declare a mistrial and the cause may again be tried.

(b) In all cases appealed to the supreme court it shall be conclusively deemed that the defendant was present in court at all stages of the trial unless the record on appeal affirmatively shows to the contrary; in all cases appealed to the supreme court it shall be conclusively deemed that the court or judge gave the proper admonition in accordance with the provision of section 95-1913 (e) unless the record affirmatively shows to the contrary.

**History:** En. 95-1904 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

Right to appear and defend in person, Mont. Const. Art. III, § 16.

#### Clerk's Minutes Sufficient Showing

Clerk's minutes, in a prosecution for felony, construed on appeal to show that the defendant was present in court when the verdict was returned. *State v. Hall*, 55 M 182, 187, 175 P 267.

#### Conclusive Presumptions

One convicted of crime may not assert prejudicial error on the ground that the record on appeal fails to disclose that he was present at the time the verdict was returned, unless the record affirmatively shows the contrary, otherwise it must be conclusively deemed that he was present in court at all stages of the trial. *State v. Cates*, 97 M 173, 197, 33 P 2d 578.

#### Court May Vacate and Repronounce Sentence

Where the trial court pronounced sentence against defendant convicted of second degree assault while defendant was absent, it was not error for the court, on its own motion, to vacate the sentence and repronounce the same sentence two days later in the presence of the defendant and his attorney. *State v. Porter*, 143 M 528, 391 P 2d 704.

#### Motion for New Trial

This section and section 16, article III of the Montana constitution do not require that the defendant be present at a hearing on a motion for a new trial because such a hearing is held after the verdict has been rendered and is not part of the trial. *State v. Peters*, 146 M 188, 405 P 2d 642.

#### Presence of Defendant

While the fact that the defendant in a criminal cause was present when the ver-

dict was received must affirmatively appear, minutes which show his presence during the trial up to the time the jury retired, and then recite that "defendant thereupon waived the polling of the jury," and "defendant thereupon waives time for sentence and elects to be sentenced at this time," sufficiently meet this requirement. *State v. De Lea*, 36 M 531, 534, 93 P 814.

#### Right Cannot Be Waived

One charged with crime cannot waive his right to be present at his trial. *State v. Reed*, 65 M 51, 55, 56, 210 P 756.

#### Right To Be Present

A defendant's constitutional and statutory right to be present at his trial does not encompass proceedings before the court involving matters of law. Such rights are violated only if the defendant is prevented from being personally present when jury is hearing his cause or is prevented from attending such other proceedings where his presence is essential to a fair and just determination of a substantial issue. *State v. Peters*, 146 M 188, 405 P 2d 642.

#### Showing Necessary

It must affirmatively appear that one charged with a felony was present when the verdict was received; but this may be shown by every fair intendment of the record. *State v. De Lea*, 36 M 531, 537, 93 P 814.

Under the constitutional and statutory provisions applicable, a defendant charged with crime must be present throughout the entire trial, including the rendition of the verdict, and the fact of his presence must be made to appear from the record. *State v. Reed*, 65 M 51, 55, 56, 210 P 756.

Minutes of the trial court in a capital case examined and held not to show even by reasonable inference that defendant or his counsel was present during the trial of the cause, in disregard of the statutory provisions entitling defendant to a reversal of the judgment. *State v. Reed*, 65 M 51, 55, 56, 210 P 2d 756.

### What Is Not Considered Part of the Trial

The settlement of instructions being no part of the "trial," within the meaning of former section, the absence of one charged with felony during such settlement does not constitute reversible error. *State v. Hall*, 55 M 182, 187, 175 P 267.

Predecessor section required the personal presence of the defendant at the trial in felony cases. After the jury had retired to the jury room for deliberation of their verdict they requested that certain exhibits consisting of a gun, a pair of shoes

and other articles found in defendant's room, be sent to them. While defendant was not present in the courtroom, his counsel gave his consent. Held, that the proceeding did not constitute a part of the trial and therefore defendant's presence was not required, and that defendant's counsel having given his consent, the court did not abuse its discretion in complying with the jury's request, even though the exhibits were not of the nature of those authorized by statute to be taken to the jury room. *State v. Olson*, 87 M 389, 395, 287 P 938.

**95-1905. Formation of trial jury.** Trial juries for criminal actions are formed in the same manner as trial juries in civil actions, except that the total number of jurors drawn shall be at least twelve (12) plus the total number of peremptory challenges.

**History:** En. 95-1905 by Sec. 1, Ch. 196, L. 1967.

### Operation and Effect

A jury panel in a criminal case must be drawn in substantial conformity with the

requirements of the code relating to trial juries in civil actions, and those requirements in their essential particulars are mandatory. *State v. Landry*, 29 M 218, 223, 74 P 418.

**95-1906. Order of prosecutions.** Prosecutions against defendants held in custody must be disposed of in advance of prosecution against defendants on bail unless for good cause the court shall direct an action to be tried out of its order.

**History:** En. 95-1906 by Sec. 1, Ch. 196, L. 1967.

### Control of Docket

Former section requiring the clerk of the district court to keep a calendar of criminal actions enumerated according to the date of filing the information; former section declaring that the calendar must be disposed of in the order therein named

unless the court shall direct otherwise, and former section 94-7013, providing that if a case is not postponed it must be set for hearing in the order in which it appears on the calendar, unless by consent it is set down for trial out of its order, are directory only, the district court having power to control its docket and the order in which it may try cases. *State v. Quinlan*, 84 M 364, 369, 275 P 750.

**95-1907. Time to prepare for trial.** After plea, the defendant shall be entitled to a reasonable time to prepare for trial.

**History:** En. 95-1907 by Sec. 1, Ch. 196, L. 1967.

### Continuance

Trial judge did not abuse discretion in denying defendant's application for continuance over the term where trial was set for May 7, 1956, after defendant entered plea of guilty on April 24, 1956. *State v. McLeod*, 131 M 478, 311 P 2d 400, 407.

mitted on day of trial to amend showing manner and means of the attempt, whereupon defendant was unnecessarily rearraigned, the fact that he was not given two days in which to prepare trial after rearraignment under former statute could not have affected him prejudicially, in view of notice and unnecessary amendment. *State v. Gaffney*, 106 M 310, 312, 77 P 2d 398.

### Time Allowed

### Nonprejudice on Unnecessary Amendment and Rearraignment under Notice

Where original information on attempt to commit arson sufficient, to which defendant pleaded not guilty, but county attorney, after giving defendant ten days' notice of proposed amendment was per-

Under former section the defendant was entitled to at least two days to prepare for trial; therefore where he had seven months from the day of entry of his plea to the day of trial for preparation, he had no cause for complaint in this regard. *State v. Showen*, 60 M 474, 478, 199 P 917.



**95-1908. Motion to discharge jury panel.** (a) Any objection to the manner in which a jury panel has been selected or drawn shall be raised by a motion to discharge the jury panel. The motion shall be made at least five (5) days prior to the term for which the jury is drawn. For good cause shown, the court may entertain the motion at any time thereafter.

(b) The motion shall be in writing supported by affidavit and shall state facts which show that the jury panel was improperly selected or drawn.

(c) If the motion states facts which show that the jury panel has been improperly selected or drawn, it shall be the duty of the court to conduct a hearing. The burden of proof shall be on the movant.

(d) If the court finds that the jury panel was improperly selected or drawn, the court shall order the jury panel discharged and the selection or drawing of a new panel in the manner provided by law.

**History:** En. 95-1908 by Sec. 1, Ch. 196, L. 1967.

#### **Burden of Proof**

Where defendant's offer to submit a challenge to the panel on the testimony taken at a prior term of court was withdrawn, and no evidence whatever was offered, defendant's request to discharge the jury was properly denied. *State v. Jones*, 32 M 442, 449, 80 P 1095.

Where defendant interposed a challenge to the jury panel because the sheriff had intentionally omitted to summon some of the jurors drawn by the jury commission, to which the state took an exception, the court erred in overruling the challenge on the ground that defendant had failed to sustain the burden of establishing the truth of his assertion, since by its exception, which was, in effect a demurrer, the facts stood admitted by the state, and no burden rested upon defendant. *State v. Groom*, 49 M 354, 358, 141 P 858.

Evidence, including testimony by sheriff that his failure to summon some of jurors was occasioned by his imperfect knowledge of county lines incident to creation of a new county, was sufficient to sustain challenge premised on sheriff's intentional omission to summon some of jurors drawn by jury commission. *State v. Groom*, 49 M 354, 358, 141 P 858.

Where two jurors did not appear and were not excused when the jury was impaneled but the defendant could not show affirmatively that the panel had not been served, there was no prejudicial error. *State v. Moran*, 142 M 423, 384 P 2d 777.

#### **Effect of Demurrer to Challenge**

In a criminal case, a demurrer to a challenge to the jury panel is equivalent to an exception to the challenge, the mere name not being important; and the action

of the court in sustaining a demurrer to such challenge, and in impaneling the jury, amounted to a disallowance of the challenge, so as to render the question raised by the challenge reviewable on appeal. *State v. Tighe*, 27 M 327, 330, 71 P 3, overruled on other grounds in *State v. Sherman*, 35 M 512, 518, 90 P 981.

An exception to the challenge to a jury panel in a criminal case is, in effect, a demurrer, and admits all the facts stated to be true. *State v. Groom*, 49 M 354, 357, 141 P 858.

#### **Only Material Departures Ground for Challenge**

It is not every deviation from the strict letter of the law in drawing or returning a jury that will furnish ground for a challenge. The departure must be a material one. *State v. Groom*, 49 M 354, 359, 141 P 858.

#### **Presumption That Jury Commissioners Performed Their Duty**

Where defendant filed a verified, specific and detailed challenge to a jury panel and the county attorney did not deny the sufficiency of the facts alleged and the defendant also filed a timely motion for the issuance of a subpoena to the jury commissioners to appear, the trial court could not presume the jury commissioners had performed their duty in selecting the panel; hence, it was error for the trial court to overrule defendant's motion based on the presumption that the jury commissioners had performed in accordance with the law. *State v. Deeds*, 130 M 503, 305 P 2d 321, 324.

#### **Question of Fact**

Where all parties treat a challenge to the panel as raising an issue of fact, the supreme court will treat the matter

as though an issue had been raised by a denial of the challenge. *State v. Groom*, 49 M 354, 357, 141 P 858.

#### Right of Defendant

Failure of a properly notified juror to be present when the jury was impaneled did not invalidate the trial as the defendant had the right only to reject jurors and not to select any particular juror. *State v. Moran*, 142 M 423, 384 P 2d 777.

#### Substantial Compliance Required

A substantial compliance with the law is required in the work of procuring a jury. Anything less will vitiate such work. *State v. Landry*, 29 M 218, 224, 74 P 418; *State v. Groom*, 49 M 354, 358, 141 P 858.

#### Trial of Facts Required

If a challenge to the panel alleges facts

which, if true, would show a material variation from the statutory procedure in making up the jury list, the court could not, on the basis of a presumption that the jury commissioners had done their duty, summarily deny the challenge, particularly in the absence of an exception by the adverse party. *State v. Chapman*, 139 M 98, 360 P 2d 703.

#### Who May Testify

Query, whether a judge of the district court may be called as a witness when the regularity of the drawing of a jury in a criminal prosecution is questioned by a challenge to the panel, inasmuch as he orders such drawing and directs the clerk during its progress, both judicial and ministerial officers whose irregularity is complained of may be called upon to testify. *State ex rel. Breen v. District Court*, 34 M 107, 111, 85 P 870.

### DECISIONS UNDER FORMER LAW

#### Lack of Jurisdiction

Former statute gave court express authority to discharge the jury, in a criminal case, if the opening statement of the county attorney affirmatively disclosed

that the offense charged was committed outside of the county in which the prosecution was being had. *State v. Hall*, 55 M 182, 185, 175 P 267.

**95-1909. Trial jurors.** (a) The clerk of court shall make available to the parties a list of prospective jurors with their addresses when drawn.

(b) (1) The qualifications of jurors, and who will be exempted, are found in sections 93-1301 through 93-1307, of the Civil Code, which by reference are made a part of this code.

(2) An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

(c) The county attorney and the defendant or his attorney shall conduct the examination of prospective jurors. The court may conduct an additional examination. The court may limit the examination by the defendant, his attorney or the prosecuting attorney if the court believes such examination to be improper.

(d) (1) Each party may challenge jurors for cause, and each challenge must be tried by the court.

(2) A challenge for cause may be taken for all or any of the following reasons; or for any other reason which the court determines:

(i) Consanguinity or relationship to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant.

(ii) Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, debtor and creditor, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment.

(iii) Being a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution.

(iv) Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information.

(v) Having served on a trial jury which has tried another person for the offense charged.

(vi) Having been one of a jury formerly sworn to try the same charge, and whose verdict was set aside or which was discharged without verdict, after the case was submitted to it.

(vii) Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

(viii) If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror.

(ix) Having a belief that the punishment fixed by law is too severe for the offense charged.

(x) For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party.

(e) All challenges must be interposed before the jury is sworn, unless the cause of challenge be discovered after the jury is sworn and before the introduction of any evidence, when the court, in its discretion may allow the challenge to be interposed.

(f) Each defendant shall be allowed eight (8) peremptory challenges in capital cases, six (6) in all other cases tried in the district court, and three (3) in all cases tried in justice of the peace or police courts. However, there may not be additional challenges for separate counts charged in the indictment or information. If the indictment or information charges a capital offense, as well as lesser offenses in separate counts, the maximum number of challenges shall be eight (8). The state shall be allowed the same number of peremptory challenges as all of the defendants.

(g) After the jury is impaneled and sworn, the court may direct the selection of one or more alternate jurors, in the same manner as principal jurors, who shall take the same oath as the principal jurors. Each party shall have one additional peremptory challenge for each alternate juror. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury arrives at its verdict, become unable or disqualified to perform their duties. An alternate juror shall not join the jury in its deliberation unless called upon by the court to replace a member of the jury. His conduct during the period in which the jury is considering its verdict shall be regulated by instructions of the trial court. An alternate juror who does not replace a principal juror shall be discharged after the jury arrives at its verdict.

(h) The jury shall return a general verdict to each offense charged.



(i) When, at the close of the state's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant. However, the court may allow the case to be reopened for good cause shown.

**History:** En. 95-1909 by Sec. 1, Ch. 196, L. 1967.

NOTE.—See sec. 93-1811 for provision for alternate jurors.

### Constitutionality

Former statute providing, *inter alia*, that no juror should be disqualified by having formed or expressed an opinion on matter in question, founded upon public rumor, statements in public journals or common notoriety if he would nevertheless act impartially and fairly upon matter submitted to him was constitutional. *Territory v. Bryson*, 9 M 32, 39, 22 P 147; *State v. Sheerin*, 12 M 539, 541, 31 P 543; *State v. Martin*, 29 M 273, 277, 74 P 725; *State v. Mott*, 29 M 292, 306, 74 P 728.

### Causes Enumerated Not Exclusive

The constitutional provision (section 16, article III) that one accused of crime shall have the right to trial by an impartial jury is a limitation upon the power of the legislature and it is beyond its power to curtail it; hence, where it clearly appeared from the examination of a juror on his *voir dire* that some circumstance or connection with the case rendered him unfit to serve, he should have been disqualified even though the cause did not fall within any of those specified in former statute. *State v. Russell*, 73 M 240, 244, 235 P 712.

### Challenges for Cause

Where the state challenged three jurors for cause, and the evidence showed that one of the jurors was nearly deaf, and the other two had formed opinions, the court was correct in excusing the jurors for cause. *State v. Gates*, 131 M 78, 307 P 2d 248.

### Challenges, How Taken—Waiver

Where the state waived its fourth peremptory challenge, and the defendant exhausted his peremptory challenges, it was not error, on the panel's being filled and passed for cause, to permit the state to peremptorily challenge a juror who was in the box when the state waived its fourth challenge; the state's waiver of its fourth challenge was not a waiver of any subsequent challenge to which it was entitled. *State v. Peel*, 23 M 358, 363, 59 P 169.

### Directing Jury To Acquit Defendant

Where there is an utter failure or lack of evidence to establish the state's case court may direct the jury to return a ver-

dict for the defendant. *State v. Widdicombe*, 130 M 325, 301 P 2d 1116, 1118.

### Duty of Attorneys To Advise Court That Coroner's Juror Serving as Trial Juror

Where *voir dire* examination of trial juror in murder case failed to reveal that he had served on the coroner's jury which had investigated the occurrence, known to the county attorney who directed proceedings at the inquest, and discovered by defense counsel after trial jury had been sworn, it was the duty of both to advise the trial court at the earliest opportunity to prevent a mistrial instead of remaining silent until verdict of guilty returned when defense counsel presented the matter in affidavits on motion for new trial. *State v. Allison*, 116 M 352, 364, 153 P 2d 141.

### Effect of Juror Admitting Bias

Where a juror in a criminal case on examination first admits bias in favor of defendant, but later states that notwithstanding such bias he can consider the evidence impartially, the latter statement should be received with caution. *State v. Huffman*, 89 M 194, 197, 296 P 789.

### Juror Bias

"A juror is not incompetent because he has previously served upon the trial of another defendant charged with a separate and distinct offense, although of the same character, and proved by the same witnesses or witnesses." *State v. Russell*, 73 M 240, 244, 235 P 712.

Where one had served as a juror in a prosecution for rape he was not disqualified, as for actual bias, from serving in the same capacity in a later case of the same character against another defendant in which the prosecutrix was the same as in the first, by the fact that on the former trial evidence of the guilt of the latter defendant had been introduced. *State v. Russell*, 73 M 240, 244, 235 P 712.

### Juror's Prejudice

A juror who testified on his *voir dire* examination that he entertained a bitter prejudice against the Industrial Workers of the World and against every member of it, which would abide with him throughout the trial, that it would require evidence to remove the prejudice, and less evidence to convict defendant, who was a member of the organization, than if he were not a member, was not an impartial juror, and refusal to grant a challenge for cause was error. *State v. Brooks*, 57 M 480, 188 P 942.

**Juror with an Opinion Based on Newspaper Story or Hearsay**

A juror who has formed and expressed an opinion on the case from reading newspaper statements and from hearsay, but who states that he does not know the defendant, has no prejudice, and, notwithstanding such opinion, can impartially try the case, is competent. *State v. Sheerin*, 12 M 539, 541, 31 P 543.

Where a venireman in a criminal case stated on his voir dire that he had read the newspaper accounts of the alleged robbery, and had formed an opinion, but not a fixed one, and on re-examination he said he could entirely discard the opinion thus formed, and give the defendant as fair a trial as if he had never heard of the case, he was competent as a juror. *State v. Howard*, 30 M 518, 523, 77 P 50.

General challenges of jurors "for the purposes of the record" who, while stating on their voir dire that they had read the newspaper account of the killing of deceased and were of the opinion at the time that he had been murdered, did not state that they had any belief that defendant had committed the crime, but did say that they would follow the instructions of the court and render an impartial verdict, were properly denied. *State v. Byrne*, 60 M 317, 328, 199 P 262.

A juror who on his voir dire stated that he had read in the newspapers an account of the homicide for which plaintiff was on trial; that he had formed an opinion therefrom which it would take evidence to remove, but that in determining the case he would base his verdict upon the evidence and be bound by the court's instructions; that there was nothing known to him which would prevent his trying the case fairly, etc., held competent. *State v. Juhrey*, 61 M 413, 202 P 762.

Where a juror on his voir dire stated that from newspaper reports and conversations with others he had formed the opinion that murder had been committed, but had no opinion as to the guilt or innocence of the defendant, that he would require the state to prove beyond a reasonable doubt that the latter had killed deceased with malice aforethought before he would vote for a conviction, and that he could fairly and impartially try him, he was not disqualified from serving. *State v. Vetter*, 76 M 574, 585, 586, 248 P 179.

Where a juror on his voir dire in a homicide case first stated that he had formed an opinion based on talks with others and on newspaper accounts, but later upon being questioned by the court replied that he could give a fair and impartial verdict despite his opinion and that his opinion was based only on rumor, denial of defendant's challenge for cause

was not error. *State v. Simpson*, 109 M 198, 206, 95 P 2d 761, overruled on other grounds in *State v. Knox*, 119 M 449, 453, 175 P 2d 774.

Where a juror on his voir dire in a burglary case stated that he had formed an opinion based on what he had heard on the radio, television, and read in the newspapers, but had not discussed the case with anyone purporting to know any of the facts about it and declared under oath that he could lay aside his opinion and judge the case solely on the evidence presented, it was not error to deny defendant's challenge. *State v. Moran*, 142 M 423, 384 P 2d 777.

In a criminal prosecution, a prospective juror who had formed an opinion of the case based on a newspaper account of the act but who declared under oath that he could consider the evidence impartially was competent to serve as a juror under a statute providing a challenge for cause for actual bias and under statute providing that no person shall be disqualified as a juror for having formed an opinion based on statements in public journals. *State v. White*, 151 M 151, 440 P 2d 269.

**Nature of Right To Challenge**

The right to challenge is the right to reject, not to select, a juror, and no person can acquire a vested right to have any particular member of a panel sit upon his case until such member has been accepted and sworn. *State v. Huffman*, 89 M 194, 197, 296 P 789.

**Newspaperman's Bias**

After conviction of first degree murder, defendant moved for new trial on ground, among others, that a juror had been guilty of misconduct in concealing from the court, while under examination on his voir dire, the fact that after the arrest of defendant, he, as correspondent for the newspaper published at the county seat, had furnished it articles, which were published, in effect complimenting the officers for their quick action in apprehending the "murderer" whose "worthless carcass will lie to rot deeply buried when the wheels of justice cease to grind," etc. The motion was denied. Held, in answer to the contention that the court abused its discretion in denying it, that in view of the explanation of his conduct by the juror on the hearing of the motion that the articles were not intended to be personal as applied to defendant, whom he did not know, but applicable to anyone who committed homicide, and the advantageous position of the trial judge in passing upon the sincerity and truth of the statements of the juror on his examination touching his competency as well as on the hearing of the motion, that the court did not err



in its ruling. *State v. Hoffman*, 94 M 573, 586, 23 P 2d 972. See also *State v. Huffman*, 89 M 194, 197, 296 P 789.

#### Number of Peremptory Challenges

In a prosecution for murder, the accused was properly compelled to exhaust alternately two peremptory challenges to each one taken by the state, where none were taken until the panel was full. *State v. Sloan*, 22 M 293, 298, 56 P 364.

#### Overruling Challenge

Where court relied on answers to last two questions and on the assumption that there was a misunderstanding as to the earlier questions in examining a prospective juror for prejudice, the overruling of the challenge would not be disturbed especially where the defendant had three peremptory challenges left at the time and exercised one to discharge such juror, and fact that defendant regarded other jurors as undesirable on which he might have exercised his challenge gave him no right to have such juror excused for bias where there was no showing that such jurors were disqualified. *State v. Allison*, 122 M 120, 199 P 2d 279, 286.

#### Prosecutor's Brother-in-Law Not Disqualified

A juror who, upon examination, has shown no bias, either implied or actual, is not disqualified by reason of being a brother-in-law of the prosecuting attorney. *State v. Cadotte*, 17 M 315, 316, 42 P 857.

### DECISIONS UNDER FORMER LAW

#### Advising Acquittal

Under former statute, if a trial judge was of the opinion that the defendant, if convicted, should be granted a new trial because of the insufficiency of the evidence, it was his duty to advise the jury to return a verdict of not guilty. *State v. Fisher*, 23 M 540, 555, 59 P 919.

Former section permitting court to advise jury to acquit the accused but not binding jury by such advice was applicable to those cases only in which the trial court deemed the evidence, although tending to prove every element necessary to constitute the crime charged, insufficient in weight to warrant a conviction. *State v. Mahoney*, 24 M 281, 286, 61 P 647.

Under former statute, trial court could not direct verdict in favor of defendant, being authorized to do no more, when it deemed the evidence insufficient to warrant conviction, than to advise the jury to acquit. *State v. Collins*, 88 M 514, 523, 294 P 957; *State v. Wong Sun*, 114 M 185, 192, 133 P 2d 761.

By former section, the trial court was

#### Showing Necessary for New Trial

After verdict, the accused must make it appear affirmatively that he is entitled to a new trial because he has been deprived of his constitutional right to an impartial jury, and the probability that one juror was incompetent is not sufficient to set aside the verdict. In the absence of a clear showing of an abuse of discretion by the trial court in passing on a motion for a new trial, based on the alleged incompetency of a juror, the supreme court will not interfere. *State v. Mott*, 29 M 292, 307, 74 P 728.

#### Summoning Jury by Interested Sheriff

The facts that the victim of a homicide was a deputy sheriff, and that the sheriff was a witness for the state, did not disqualify the latter or his deputies from summoning the jury on the theory that they were interested in the outcome of the prosecution; if they were disqualified, the remedy of defendant was to object to the panel before sworn. *State v. Heaston*, 109 M 303, 314, 97 P 2d 330.

#### When Trial Judge Should Sustain Challenge

On the voir dire examination of a prospective juror the trial court is the judge of the weight to be given to his testimony, and if it has any doubt as to the existence of such a state of mind in a juror as would disqualify him, it should sustain a challenge to him in the interest of justice. *State v. Huffman*, 89 M 194, 197, 296 P 789.

prohibited from directing a verdict in any criminal case; if the advice was disregarded by the jury, the remedy was by granting a new trial. *State v. Thierfelder*, 114 M 104, 111, 132 P 2d 1035, overruled in *State v. Labbitt*, 117 M 26, 35, 156 P 2d 163.

Where there was an utter failure of proof as to one or more of the essential elements of the offense charged, the trial court had the duty to order the jury to return a verdict of not guilty, but where there was evidence tending to prove every element necessary to constitute the offense charged but such evidence was insufficient in weight to warrant a conviction, the court could advise the jury to acquit but the jury was not bound by the advice. *State v. Labbitt*, 117 M 26, 35, 156 P 2d 163.

Former section permitting trial court to advise jury to acquit defendant was applicable only in cases in which the trial court deemed the evidence, although tending to prove every element constituting the crime charged, insufficient in weight to warrant



a conviction. *State v. Peschon*, 131 M 330, 310 P 2d 591, 595.

#### **Cause for Challenge Must Be Alleged**

Former provision that in challenging a juror for implied bias one or more of the statutory causes and in challenging for actual bias the cause stated in certain subdivision must be alleged, was mandatory; hence where that was not done, denial of the challenge did not entitle appellant to allege error. *State v. Vetter*, 76 M 574, 584, 248 P 179.

#### **Challenges, How Taken—Waiver**

Where either party fails to challenge in his turn, he is deemed to waive the challenge or challenges he might use at that time, but this rule goes no further than is necessary to preserve the alternation required by former statute. *State v. Peel*, 23 M 358, 362, 59 P 169. See also *Chenoweth v. Great Northern Ry. Co.*, 50 M 481, 485, 148 P 330.

#### **Motion for Nonsuit Not Proper Practice**

In a criminal case motions for nonsuit are not proper to raise the question of the sufficiency of the evidence to warrant conviction, the proper practice being pre-

scribed by former section, authorizing the trial court to advise the jury to acquit if it deemed the evidence insufficient. *State v. DeTonancour*, 112 M 94, 98, 112 P 2d 1065.

#### **Number of Peremptory Challenges**

Under former statute allowing eight peremptory challenges for offense punishable by imprisonment in state prison for not less than a specified number of years and six challenges for other offenses punishable by imprisonment in state prison, defendant, on trial for grand larceny aggravated by a prior conviction of the same offense, was entitled to eight—not six—peremptory challenges. *State v. Collins*, 53 M 213, 163 P 102.

#### **Purpose**

The purpose of former section governing how causes of challenge were to be stated was to require the ground of challenge to be stated before the challenger is in a position to predicate error on the court's refusal to sustain a challenge. It was not intended as a limitation upon the power of the court in granting challenges which the facts warrant. *State v. Gates*, 131 M 78, 307 P 2d 248, 249.

**95-1910. Order of trial.** (a) The court may instruct the jury as to its duties. Such general instructions must be settled in the same manner as provided for the settlement of special instructions in subsection (d) of this section.

(b) The county attorney must state the case and offer evidence in support of the prosecution. The defendant may make his opening statement prior to the state's offer of evidence, or may state his defense and then offer evidence in support thereof after the state rests.

(c) The parties may then respectively offer rebutting testimony only, unless the court, for good cause, permits them to offer evidence upon their original case.

(d) When the evidence is concluded, if either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered, and signed by the party, or his attorney, and delivered to the court. The instructions shall be settled by the court, without the presence of the jury, at which settlement counsel for the parties, or the defendant if he is without counsel, shall be allowed reasonable opportunity to examine the instructions requested and proposed to be given by the court, and to present and argue to the court objections to the adoption or rejection of any instruction offered by counsel or proposed to be given to the jury by the court. On such settlement of instructions, the respective counsel, or the parties, shall specify and state the particular ground on which an instruction is objected to, and it shall not be sufficient to object generally that the instruction does not state the law, or is against the law, but the objection must specify particularly wherein the instruction is insufficient, or does not state the law, or what particular clause therein is objected to.

The court shall pass upon the objections to the instructions and shall either give each instruction as requested or proposed or positively refuse to do so, or give the instruction with modification, and shall mark or endorse upon each instruction in such a manner that it shall distinctly appear what instructions were given in whole or in part, and in like manner those refused or modified, and if modified, wherein and how modified. All instructions must be filed as a part of the record of the cause. No exceptions are necessary to the rulings of the court on the settlement of instructions.

The court reporter shall be present at such settlement and shall take down all the objections to any or all of the instructions given or refused by the court, together with modifications made therein, and the ruling of the court thereon.

(e) When the instructions have been passed upon and settled by the court, and before the arguments to the jury have begun, the court shall charge the jury in writing, giving in such charge only such instructions as have been passed upon and settled. In charging the jury, the court shall give them all matters of law which it thinks necessary for the jury's information in rendering a verdict.

(f) When the jury has been charged, unless the case is submitted to the jury on either side or on both sides without argument, the county attorney must commence and may conclude the argument. If several defendants having several defenses appear by different counsel, the court must determine their relative order in evidence and argument. Counsel, in arguing the case to the judge, may argue and comment upon the law of the case as given in the instructions of the court, as well as upon the evidence of the case.

**History:** En. 95-1910 by Sec. 1, Ch. 196, L. 1967.

#### **Error Cannot Be Predicated on Instructions Not Ruled on by the Court**

Where the record in a criminal cause does not show that the court ruled, or was requested to rule, on defendant's requests for instructions, or his objections to those given, errors relating to them will not be considered on appeal, since error cannot be predicated on the mere silence of the court. *State v. McCarthy*, 36 M 226, 236, 92 P 521.

#### **Failure To Read Information**

It is not error to fail to read the information, there being no statutory requirement for such procedure. *State v. Gall*, 135 M 131, 337 P 2d 932.

#### **Instructions—Considered as a Whole**

In determining whether an instruction is erroneous the charge as a whole must be considered. *State v. Wong Sun*, 114 M 185, 198, 133 P 2d 761.

Instructions must be considered as a

whole and, if they fairly tender the case to the jury, the fact that one or more of the instructions, standing alone, is not as full or accurate as it might have been, is not reversible error. *State v. Watson*, 144 M 576, 398 P 2d 949.

#### **Instructions—Duty of Court To Instruct**

The defendant introduced testimony tending to show that "prior to the occasion in question" his reputation for "truth and veracity" in the community in which he lived was good, and his counsel offered an instruction on the subject. This the court refused, and it did not give any on that phase of the case. Whether the court was of the opinion that the offered instruction was not good, or that defendant was not entitled to an instruction upon the subject, the record does not disclose. Upon the evidence introduced defendant was entitled upon his request to the benefit of a proper instruction upon the subject; subject to the provisions of former section, the court is required to instruct a jury upon all matters of law necessary for its information in rendering a verdict. *State v. Jackson*, 88 M 420, 435, 293 P 309.

In a rape trial where there was no inconsistency, contradictory evidence, or proof of falsity shown in the prosecutrix's testimony, and no showing of malice or desire for revenge against the accused, it was not error for the court to refuse to give a cautionary instruction. *State v. Lagge*, 143 M 289, 388 P 2d 792.

Where defendant was convicted of robbery, trial court did not commit reversible error in giving no instruction to the jury on the defense of threat or menace since the jury in considering the court's instructions found the allegations of willful commission of the crime proven beyond a reasonable doubt. *State v. Watson*, 144 M 576, 398 P 2d 949.

#### Instructions—Duty To Object and Point Out Error

Where defendant fails to make objection to any portion of the charge or to any action of the trial court in its settlement during trial, he will not, on appeal, be heard to complain of error therein, or of any omission by the court to submit any special instruction. *State v. Stone*, 40 M 88, 93, 105 P 89.

The defendant, in a criminal case, is bound by instructions to which he does not object. *State v. Crean*, 43 M 47, 60, 114 P 603.

Where defendant, through his attorney, at the settlement of the instructions, stated that he had no objections to them, assignments based on alleged error in them cannot be considered on appeal. *State v. Chronopoulos*, 60 M 329, 330, 199 P 266; *State v. Evans*, 60 M 367, 374, 199 P 440.

Where a defect in an instruction given was not pointed out specifically by defendant at the settlement of the instructions, the supreme court on appeal may not, under former section, consider an objection not so pointed out. *State v. Bolton*, 65 M 74, 81, 212 P 504; *State v. Dougherty*, 71 M 265, 266, 229 P 735; *State v. Sawyer*, 71 M 269, 272, 229 P 734; *State v. Cassill*, 71 M 274, 279, 229 P 716; *State v. Vallie*, 82 M 456, 268 P 493.

An objection made at the settlement of the instructions in a criminal case that a certain paragraph thereof "is not applicable to the facts of this case" is insufficient to warrant review of alleged errors urged under the specification relating thereto. *State v. McClain*, 76 M 351, 358, 246 P 956.

Objection to instruction that "it is rep-etitious and not a correct statement of the law" does not comply with this section. *State v. Hay*, 120 M 573, 194 P 2d 232, 237.

Objection to instruction that it "is not

a correct statement of the law; it is not applicable to the facts in this case" does not comply with predecessor section. *State v. Hay*, 120 M 573, 194 P 2d 232, 237.

Any error in giving instructions is not available to appellants on appeal where the record shows no objections made by the appellants. *State v. Holt*, 121 M 459, 194 P 2d 651, 654.

Where defendant sought appeal from conviction for robbery on grounds that instructions to jury were incomplete, it was incumbent on the defendant to request more specific instructions at the time of trial and failure to do so did not furnish grounds for reversible error. *State v. Watson*, 144 M 576, 398 P 2d 949.

Objection to instruction cannot state merely that instruction is not the law but must state specifically wherein the instruction is insufficient, or what particular clause is objected to. *State v. Schleining*, 146 M 1, 403 P 2d 625.

#### Instructions—Duty To Submit an Instruction if Desired

It is well settled in this state that, if a party is not satisfied with an instruction proposed to be given, he must submit an instruction which more fully covers the particular matter, or he cannot be heard to complain, unless the instruction given be inherently wrong. *Territory v. Hart*, 7 M 489, 505, 17 P 718; *Territory v. Manton*, 8 M 95, 109, 19 P 387; *State v. Broadbent*, 19 M 467, 473, 48 P 775; *State v. Gordon*, 35 M 458, 467, 90 P 173; *State v. Tracey*, 35 M 552, 555, 90 P 791; *State v. Powell*, 54 M 217, 221, 169 P 46.

Where the defendant failed to offer an instruction on circumstantial evidence, he is in no position to complain of the omission to instruct the jury on that point. *State v. Francis*, 58 M 659, 670, 194 P 304.

Where the testimony of a physician touching a physical examination of the complaining witness was admitted solely for the purpose of showing that sexual intercourse might have taken place, and for none other, failure of the defendant to offer an instruction on the subject of its limitation deprived him of the right to complain that such an instruction was not given. *State v. Richardson*, 63 M 322, 328, 207 P 124.

#### Instructions—Requirement that Instructions Be Written

Mere silence of the accused or his counsel is not equivalent to a consent to the giving of oral instructions. *State v. Fisher*, 23 M 540, 551, 59 P 919.

A statute requiring written instructions in a criminal action is mandatory, and the



violation thereof is reversible error. *State v. Fisher*, 23 M 540, 59 P 919.

A charge is oral if not in writing at the time of its delivery, and read to the jury as written. *State v. Fisher*, 23 M 540, 551, 59 P 919.

In the absence of waiver by the parties, it is imperative that all instructions be submitted to the jury in writing. *State v. Tudor*, 47 M 185, 131 P 632.

After the jury in a criminal case had retired to the jury room it was brought back at its request for information relative to the punishment which might be imposed under the indeterminate sentence statute. The court in the presence of defendant and counsel orally explained the provisions of the law and advised the jury as to the form in which it might return a verdict under that law. Defendant's counsel did not make any objection. Held, that the explanations made were not instructions on the law of the case and that, therefore, prejudicial error was not committed in making them orally. *State v. Kennedy*, 82 M 165, 167, 266 P 386.

#### Instructions—Review of Instructions

Even though the supreme court may not review instructions which were not given, it may examine the instructions which were given for the purpose of determining whether or not the jury was properly instructed. *State v. Watson*, 144 M 576, 398 P 2d 949.

Failure to instruct in certain particulars cannot be assigned as error, where the court has properly covered issues, since, in the absence of request for instructions, there is no ruling to review. *State v. Watson*, 144 M 576, 398 P 2d 949.

#### Instructions—Signing of Instructions—Necessity For

Requested instructions are required to be signed merely for the purpose of identification, to be used by the court in making up its charge to the jury; it is an irregularity, but no reversible error, for the court to permit the name and official title of the county attorney to be placed on instructions requested by him and given to the jury. *State v. Martin*, 29 M 273, 278, 74 P 725.

#### Instructions—Undue Emphasis

Trial judge did not err in giving five instructions to jury which were in part repetitious on the matter of conspiracy since the number of fact situations to be covered required them and while fewer instructions possibly would have been sufficient, they might have been difficult for the jury to understand. *State v. Schleining*, 146 M 1, 403 P 2d 625.

#### Opening Statement

Provision requiring the county attorney to make an opening statement in a prosecution for crime is merely directory. *State v. Hall*, 55 M 182, 185, 175 P 267.

Held, that where defendant, charged with burglary and three prior convictions, at the opening of the trial admitted the prior convictions, the court did not err in permitting knowledge of the prior convictions to go to the jury by allowing the county attorney to read the information charging such convictions, in overruling an objection to question asked defendant on cross-examination as to the prior convictions, or in instructing the jury that if they found the defendant guilty of burglary they should then consider the matter of the former convictions, giving the provisions of the statute fixing punishment for that crime when aggravated by prior convictions of felonies, in view of provisions requiring the county attorney to state the case and offer evidence in support of the prosecution, and the fact that without such knowledge the jury could not intelligently fix the punishment to fit the crime. *State v. O'Neill*, 76 M 526, 532, 535, 248 P 215.

The county attorney must advert to evidence the state intends to prove in his opening statement, but is not required to state for what purpose he intends to produce certain evidence; hence the trial court did not err in denying a request of counsel for defendant requiring him to do so. *State v. Keays*, 97 M 404, 416, 34 P 2d 855.

It was not a denial of fair trial where the jury was allowed to consider the proven and admitted fact that the defendant in a first degree assault case had been convicted of three prior felonies, where only one would have served to increase the punishment, when they were instructed that the prior convictions were to be considered only in fixing the punishment if and when the defendant was found guilty of the assault charge. *Petition of Jones*, 144 M 13, 393 P 2d 780.

#### Permitting Witness to Correct Testimony

The trial court did not abuse its discretion in permitting state's witness the opportunity to correct testimony made on direct examination under statute authorizing court to permit state to offer evidence upon their original cause during period reserved for rebuttal testimony. *State v. Crockett*, 148 M 402, 421 P 2d 722.

#### Purpose

Predecessor section did not undertake to do more than prescribe an orderly procedure for the trial of criminal cases. *State v. Hall*, 55 M 182, 185, 175 P 267.

DECISIONS UNDER FORMER LAW

**Instructions — Bill of Exceptions Required To Review Instructions**

Former provision prohibiting reversal by the supreme court for error in instructions where such error was not specifically pointed out and excepted to at the settlement of the instructions, and the error and exception incorporated and settled in a bill of exceptions, was mandatory, and error in instructions could not be considered on appeal in a criminal case where the record did not contain a bill of exceptions. *State v. Cook*, 42 M 329, 331, 112 P 537.

Errors in instructions must be specifically pointed out at the time the instructions are settled and the exceptions presented in a bill of exceptions before they will be considered on appeal. *State v. Thomas*, 46 M 468, 128 P 588.

Under former section, to entitle appellant in a criminal action to a review of an instruction given, the record was required to disclose that at the time of settlement of the instructions he made suitable objections and reserved an exception thereto. *State v. Brodock*, 53 M 463, 164 P 658; *State v. Neidamier*, 98 M 124, 37 P 2d 670.

Errors in the instructions were not ground for reversal on appeal unless the same were specifically pointed out and excepted to. *State v. Kahn*, 56 M 108, 120, 182 P 107.

An erroneous instruction, given without objection, became the law of the case, the supreme court on appeal being precluded by former section from reversing a judgment for error in instructions not specifically pointed out and excepted to at the settlement of the instructions. *Hawley v. Richardson*, 60 M 118, 128, 198 P 450.

Under former section, errors in giving or refusing instructions cannot be reviewed on appeal unless they, with the proceedings had at the settlement thereof, are incorporated in a bill of exceptions, even though they constitute a part of the judgment-roll of technical record, section

12043, R. C. M. 1921 (omitted), providing otherwise, having been superseded by former section. *State v. Carmichael*, 62 M 159, 161, 204 P 362; *State v. Zorn*, 99 M 63, 41 P 2d 513.

Held, that the provision of former section prohibiting the supreme court from reversing a judgment in a criminal cause for any error in instructions not specifically pointed out and excepted to at the settlement of instructions and incorporated and settled in the bill of exceptions, applies only to error allegedly committed in refusing to give offered instructions. *State v. Daw*, 99 M 232, 234, 43 P 2d 240; *State v. Heaston*, 109 M 303, 314, 97 P 2d 330.

Where attorney for defendant presented bill of exceptions and prayed that the same be signed, settled and allowed, he could not be heard to complain on appeal that his bill of exceptions was not accurate. *State v. Pankow*, 134 M 519, 333 P 2d 1017, 1020.

The provisions of former section forbidding the supreme court to reverse a judgment for errors in instructions unless such errors are specifically pointed out at the time the instructions are settled is mandatory, and in the absence of such exceptions the court cannot consider errors predicated upon the instructions, however erroneous or prejudicial they may be. *State v. Watson*, 144 M 576, 398 P 2d 949.

**Instructions—Duty To Object and Point Out Error**

Where instructions as finally proposed to be given were not objected to by counsel for defendant, the district court by statute was expressly forbidden to grant a new trial and the supreme court was forbidden to reverse the cause, even if error existed in such instructions. *State v. Donges*, 126 M 341, 251 P 2d 254, 255; *State v. Bubnash*, 142 M 377, 382 P 2d 830.

**95-1911. When order of trial may be departed from.** When the state of the pleading requires it, or in any other case, for good reasons, and in the discretion of the court, the order prescribed in the last section may be departed from.

**History:** En. 95-1911 by Sec. 1, Ch. 196, L. 1967.

**95-1912. View of place of offense or property.** When the court deems it proper that the jury view any place or personal property pertinent to the case, it will order the jury to be conducted in a body under the custody of the sheriff or bailiff, to view said place or personal property

in the presence of the defendant and his counsel. The place or personal property will be shown them by a person appointed by the court for that purpose, and they may personally inspect the same. The sheriff or bailiff must be sworn to suffer no person to speak or otherwise communicate with the jury nor to do so himself on any subject connected with the trial, and to return them into the courtroom without unnecessary delay or at a specified time as the court may direct.

**History:** En. 95-1912 by Sec. 1, Ch. 196, L. 1967.

#### Condition of Premises

The fact that the premises to be viewed had accumulated dirt which had been hastily swept away, that doors had been replaced and the view was bleak and morbid furnished no ground for interfering with an order permitting a view of the premises. *State v. Allison*, 122 M 120, 199 P 2d 279, 292.

#### Defendant May Waive Right To Be Present

Since the only purpose of a view by the jury of the place where a homicide was committed is to enable the jurors better to understand the evidence heard by them at the trial and testimony may not there be taken for any purpose, the defendant may waive his right to be present at the viewing, and where he did not make a request for permission to be present at the view of an automobile in and near which the shooting occurred, he will be held to have waived his right in that behalf. *State v. Cates*, 97 M 173, 191, 33 P 2d 578.

#### Discretion of Court

Matter of permitting the jury to view cattle charged to have been stolen by defendant and recaptured was within the discretion of the trial court, and in the absence of a showing of abuse of its discretion in that behalf error may not be said to have been committed in permitting the viewing. *State v. Arnold*, 84 M 348, 362, 275 P 757.

The matter of permitting the jury to view the premises rests entirely in the discretion of the trial court which will not be interfered with except in case of manifest abuse. *State v. Allison*, 122 M 120, 199 P 2d 279, 292.

#### Waiver of Alleged Error in Permitting View

By failing to object to an order of the trial court, made in its discretion and at the close of the testimony in a prosecution for murder, permitting the jury to view an automobile in which the shooting occurred, defendant waived his right to secure a review of the propriety of the order urged on the ground that no proper foundation had been laid for the view in that it was not shown that the car was in the same condition as at the time of the killing. *State v. Cates*, 97 M 173, 191, 33 P 2d 578.

**95-1913. Conduct of jury after submission of case.** (a) Jurors, Separation of During Trial. The jurors sworn to try an action may, at any time before the submission of the case, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. The officer must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial, and to return them into court at the next meeting thereof.

(b) Retirement of Jury. When the jury retires to consider its verdict an officer of the court shall be appointed to keep them together and to prevent conversations between the jurors and others.

(c) Items Which May be Taken in the Jury Room. Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in his possession. The jury may also take with them



any exhibits which the court may deem proper, and notes of the proceedings taken by themselves.

(d) After Retirement, May Return into Court for Information. After the jury has retired for deliberation, if there be any disagreement among them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information requested may be given in the discretion of the court; if such information is given it must be given in the presence of the county attorney and the defendant and his counsel.

(e) Admonition. The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them.

**History:** En. 95-1913 by Sec. 1, Ch. 196, L. 1967.

#### **Impliedly Repealing Earlier Statute on Separation after Charge**

Predecessor section declaring that jury may be permitted to separate at any time before submission of case to them was enacted some twenty years after section prohibiting separation of jury in criminal cases after hearing the charge and impliedly repealed the latter section; hence error was not committed in permitting separation for lunch after the giving of instructions and before the argument of counsel, i. e., at any time before submission of the case to them. *State v. DeTonancour*, 112 M 94, 99, 112 P 2d 1065.

#### **Juror's Opinion**

Where a juror on his voir dire in a burglary case stated that he had formed an opinion based on what he had heard on the radio, television and read in the newspapers, but, had not discussed the case with anyone purporting to know any of the facts about it and declared under oath that he could lay aside his opinion and judge the case solely on the evidence presented, it was not error to deny defendant's challenge. *State v. Moran*, 142 M 423, 384 P 2d 777.

#### **No Presumption of Prejudice**

Where exhibits consisting of photographs of the automobile in which some of the shots resulting in the killing of deceased had been fired and of the body of deceased, a pistol taken from defendant after the shooting, revolver clips, etc., all of which had been admitted in evidence without objection by defendant, were taken to the jury room, at the close of the trial, apparently without the affirmative consent of the defendant and without an order of

the court permitting it to be done, but there was no showing that by the procedure the jury were given any other information than that obtained at the trial, it may not be presumed that the procedure resulted to the prejudice of defendant. *State v. Cates*, 97 M 173, 197, 33 P 2d 578.

#### **Oral Instructions**

Where in a prosecution for rape the jury, after retiring to the jury room, were returned into court for information relative to a certificate of birth of the prosecutrix, which had been excluded from the evidence, and an affidavit made by her to the effect that defendant had not committed any offense against her, which was admitted, and the court orally advised them that the certificate had been excluded and that as to the affidavit they would have to determine for themselves, its action in not going further and instructing them orally as to what weight should be given the affidavit was proper, since instructions, in the absence of a waiver by the parties, must be delivered in writing. *State v. Duncan*, 82 M 170, 177, 266 P 400.

#### **Oral Instructions—Presence of Defendant**

After retiring to the jury room to deliberate of their verdict in a criminal cause, the jury returned, asking the court whether two instructions given were conflicting. The court, in the absence of defendant though in the presence of his attorney, orally instructed the jury to disregard one of them and withdrew it. Held, that withdrawing the instruction and directing the jury to disregard it was instructing the jury orally, constituting reversible error, and that doing so in the absence of the defendant from the courtroom was contrary to the provisions of predecessor sec-

tion. *State v. Jackson*, 88 M 420, 434, 293 P 309.

### Rereading Testimony at Jury's Request

It is within the trial court's discretionary power to grant a jury's request to reread parts of testimony and such procedure is authorized by statute. *State v. Armstrong*, 149 M 470, 428 P 2d 611.

### Showing of Compliance

The record on appeal in a criminal cause which disclosed that when an adjournment was taken, "the jury was admonished by the court and placed in charge of the sheriff," etc., was sufficient to disclose compliance with statute, imported verity, and could not be impeached by affidavit. *State v. Hall*, 55 M 182, 186, 175 P 267.

### Taking Depositions to Jury Room

Held, that it was error for the trial court to send to the jury room as an exhibit an alleged confession headed "Affidavit," which to all intents and purposes was a deposition, in view of former section which expressly prohibited the jury from taking depositions to the jury room for consideration during its deliberations. *State v. Crighton*, 97 M 387, 403, 404, 34 P 2d 511.

### Taking Exhibits to Jury Room

Personal presence of the defendant is required at the trial in felony cases. After the jury had retired to the jury room for deliberation of their verdict they requested that certain exhibits consisting of a gun, a pair of shoes and other articles found in defendant's room, be sent to them. While defendant was not present in the courtroom, his counsel gave his consent. Held, that the proceeding did not constitute a part of the trial and therefore defendant's presence was not required, and that defendant's counsel having given his consent, the court did not abuse its discretion in complying with the jury's request, even though the exhibits were not of the nature of those authorized by statute to be taken to the jury room. *State v. Olson*, 87 M 389, 395, 287 P 938.

### Taking Photographs to Jury Room

In a criminal prosecution for involuntary manslaughter, photographs of the

scene of the accident are "all papers" within the meaning of that phrase as it appears in the statute, thus the trial court properly sent the photographs along with the jury when they retired to the jury room for deliberations. *State v. Medicine Bull*, — M —, 445 P 2d 916.

### Time of Admonition

The court is not required to admonish the jury before it has been completed; as, where a recess has been taken before the completion of the jury; the body of men intended for a jury is not such, under section 93-1203, until it has been sworn to try and determine by verdict a question of fact. *State v. Hall*, 55 M 182, 186, 175 P 267.

Where a jury was completed on the afternoon of the sixth of the month, and an adjournment was then taken until the seventh, and at noon on the seventh a recess was taken until 1:30 p.m. of that day, a new trial will not be granted because of the failure of the court to give to the jury the full statutory admonition, where the jury was properly admonished, as required by this section, at each adjournment taken after the noon recess on the seventh. *State v. Hall*, 55 M 182, 186, 175 P 267.

### Waiver of Objection

Where on motion for new trial it is found that counsel for defendant consented to the taking of certain exhibits to the jury room previously admitted in evidence on a prosecution for murder, such consent constitutes a waiver of any objection to the sending of the exhibits to the jury during retirement. *State v. Allen*, 23 M 118, 57 P 725.

### When Information Deemed Oral

The information referred to in predecessor section was deemed to be oral if it was not in writing at the time of its delivery and read to the jury as written. *State v. Fisher*, 23 M 540, 553, 59 P 919.

### Law Review

General Admonitions To Jury Not To Read Newspaper Accounts of Trial Held Sufficient To Counteract Adverse Publicity (*State v. Moran*, 142 M 423, 384 P 2d 777), 25 Mont. L. Rev. 156 (1963).

**95-1914. Court may adjourn during absence, but deemed open.** While the jury is absent the court may adjourn from time to time as to other business, but it must nevertheless be open for every purpose connected with the cause submitted to the jury until a verdict is returned or the jury discharged.

**History:** En. 95-1914 by Sec. 1, Ch. 196, L. 1967.

**95-1915. Verdict.** (a) Return. The verdict shall be unanimous in all felonies and two-thirds ( $\frac{2}{3}$ ) in all misdemeanors and appeals from justice or police courts. Such verdict shall be signed by the foreman and returned by the jury to the judge in open court.

(b) Several Defendants. If there are two (2) or more defendants, the jury, at any time during its deliberations, may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) Conviction of a Lesser Offense. The defendant may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.

(d) Poll of Jury. When a verdict is returned, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not the required concurrence the jury may be directed to retire for further deliberations or may be discharged.

**History:** En. 95-1915 by Sec. 1, Ch. 196, L. 1967; Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968.

#### **Advisory Committee Note:**

Amendment by addition of second paragraph brings this section into conformity with section 94-7234, R. C. M. 1947.

#### **Cross-References**

Right to unanimous verdict in felony cases, Mont. Const. Art. II, § 23.

#### **Degrees of Murder**

There is but one crime of murder, and its division into degrees is simply for the purpose of adjusting the punishment with reference to the presence or absence of circumstances of aggravation. *State v. Hliboka*, 31 M 455, 458, 78 P 965.

#### **Degree of Offense**

In charging burglary, it is not necessary to allege in the information the time of the entry, but the jury, if they convict, must find the degree. *State v. Copenhagen*, 35 M 342, 344, 89 P 61; *State v. Mish*, 36 M 168, 175, 92 P 459.

Where a specific crime is divided into degrees, it is sufficient to charge the commission of the substantive offense; it is then made the duty of the jury to determine from the evidence the particular degree of the crime of which the accused is guilty, if guilt is shown. *State v. Wiley*, 53 M 383, 386, 164 P 84.

#### **Finding as to Previous Conviction**

In an information charging, among other things, a prior conviction of an offense in another state which, in this state,

is punishable by imprisonment in the state prison, it is unnecessary to allege the facts constituting the crime in the foreign state, and it is immaterial whether the offense for which defendant is alleged to have been previously convicted in the sister state is a felony there. *State v. Paisley*, 36 M 237, 247, 92 P 566.

While it is not necessary for the jury to find that a charge of prior conviction is true where the charge is admitted, if it does so find, defendant is not in a position to complain. *State v. O'Neill*, 76 M 526, 528, 248 P 215.

Where defendant's answer admits the charge of a previous conviction, finding of previous conviction is unnecessary and jury's failure to make such finding did not render invalid the judgment increasing sentence for a prior conviction. *State ex rel. Williams v. Henry*, 119 M 271, 174 P 2d 220, 222.

#### **Insufficient Verdict**

A party cannot be charged with one crime and be convicted of another independent offense; thus, a verdict of guilty of malicious destruction of property is insufficient under a charge of the malicious burning of property; the offense found does not include the offense charged; in such a case it is the right and duty of the trial court to require the jury to return some form of verdict authorized by law, or to report a disagreement. *State v. Sieff*, 54 M 165, 168, 168 P 524.

#### **Lesser Offense**

Where the defendant was specifically charged with burglary in the nighttime, constituting the first degree of the offense



of burglary, the jury could not convict him of the crime in the second degree, as having been committed in the daytime, since the former does not include the latter, and inasmuch as the defendant need only meet the accusation as made, and not another and a different one, and the prosecution is held to proof of the charge as set out in the information. *State v. Copenhagen*, 35 M 342, 345, 89 P 61.

An information charging murder, when stripped of the terms conveying the idea of deliberation, premeditation, and malice, sufficiently charges manslaughter, and the accused may be found guilty of the lesser offense. *State v. Crean*, 43 M 47, 53, 114 P 603.

Murder in the first degree includes manslaughter. *State v. Crean*, 43 M 47, 53, 114 P 603.

While the offense of kidnaping includes the minor offenses of false imprisonment and assault in the third degree, the court need not so formulate the charge that the jury may find the defendant guilty of a lower offense or of an included offense, where the evidence is such as to show that defendant is guilty of the offense charged or is entitled to an acquittal. *State v. McDonald*, 51 M 1, 16, 149 P 279.

Where defendant was charged with murder in the second degree it was permissible for the jury to find him guilty of involuntary manslaughter. *State v. Allison*, 122 M 120, 199 P 2d 279, 288.

#### **Manslaughter Not a Degree of Murder**

Where there is evidence tending to show that defendant is guilty of murder in the first degree, murder in the second degree, and manslaughter, it is the duty of the court to instruct that a verdict for manslaughter may be returned, manslaughter not being a degree of murder. *State v. Shadwell*, 26 M 52, 59, 66 P 508.

#### **Poll of Jury**

Where on the poll of the jury one juror answered that the verdict of guilty of burglary was his verdict provided the sentence was suspended, but thereafter, upon inquiry by the court, unqualifiedly answered that it was his verdict, a motion for dismissal of the information on the ground that the verdict had not been rendered by a full panel was properly denied. *State v. Asher*, 63 M 302, 306, 206 P 1091.

#### **Sentence for Prior Conviction**

A judgment that defendant "be imprisoned in the state prison for the term of ten years, five years upon the conviction for assault in the second degree, and five years for the prior conviction of a felony as by the statute made and provided," is not void as to the five years for former

conviction. *State v. Connors*, 27 M 227, 228, 70 P 715.

#### **Value of Property**

Held, in view of former section providing that in a prosecution for an offense against the property of another, the jury must ascertain and declare in their verdict not only the value of the property taken but also the amount restored, that refusal to permit defendant to introduce evidence to show the amount restored to the person from whom he obtained money by false pretenses was prejudicial error. *State v. Mason*, 62 M 180, 190, 204 P 358.

Where the fact that all of the articles taken by one charged with burglary were found and restored to the owner was before the jury, failure of the verdict to declare the value of the property taken and the amount restored, if any, and the value thereof, as required by former statute which closed with the words that "the jury's failure to do so does not affect the validity of their verdict," was not a fatal defect, if the provisions of the section were to guide the jury in fixing punishment. *State v. Dixon*, 80 M 181, 207, 208, 260 P 138.

#### **Verdict by Full Panel**

Where, on the poll of the jury one juror answered that the verdict of guilty of burglary was his verdict provided that the sentence was suspended, but thereafter, upon inquiry by the court, unqualifiedly answered that it was his verdict, a motion for dismissal of the information on the ground that the verdict had not been rendered by a full panel was properly denied. *State v. Asher*, 63 M 302, 306, 206 P 1091.

#### **Verdict Not Subject to Technical Pleading Rules**

A verdict is not subject to the technical rules which govern pleadings. The object sought in construing a verdict is to ascertain the intention of the jury, and to that end reference may be made to the pleadings, the evidence and the instructions of the court. *Consolidated Gold & Sapphire Min. Co. v. Struthers*, 41 M 565, 111 P 152; *Tripp v. Silver Dyke Min. Co.*, 70 M 120, 224 P 272.

#### **Verdict upon Finding of Insanity**

Where defendant, charged with assault in the first degree, relied wholly upon the defense of insanity, the court's instruction that the jury might find defendant guilty of assault in the first, second, or third degree, or not guilty was inaccurate; the jury should have been told that, if they found him not guilty because insane, their verdict should be "not guilty by reason of insanity." *State v. Crowe*, 39 M 174, 184, 102 P 579.

## DECISIONS UNDER FORMER LAW

**Finding as to Previous Conviction**

For a mere informality in the wording of a verdict finding the defendant guilty of robbery and also "guilty of prior convictions," instead of following the language of former section and saying, "We find the charge of previous conviction true," the judgment of conviction would not be reversed, since the provision was directory only, and the verdict in question substantially conformed to it. *State v. Gordon*, 35 M 458, 465, 90 P 173; *State v. Paisley*, 36 M 237, 248, 92 P 566.

**Insufficient Verdict**

Where a jury in a criminal case brought in a verdict of guilty, and, in the at-

tempted exercise of its former right to fix the punishment, set out in its verdict the maximum of years the defendant was to serve in prison, but neglected to set out the minimum, the court should have, on motion therefor, sent it out again to fill in the omission. *In re Gomez*, 52 M 189, 190, 156 P 1078.

**Manner of Taking Verdict**

Purpose of former section dealing with manner of taking verdict and requiring the names of the jurors to be called when their verdict was delivered, was to ensure their presence before the verdict was delivered. *State v. De Lea*, 36 M 531, 534, 93 P 814.

**95-1916. Defendant, when to be discharged.** If judgment of acquittal is given on a general verdict, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given, except where the acquittal is because of a variance between the pleading and proof which may be obviated by a new indictment or information the court may order his detention to the end that a new indictment or information may be filed by the county attorney.

**History:** En. 95-1916 by Sec. 1, Ch. 196, L. 1967.

## CHAPTER 20

## JUSTICE AND POLICE COURT PROCEEDINGS

- Section 95-2001. Initiation of proceedings.  
 95-2002. Minutes.  
 95-2003. Change of place of trial.  
 95-2004. Trial in justice and police courts.  
 95-2005. Formation of trial jury.  
 95-2006. Verdict.  
 95-2007. Sentence and judgment.  
 95-2008. Execution of judgment.  
 95-2008.1. Fines for city ordinance violations tried on appeal—half to city.  
 95-2009. Appeal.

**95-2001. Initiation of proceedings.** In justice and police courts all criminal prosecutions must be commenced by complaint under oath.

**History:** En. 95-2001 by Sec. 1, Ch. 196, L. 1967.

**Limited Jurisdiction**

Police courts, like justices' courts, are courts of limited jurisdiction and have only such authority as is expressly conferred upon them. *State ex rel. Marquette v. Police Court*, 86 M 297, 308, 283 P 430.

**Nature of Action**

The nature of an action for the violation of a city ordinance, whether civil or criminal, must be determined by the relief sought in the proceeding, without regard to the question whether some other proceeding may or may not be brought under the state statutes. *State ex rel.*

**Cross-References**

Prosecution of criminal offenses, Mont. Const. Art. III, § 8.

**Issuance of Arrest Warrant**

It is the duty of a justice of the peace, when he is satisfied upon the complaint of any citizen that an offense has been committed, to issue a warrant of arrest and to have the offender brought before him for trial or examination, as the case may be. *State v. O'Brien*, 35 M 482, 494, 90 P 514.

Marquette v. Police Court, 86 M 297, 308, 283 P 430.

### Pleading

In a criminal proceeding, it is sufficient to plead a city ordinance by reference to its title, section and subdivision of section. City of Philipsburg v. Weinstein, 21 M 146, 53 P 272.

For an instance of a complaint charging a sale of liquor, in violation of the local option law, and meeting all the requirements of the statute, see State v. O'Brien, 35 M 482, 494, 90 P 514.

### Sufficiency of Complaint

A complaint was sufficient where it stated facts constituting a public offense and charged a violation which was a misdemeanor within the jurisdiction of the justice of the peace court. State ex rel. Borberg v. District Court, 125 M 481, 240 P 2d 854, 856.

### Where Issues Narrowed from General Allegations to Specific Averments

Where general allegations in a complaint are followed by specific averments, the issues are narrowed to those embraced within the particular allegations. State v. Schnell, 107 M 579, 585, 88 P 2d 19.

### Where Offense Erroneously Named, Not Fatal to Pleading

The general rule is that when the facts, acts and circumstances are set forth with sufficient certainty to constitute an offense, it is not a fatal defect that the complaint gives the offense an erroneous name; the name of the crime is controlled by the specific acts charged, and an erroneous name of the charge does not vitiate the complaint. State v. Schnell, 107 M 579, 585, 88 P 2d 19.

### Law Review

Mason & Kimball, Montana Justices' Courts—According to the Law, 23 Mont. L. Rev. 62 (1961).

**95-2002. Minutes.** A docket must be kept by the justice of the peace, or police judge, in which must be entered each action, and the proceedings of the court therein.

**History:** En. 95-2002 by Sec. 1, Ch. 196, L. 1967.

**95-2003. Change of place of trial.** (a) The defendant or prosecution, before trial, may move for a change of place of trial on the ground that there exists in the township in which the charge is pending such prejudice that a fair trial cannot be had in such township.

(b) The motion shall be in writing and supported by affidavit which shall state facts showing the nature of the prejudice alleged. The defendant or the state may file counteraffidavits. The court shall conduct a hearing and determine the merits of the motion.

(c) If the court determines that there exists in the township where the prosecution is pending such prejudice that a fair trial cannot be had it shall transfer the cause to any other court of competent jurisdiction in any township where a fair trial may be had.

**History:** En. 95-2003 by Sec. 1, Ch. 196, L. 1967.

### Change of Place of Trial

It seems that a police judge may grant a change of the place of trial of a criminal cause pending before him upon a motion, supported by a proper showing, either for bias or prejudice of such judge,

or prejudice in the citizens of the township. In re Graye, 36 M 394, 397, 93 P 266.

A change of venue cannot be had from a justice of the peace court of one county to a justice of the peace court of another county. State ex rel. Gillett v. Cronin, 41 M 293, 295, 109 P 144.

**95-2004. Trial in justice and police courts.** (a) Method of Trial:

(1) The defendant is entitled to a jury of six (6) qualified persons, but may consent to a lesser number.

(2) A trial by jury may be waived by the consent of both parties expressed in open court and entered in the docket.



(3) Questions of law shall be decided by the court and questions of fact by the jury except when a jury trial is waived, then the court shall determine both questions of law and of fact.

(b) Plea of Guilty. Before or during trial a plea of guilty may be accepted when:

(1) The defendant enters a plea of guilty in open court, and

(2) The court has informed the defendant of the consequences of his plea and of the maximum penalty provided by law which may be imposed upon acceptance of such plea.

(c) Presence of Defendant. The trial may be had in the absence of the defendant; but if his presence is necessary for any purpose, the court may require the personal attendance of the defendant at the trial.

(d) Time to Prepare for Trial. After plea the defendant shall be entitled to a reasonable time to prepare for trial.

**History:** En. 95-2004 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

Juries in justices' courts, sec. 93-1206.

Right of trial by jury, Mont. Const. Art. III, § 23.

#### Questions of Law—Questions of Fact

Provision that court shall decide questions of law but can give no charge with respect to matters of fact was the statement in legislative form of an ancient legal maxim which has been enacted in many statutes, and has been deemed so vital to the rights and liberties of the people that it has been engrafted upon the constitutions of states. *State v. Sullivan*, 9 M 174, 177, 22 P 1088.

### DECISIONS UNDER FORMER LAW

#### Written "Special Plea in Bar" Not Authorized

Justice of the peace was acting within his jurisdiction and in accordance with the law in overruling the defendant's written "Special Plea in Bar" and ordering the

defendant to answer to the complaint in accordance with statutory requirements explicitly calling for oral plea. *State ex rel. Borberg v. District Court*, 125 M 481, 240 P 2d 854, 857, 859, 861.

**95-2005. Formation of trial jury.** (a) Number of Jurors. A jury in justice or police court shall consist of six (6) persons, but the parties may agree to a number less than six (6).

(b) Formation of Trial Jury. The county jury commission, at the time of preparing the district court jury list, shall prepare a jury list for each justice and police court within the county. Each list shall consist of residents of the appropriate township, city or town. Such list shall be selected in any reasonable manner which shall ensure fairness, and it shall include a number of names sufficient to meet the annual jury requirements of the respective court. Additional lists may be prepared if required. The list shall be filed in the office of the clerk of the district court and the appropriate list shall be posted in a public place in each such township, city or town, and such list shall comprise the trial jury list for the ensuing year for such township, city or town.

Trial jurors shall be summoned from the jury list by notifying each orally that he is summoned and of the time and place at which his attendance is required.

The prosecuting attorney and the defendant or his attorney shall conduct the examination of prospective jurors. The court may conduct an additional examination. The court may limit the examination by the defendant, his attorney or the prosecuting attorney if the court believes such examination to be improper.

Each party may challenge jurors for cause, and each challenge must be tried by the court. The challenge may be for any cause enumerated in section 95-1909(d) (2) of this code. Each defendant shall be allowed three (3) peremptory challenges and the state shall be allowed the same number of peremptory challenges as all of the defendants.

**History:** En. 95-2005 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968.

#### Cross-References

Juries in justices' courts, sec. 93-1206.  
Number of jurors, Mont. Const. Art. III, § 23.

**95-2006. Verdict.** (a) Return. The verdict of the jury must in all cases be general. It shall be returned by the jury to the judge in open court, who must enter, or cause it to be entered in the minutes. Two-thirds ( $\frac{2}{3}$ ) in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all jurors had concurred therein.

(b) Several Defendants. When several defendants are tried together, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered accordingly, and the case as to the rest may be tried by another jury.

(c) Poll of Jury. When a verdict is returned, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not a two-thirds ( $\frac{2}{3}$ ) concurrence, the jury may be directed to retire for further deliberations or may be discharged.

(d) Discharge of Jury. The jury cannot be discharged after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless for good cause the court sooner discharges them.

**History:** En. 95-2006 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

Two-thirds in number of jury for verdict, Mont. Const. Art. III, § 23.

### DECISIONS UNDER FORMER LAW

#### Discharge of Jury without Verdict

In a prosecution for murder, where the jury was discharged at the end of a mistrial, because there was "a reasonable probability that the jury cannot agree," an entry in the minutes in those words was sufficient under former section pro-

viding that jury was not to be discharged, after cause was submitted to them, until rendering their verdict unless it appeared that there was a reasonable probability that they could not agree. *State v. Keerl*, 33 M 501, 513, 85 P 862, affirmed in 213 US 501, 53 LEd 734, 29 S Ct 469.

**95-2007. Sentence and judgment.** (a) If a judgment of acquittal is rendered the defendant must be immediately discharged.

(b) After a plea or verdict of guilty, or after a judgment against the defendant, the court must designate a time for sentencing, which must be within a reasonable time after the verdict or judgment is rendered. The sentence must be entered in the minutes of the court as soon as it is imposed.

(c) If the defendant pleads guilty, or is convicted either by the court or by a jury, the court must impose a sentence of fine or imprisonment or both, as the case may be.

(d) The determination and imposition of sentence shall be the exclusive duty of the court.

**History:** En. 95-2007 by Sec. 1, Ch. 196, L. 1967.

Hosoda v. Neville, 45 M 310, 312, 123 P 20.

#### Waiver of Sentencing Date

Where a person accused in a justice's court of a misdemeanor is convicted, and the justice immediately proceeds, upon the return of the verdict, to pronounce sentence without any objection from the defendant, his silence is a waiver of his right to a postponement of judgment.

Defendant convicted in a justice of the peace court of driving a vehicle on a highway while under the influence of intoxicating liquor in violation of section 32-2142 waived postponement of the sentencing date where there was a stipulation to the sentencing date. Wilson v. Brodie, 148 M 235, 419 P 2d 306, 308.

**95-2008. Execution of judgment.** (a) The judgment must be executed by the sheriff, constable, marshal or policeman of the jurisdiction in which the conviction was had.

(b) When a judgment of imprisonment is entered, a certified copy thereof must be delivered to the sheriff or other officer, which is a sufficient warrant for its execution.

(c) If a judgment is rendered imposing a fine only, without imprisonment for nonpayment, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given.

A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in the proportion of one (1) day's imprisonment for every ten dollars (\$10.00) of the fine.

When such a judgment is rendered the defendant must be held in custody the time specified in the judgment, unless the fine is sooner paid.

(d) Any officer charged with the collection of fines, under the provisions of this chapter, must return the execution to the judge within thirty (30) days from its delivery to him, and pay over to the judge the money collected therefrom, deducting his fees for the collection.

All fines imposed and collected by a justice or police court must be paid to the treasurer of the county, city or town as the case may be, within thirty (30) days after the receipt of the same, and the justice or police judge must take duplicate receipts therefor, one (1) of which he must deposit with the county or city or town clerk as the case may be.

**History:** En. 95-2008 by Sec. 1, Ch. 196, L. 1967.

justice court, such imprisonment operated ipso facto to satisfy and discharge the judgment. Petelin v. Kennedy, 29 M 466, 75 P 82.

#### Fine with or without Imprisonment

Legislature recognized a distinction between a judgment for fine, and one for fine with imprisonment until the fine be paid. State ex rel. Hodgdon v. District Court, 33 M 119, 120, 82 P 663.

#### Imprisonment for Nonpayment of Fine

Where a defendant was imprisoned under predecessor section for the full period prescribed in a judgment rendered in a

#### Judgment for Fine Only

A judgment rendered by a justice of the peace, in a case of misdemeanor, imposing a fine, with imprisonment in the county jail until the fine be paid, is not a judgment for fine only, within the meaning of predecessor section. State ex rel. Hodgdon v. District Court, 33 M 119, 120, 82 P 663.



**95-2008.1. Fines for city ordinance violations tried on appeal—half to city.** All fines obtained from a judgment in a higher court on an appeal from a police court for violation of a city ordinance, tried de novo, in the higher court, shall be paid to the county treasurer who shall before thirty-one (31) days after receipt of the sum forward one-half ( $\frac{1}{2}$ ) of the amount to the treasurer of the city in which the action originated.

**History:** En. Sec. 1, Ch. 32, L. 1967.

**Title of Act**

An act giving cities and towns one-half ( $\frac{1}{2}$ ) of the money from judgments obtained on appeals from police courts.

**Repealing Clause**

Section 2 of Ch. 32, Laws 1967 repealed all acts and parts of acts in conflict therewith.

**95-2009. Appeal.** (a) All cases on appeal from justices' or police courts must be tried anew in the district court and may be tried before a jury of six (6) which may be drawn from either the regular panel or jury box No. 3.

(b) The defendant may appeal to the district court by giving written notice of his intention to appeal within ten days (10) days after judgment.

(c) Within thirty (30) days the entire record of the justice or police court proceedings shall be transferred to the district court or the appeal shall be dismissed. It shall be the duty of the defendant to perfect the appeal.

**History:** En. 95-2009 by Sec. 1, Ch. 196, L. 1967.

**Appeal Waives Certain Irregularities**

Since the district court does not, on appeal from a justice's court, sit as a court of review, but tries the case de novo, any irregularities attending the rendition of the judgment in a case in which the justice had jurisdiction of the offense charged and of the defendant are waived by taking the appeal. *State v. O'Brien*, 35 M 482, 491, 90 P 514.

The result of an appeal from a judgment of a justice of the peace, in a prosecution for misdemeanor, is to abrogate that judgment and to hold defendant under the original warrant of arrest for trial de novo in the district court, and the defendant cannot complain, on habeas corpus, of any irregularity committed by the justice in rendering judgment. *Hosoda v. Neville*, 45 M 310, 313, 123 P 20.

**Dismissal for Want of Prosecution Void**

Where an appeal is taken to the district court from a conviction in a police court for a liquor law violation, but neither the city nor the defendant requested the cause be set for trial, the judge of the court could not order the appeal dismissed "for want of prosecution" without giving notice to the defendant. Such an order is void and in excess of jurisdiction. *State ex rel. Healy v. District Court*, 125 M 77, 230 P 2d 763.

**Effect of Payment of Fine after Appeal**

Where defendant was convicted in a police court of the violation of a town ordinance and appealed to the district court and served notice of his appeal to the district court while in jail serving a sentence imposed for his nonpayment of the fine, the fact the defendant had paid the fine before the hearing in the district court did not effect an abandonment of his appeal. *Town of White Sulphur Springs v. Voise*, 136 M 1, 343 P 2d 855, 857.

**No Right of Appeal by Cities**

Defendant, charged with wrongfully obstructing an alley, was proceeded against under statutes governing criminal procedure in police courts, convicted and appealed to the district court, where the complaint was dismissed. Held, on appeal by the city that, the statute not granting the right of appeal to cities in criminal causes tried in justice or police courts, the appeal did not lie. *City of Miles City v. Drum*, 60 M 451, 199 P 719.

**Objection to Form of Appeal**

Where defendant sought to appeal decision of justice of peace and although undertaking was not in proper form, it was approved by the justice, it was improper for the district court to dismiss the appeal for insufficiency of form of undertaking when no objection to the form was made in the justice's court of original jurisdiction. *Reidelbach v. District Court*,

142 M 52, 381 P 2d 470; *Clark v. District Court*, 142 M 56, 381 P 2d 472.

### Record on Appeal

In the absence of specific statutory provision on the subject, the original files, together with a copy of the docket minutes, constitute the record on appeal, in a criminal cause, from a justice of the peace to the district court. In *re Graye*, 36 M 394, 397, 93 P 266.

The original files, together with a copy of the docket minutes, may be regarded as constituting the record on appeal from a justice of the peace to the district court. In *re Graye*, 36 M 394, 397, 93 P 266.

### Trial de Novo

On appeal from a justice's court in a misdemeanor case, the cause must be tried de novo in the district court on the papers and files in the former, unless the latter court allows other or amended pleadings, and each party has the benefit of all legal objections made in the justice's court. *State v. Benson*, 91 M 109, 5 P 2d 1045.

The district court does not, on appeal from a police court, sit as a court of review, but it tries the cause de novo. *Town of White Sulphur Springs v. Voise*, 136 M 1, 343 P 2d 855, 857.

### Undertaking

An undertaking on appeal, being purely a statutory regulation, may not be exacted unless the statute specifically makes such requirement. *State ex rel. Hodgdon v. District Court*, 33 M 119, 122, 82 P 663.

### Waiver of Irregularities

A party cannot, under the guise of an application for a trial de novo, insist that irregularities, to which he made no objection, shall be taken note of, or that the judgment, which is abrogated by the appeal, be reversed on account of them. It is therefore immaterial, on the trial of the case appealed, whether the justice lost jurisdiction by conducting the trial in part on a legal holiday, or failed to comply with the statute in giving judgment or pronouncing sentence. In *re Graye*, 36 M 394, 397, 93 P 266.

## DECISIONS UNDER FORMER LAW

### Oral Notice of Appeal

An appeal may be taken by oral notice at the time of the rendition of the verdict or judgment. In *re Graye*, 36 M 394, 398, 93 P 266.

Former section permitting appeal by notice in open court did not apply to the taking of an appeal to the supreme court from a judgment of a district court. *State ex rel. Treat v. District Court*, 124 M 234, 221 P 2d 436, 437.

### Trial de Novo

Defendant, who gave oral notice of appeal upon his conviction in a justice of the peace court of the offense of driving a vehicle on a highway while under the influence of intoxicating liquor, was entitled to a trial de novo in the district court. *Wilson v. Brodie*, 148 M 235, 419 P 2d 306, 309.

## CHAPTER 21

### POST-TRIAL MOTIONS

#### Section 95-2101. New trial.

**95-2101. New trial.** (a) Definition and Effect. A new trial is a re-examination of the issue in the same court, before another jury, after a verdict or finding has been rendered and the granting of a new trial places the parties in the same position as if there had been no trial.

#### (b) Motion for a New Trial.

(1) Following a verdict or finding of guilty the court may grant the defendant a new trial if required in the interest of justice.

(2) The motion for a new trial shall be in writing and shall be filed by the defendant within thirty (30) days following a verdict or finding of guilty. Reasonable notice of the motion shall be served upon the state.

(3) The motion for a new trial shall specify the grounds therefor.

(c) Alternative Authority of the Court on Hearing Motion for New Trial. On hearing the motion for a new trial, if justified by law and the weight of the evidence, the court may:

1. Deny the motion,
2. Grant a new trial, or
3. Modify or change the verdict or finding by finding the defendant guilty of a lesser degree of the crime charged, finding the defendant guilty of a lesser included crime or finding the defendant not guilty.

**History:** En. 95-2101 by Sec. 1, Ch. 196, L. 1967.

#### Cross-Reference

Error in instructions as ground for new trial, sec. 95-1910.

#### Appeal

Rulings upon the admission or rejection of testimony and upon giving or refusing instructions may be reviewed either upon appeal from the judgment or on appeal from an order refusing a new trial, but any other questions arising from this section may be reviewed only upon appeal from an order denying a new trial. *State v. Brantingham*, 66 M 1, 7, 8, 212 P 499.

#### Attacking Charge

When a first conviction is set aside the defendant is not precluded upon a remand for a new trial from attacking the indictment or information. *State v. Hale*, 129 M 449, 291 P 2d 229, 230, overruled on another point in 142 M 459, 462, 384 P 2d 749. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236.)

#### Evidence Received out of Court

Under former statute providing that a new trial shall be granted "when the jury has received any evidence, papers, or documents, not authorized by the court," the word "papers" refers to such written instruments as might be competent testimony when inspected by the court, and found to be competent under the rules of evidence, and does not include newspapers; and the reception by the jury of newspapers containing comments on the case does not, in itself, vitiate the verdict. *State v. Jackson*, 9 M 508, 520, 24 P 213.

Exhibits introduced in evidence in a prosecution for murder which are sent to the jury during their retirement will not be considered as having been received out of court, where it is found on motion for new trial that counsel for defendant consented to their being taken to the jury room during their retirement. *State v. Allen*, 23 M 118, 57 P 725.

#### Jury Separation or Misconduct

Under former statute providing that a new trial shall be granted "when the jury

has been separated without leave of court, or been guilty of any misconduct, tending to prevent a fair and due consideration of the case," the reception by the jury of newspapers, containing comments on the trial adverse to the defendant, is misconduct tending to show injury to the defendant. *State v. Jackson*, 9 M 508, 522, 24 P 213. See also *State v. Pepo*, 23 M 473, 479, 59 P 721.

The affidavits of two jurors, filed in aid of a motion for new trial by defendant in a prosecution for murder, in which both stated that they had misunderstood the instructions of the court, which clearly charged the jury that they could find the accused guilty of any grade of unlawful homicide or acquit him, in that from a reading of them they were under the impression that the jury was required to either find the defendant guilty of murder in the first degree or acquit him, and that, being unwilling to acquit, they voted for murder in the first degree rather than declare him innocent, did not show such misconduct on the part of the jury as to entitle defendant to a new trial. *State v. Beeskove*, 34 M 41, 51, 85 P 376.

#### Motion for New Trial after Appeal Perfected

Once an appeal has been perfected to the supreme court the district court loses jurisdiction of the case, except that if a motion for a new trial is then pending the district court retains jurisdiction thereof, with power to rule thereon. *State v. Nicks*, 131 M 567, 312 P 2d 519, 520.

#### Newly Discovered Evidence

An affidavit in support of a motion for a new trial following a conviction for attempted rape that the prosecuting witness, some five months before the trial, said to affiant that, if defendant didn't "fork over," she "would send him over the road for the rest of his life," was not "newly discovered evidence," that expression meaning evidence discovered since the trial. *State v. Prouty*, 60 M 310, 315, 199 P 281.

Though a motion for a new trial in a criminal cause on the ground of newly discovered evidence is not generally viewed with favor by the courts, it is authorized



by the codes, and, when the prescribed conditions are met, entitled to the same consideration as a motion upon any other statutory ground, and while a broad discretion is lodged in the trial court in disposing of it, its order denying it is subject to review. *State v. Gangner*, 73 M 187, 190, 235 P 703.

Alleged newly discovered evidence which is cumulative only does not warrant the granting of a new trial; nor may the court be put in error for refusing a retrial on that ground where movant made no attempt to show due diligence on his part to produce the newly discovered witness on the trial of his case. *State v. Gies*, 77 M 62, 64, 249 P 573.

Where the owner of an animal which defendant was charged with stealing testified that it was his property at the time it was taken and remained so until after defendant's arrest when it was paid for by the latter, he being fully cross-examined as to the transaction, a motion for a new trial on the ground of newly discovered evidence based upon the witness' affidavit to the effect that he was mistaken in so testifying, was properly refused, since a new trial will not be granted because of newly discovered evidence based on forgetfulness or unfamiliarity of defendant's counsel with facts within the knowledge of the witness, or to enable the witness, on a change of heart, to give testimony in excuse of defendant's conduct. *State v. Hughes*, 78 M 87, 89, 252 P 320.

Where no evidence of the fitness or unfitness of the parents of an accused delinquent minor to control or take care of him was heard by the court, a judgment that they were not unfit was unsupported by the evidence and refusal of a new trial on the ground of new evidence was error. *State ex rel. Palagi v. Freeman*, 81 M 132, 139, 262 P 168.

Where defendant and his counsel accepted the statement of the county attorney that a witness, then in the county jail, whose name was endorsed on the information had refused to testify, whereas after the trial they ascertained that if he had been called he would have testified that he and another committed the offense for which defendant was convicted, without verifying the prosecutor's statement by an interview with the witness, they were lacking in due diligence in discovering and producing the alleged newly discovered evidence, preventing reversal of the order denying retrial as an abuse of discretion. *State v. Broell*, 87 M 284, 287, 286 P 1108.

Applications for new trials on the ground of newly discovered evidence are not favored by the courts and will not be granted where the new evidence is merely

cumulative; in passing upon the correctness of a new trial order the supreme court sits only as a reviewing tribunal, not as a court of original jurisdiction or one clothed with authority to try the motion *de novo*. *State v. Broell*, 87 M 284, 287, 286 P 1108.

Where newly discovered evidence may demonstrate perjury in the state's witness upon whose evidence the verdict of guilty was founded and, but for which, conviction could not have been had, and may probably produce a different result, a new trial should be granted on that ground. *State v. Hamilton*, 87 M 353, 368, 287 P 933.

Motions for new trials on the ground of newly discovered evidence in criminal cases are not favored, and, regardless of the facts set up in affidavits filed in support thereof, defendant is not entitled to a retrial unless it is shown that he could not, with reasonable diligence, have discovered and produced the new evidence at the trial. *State v. Hamilton*, 87 M 353, 386, 287 P 933.

Where the key witness at the trial in which defendant was convicted of larceny made statements after the trial demonstrating that the testimony he gave was false and perjurious and, at the hearing on defendant's motion for new trial, the witness refused to give any testimony, the requirements for the granting of a new trial on the ground of newly discovered evidence were met and the defendant should have been granted a new trial. *State v. Greeno*, 135 M 580, 342 P 2d 1052.

Where defendant had perfected an appeal to the supreme court, and then discovered new evidence, the supreme court had no jurisdiction to grant a new trial, but upon defendant's *prima facie* showing of matters sufficient to warrant consideration, the court would instruct the district court to entertain defendant's motion for a new trial, and would stay further proceedings pending such motion. *State v. Nicks*, 131 M 567, 312 P 2d 519, 521.

### New Trial Not Double Jeopardy

Where one convicted of crime is granted a new trial he is not placed in new jeopardy by the second trial, but is in the same jeopardy he was in when the first trial was had. *State v. Aus*, 105 M 82, 86, 69 P 2d 584.

### Notice of Motion

The notice of motion for a new trial in a criminal case need not state whether the motion will be based on affidavits or a bill of exceptions; and the statement therein of the grounds on which the motion will be made is notice of what will be the basis of the motion. *State v. Landry*, 29 M 218, 220, 74 P 418.

### On Confession of Error by Attorney General

Conviction of one of the crime of first degree burglary set aside and cause remanded for new trial for error committed by the trial court, confessed by the attorney general and shown by the record, in refusing defendant's motion for retrial based on the ground that a juror was biased and prejudiced. *State v. Summers*, 107 M 34, 36, 79 P 2d 560.

### Supreme Court's Status

Upon appeal from an order granting or denying a motion for a new trial, the supreme court sits as a court of error and review, not as a court of original jurisdiction, or as an appellate court that is clothed with authority to try the motion *de novo*. *State v. Schoenborn*, 55 M 517, 520, 179 P 294.

### Verdict Contrary to Law or Evidence

An alleged error in an instruction will not be reviewed on appeal where the only ground designated is that the verdict is contrary to law and evidence. *State v. Gawith*, 19 M 48, 47 P 207, overruled in *State v. Mason*, 24 M 340, 346, 61 P 861.

Under former statute providing that when verdict is contrary to law or evidence but evidence shows accused to be guilty only of lesser degree or lesser included offense rather than degree of which he was convicted, court may modify judgment without granting new trial, the expression, "the verdict is contrary to the evidence," meant the same thing as the expression, "insufficiency of the evidence to justify the verdict." *Flaherty v. Butte Electric Ry. Co.*, 42 M 89, 93, 111 P 348; *State v. Schoenborn*, 55 M 517, 520, 179 P 294.

A defendant in a criminal case who has been convicted is not required to show an entire absence of evidence of some fact necessary to make out a case, in order to secure a new trial; but if he can convince the district court that the evidence in its entirety is insufficient in weight to justify the verdict, he is entitled to a new trial. *State v. Schoenborn*, 55 M 517, 520, 179 P 294.

The district court has authority to grant a motion for a new trial upon the ground that the verdict is contrary to the evidence without reference to the fact that a different judge may preside at the hearing of the motion, from the one who presided at the trial. *State v. Schoenborn*, 55 M 517, 520, 179 P 294.

A motion for a new trial in a criminal case upon the ground that the verdict is contrary to the law and the evidence presents for the court's determination the question of the sufficiency of the evidence to sustain the verdict. *State v. Hughes*, 76 M 421, 424, 246 P 959.

Failure of defendant to object to instructions on first degree murder does not deprive him of the right to ask for a new trial on the ground that the evidence did not justify a verdict of murder in that degree, the expression in former statute authorizing a new trial "when the verdict is contrary to the evidence" meaning the same thing as insufficiency of the evidence to justify the verdict, and the section not contemplating that defendant must first make objection to such instructions before he may rely upon the insufficiency of the evidence as a ground for a new trial. *State v. Gunn*, 85 M 553, 561, 281 P 757.

### Verdict Improperly Arrived At

Under former statute providing for new trial when verdict has been decided by lot or by any means other than a fair expression of opinion on part of all jurors, the fact that a juror, when sworn, was biased and prejudiced against the defendant, which fact he concealed upon his voir dire examination, and which neither defendant nor his counsel discovered until after verdict, was ground for a new trial. *State v. Mott*, 29 M 292, 295, 74 P 728.

While it is imperative that the accused shall have a trial by an impartial jury, nevertheless, after verdict, error will not be presumed, and it is incumbent on the accused to make it appear affirmatively that he is entitled to a new trial by reason of having been deprived of this constitutional right; mere possibility, or even probability, that one of the jurors was incompetent, is not sufficient to overthrow the verdict. *State v. Mott*, 29 M 292, 295, 74 P 728.

The fact that jurors may impeach their own verdict when it has been decided by lot excludes all other exceptions to the general rule that jurors will not be heard to impeach their own verdict. *State v. Beesskové*, 34 M 41, 51, 85 P 376; *State v. O'Brien*, 35 M 482, 503, 90 P 514; *Sutton v. Lowry*, 39 M 462, 471, 104 P 545; *State v. Wakely*, 43 M 427, 437, 117 P 95; *State v. Lewis*, 52 M 495, 504, 159 P 415.

Except in cases where it has been reached by means other than a fair expression of opinion by all the jurors, their verdict cannot be impeached by the affidavit of one or more of the individuals composing the jury. *State v. Lewis*, 52 M 495, 504, 159 P 415.

In a prosecution for statutory rape, there was no error where the jury reached a verdict of guilty, and then, in deciding on punishment, each member set down his proposed amount in years, the total was divided by twelve to get an average, and then the term of the punishment was fixed after further discussion. *State v. Moorman*, 133 M 148, 321 P 2d 236, 242.



A quotient verdict is not a lot verdict. *State v. Moorman*, 133 M 148, 321 P 2d 236, 243.

**When Assignment of Error Does Not Merit Consideration—No Record, Not Argued**

Where alleged error in denying defend-

ant's motion for new trial was not argued and nothing appeared in the record to sustain it, the assignment does not merit consideration. *State v. Wong Sun*, 114 M 185, 199, 133 P 2d 761.

**DECISIONS UNDER FORMER LAW**

**Grounds for New Trial**

Under former statute specifically enumerating grounds for new trial, held that where a motion to set aside an information was made in the trial court, on the ground that it was not properly subscribed by the county attorney, and improperly refused, the error could be reviewed only on appeal from the judgment; it could not be reviewed on an appeal from an order granting a new trial, not being one of the enumerated grounds. *State v. Schnepel*, 23 M 523, 528, 59 P 927.

Where a defendant convicted of crime bases his motion for a new trial upon a number of the statutory grounds therefor, he has an absolute right to have all the grounds specified passed upon by the trial court; if it fails to do so but grants a new trial upon a ground not sustained on appeal by the state, the order will be reversed with directions to pass upon the motion in its entirety. *State v. Hughes*, 76 M 421, 424, 246 P 959.

**Newly Discovered Evidence**

Under former section authorizing new trial on ground of newly discovered evidence and requiring affidavits in support of such motion, a new trial would not be granted when the persons from whom the evidence was expected declined to make affidavits. *State v. Gaimos*, 53 M 118, 128, 162 P 596.

An affidavit of one of defendant's attorneys in support of a motion for new trial, asked because of newly discovered evidence, to the effect that he could not with reasonable diligence have discovered the affidavits of five persons who claimed to have been present at the place where the alleged assault occurred and whose testimony would tend to contradict the state's witnesses or corroborate appellant's version of the affray "and presented same upon the trial," was insufficient to

show abuse of the court's discretion in denying the motion. *State v. Prija*, 57 M 461, 189 P 64.

Failure of defendant to show by his own affidavit that alleged newly discovered evidence was not known to him at the time of the trial warrants refusal to grant a retrial, affidavits of others in that regard being, as a general rule, insufficient. *State v. Prouty*, 60 M 310, 315, 199 P 281.

To constitute a showing of due diligence in discovering new evidence in a criminal case to warrant the granting of a new trial, movant is not required to allege in his supporting affidavits that he made inquiry of every person residing in the town in which the crime of which he was convicted was committed, some seventy-five miles from the county seat, by telephone or telegraph, as to whether they knew anything concerning the case. *State v. Hamilton*, 87 M 353, 368, 287 P 933.

Failure of trial court to grant motion for new trial in first degree murder case on alleged newly discovered evidence was not reversible error where counteraffidavit by county attorney showed that his office investigated each of the people named in the affidavits and that each of the parties denied that they had any evidence or information relative to the case. *State v. Cor*, 144 M 323, 396 P 2d 86, 101. (Dissenting opinion, 144 M 323, 353, 396 P 2d 86, 102.)

**Timeliness of Supplemental Motion**

A supplemental motion for a new trial on the ground of newly discovered evidence is timely and properly before the court if made while the original motion remains undetermined when the applicant shows by affidavit that it was filed within thirty days after discovery of the alleged new evidence. *State v. Hughes*, 78 M 87, 89, 252 P 320.

**CHAPTER 22**

**SENTENCE AND JUDGMENT**

- Section 95-2201. Liberal construction.  
 95-2202. Sentence and judgment.  
 95-2203. Presentence investigations.



- 95-2204. Content of investigation.
- 95-2205. Availability of the report to defendant and others.
- 95-2206. Sentence.
- 95-2207. Withdrawal of plea on a deferred imposition.
- 95-2208. Judgment to pay fine constitutes a lien.
- 95-2209. Entry of judgment and judgment roll.
- 95-2210. Information from courts.
- 95-2211. Review of sentence.
- 95-2212. Sentence to be imposed by judge.
- 95-2213. Merger of sentences.
- 95-2214. Credit for time served.
- 95-2215. Credit for incarceration prior to conviction.
- 95-2216. Jail work release program.
- 95-2217. Prisoner furlough program—purpose and intent.
- 95-2218. Definitions.
- 95-2219. Warden to establish program and rules—privileges granted prisoners.
- 95-2220. Application for participation in furlough program.
- 95-2221. Consideration of application—furlough plan—consent of sheriff necessary.
- 95-2222. Disposition of prisoner's earnings—trust fund—schooling costs.
- 95-2223. Administrative rules—co-operation by state agencies.
- 95-2224. Prisoner not agent, employee or involuntary servant of warden or sheriff.
- 95-2225. Eligibility for parole unaffected.
- 95-2226. Sheriff's responsibility—cancellation or revocation of furlough.

**95-2201. Liberal construction.** This chapter shall be liberally construed to the end that persons convicted of a crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual.

**History:** En. 95-2201 by Sec. 1, Ch. 196, L. 1967.

#### **Law Review**

Ramifications of Jail-Based Probation Upon Suspended Imposition of Sentence (Petition of Joseph Williams, 145 M 45, 399 P 2d 732), 27 Mont. L. Rev. 98 (1965).

**95-2202. Sentence and judgment.** (a) The judgment shall be rendered in open court.

(b) If the verdict or finding is not guilty judgment shall be rendered immediately and the defendant shall be discharged from custody or from the obligation of his bail bond.

(c) If the verdict or finding is guilty sentence shall be pronounced and judgment rendered within a reasonable time.

**History:** En. 95-2202 by Sec. 1, Ch. 196, L. 1967.

#### **Delay Due to Motions of Defendant—Nonprejudice**

While ordinarily the trial court in a criminal case should pass judgment without delay, other than that provided by former statute, and in the absence of statute declaring that sentence must be pronounced at the same term of court at

which the verdict of guilty is returned, where the verdict was returned on Nov. 18, 1938, and sentence was not pronounced until Jan. 19, 1939, the delay being caused by defendant's motions in arrest of judgment and for new trial and the hearings thereof, complaint may not be made that the court lost jurisdiction, or judgment not pronounced in the trial term. State v. Heaston, 109 M 303, 309, 97 P 2d 330.

## DECISIONS UNDER FORMER LAW

**Record of Arraignment**

Record of arraignment was required to show that the former provisions as to the period of time between plea and sentence had been complied with. *State ex rel. Biebinger v. Ellsworth*, 147 M 512, 415 P 2d 728.

**Time for Judgment**

Former section providing, *inter alia*, for pronouncing judgment in felony cases at least two days after verdict meant that the defendant was entitled to two days after the verdict was returned before judgment was pronounced, provided the term of court lasted that long; but, if the term was not to continue for two days after the verdict was returned then the time for pronouncing judgment should be postponed to a date as remote as can reasonably be fixed within the then current term of court. *State v. Lu Sing*, 34 M 31, 40, 85 P 521.

When two days did not intervene between the rendition of a verdict of guilty in a capital case, and the pronouncement of judgment, it was presumed on appeal,

in the absence of anything in the record to the contrary, that the court did not remain in session after the date on which the judgment was pronounced. *State v. Lu Sing*, 34 M 31, 40, 85 P 521.

Method pursued by trial judge, in passing sentence and rendering judgment in a prosecution for illegally manufacturing and illegally possessing intoxicating liquor where defendant was guilty upon both counts and waived the statutory time for pronouncing judgment and sentence, examined, held to have been in faultless adherence to the provisions of the code sections and not open to the objection that no judgment was ever made or entered and all that was done was an entry by the clerk in the minute book that the court did certain things. *State v. Sorenson*, 75 M 30, 34, 241 P 616.

Failure of court to wait two days after verdict before imposing sentence as required by former statute, was ground for setting aside conviction, and annulling plea of guilty. *Harding v. State*, 149 M 147, 424 P 2d 130

**95-2203. Presentence investigations.** No defendant convicted of a crime which may result in commitment for one (1) year or more in the state prison, shall be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court, unless the court deems such report unnecessary. The court may, in its discretion, order a presentence investigation for a defendant convicted of any lesser crime or offense.

**History:** En. 95-2203 by Sec. 1, Ch. 196, L. 1967.

**Reading into Record**

Trial court did not err in considering and in reading into the record in open court prior events of eighteen-year-old defendant's life as disclosed by his juvenile record under statute directing judge to have a written report by the probation officer or parole officer and to consider the same before sentencing a defendant, since defendant did not object to the reading into the record and since after reading

into the record the judge had asked "Is there any legal excuse why judgment and sentence of court should not be pronounced against you?" *State v. Manning*, 149 M 517, 429 P 2d 625.

**Report of Investigator**

Where trial judge requested pre-sentence investigation, unsworn representations and recommendations set forth in investigator's unsigned report privately offered to and privately received and adopted by the trial judge were not evidence. *Kuhl v. District Court*, 139 M 536, 366 P 2d 347, 364.

## DECISIONS UNDER FORMER LAW

**Discretion of Trial Court**

Trial court did not have discretion to determine for itself whether former provisions dealing with testimony as to circumstances in aggravation or mitigation of punishment should be applied. *Kuhl v. District Court*, 139 M 536, 366 P 2d 347, 352.

**Examination of Witnesses in Open Court**

Where defendant pleaded guilty to grand larceny, the extent of his punishment should have been determined by the exercise of a sound discretion on the part of the trial judge after the circumstances had been "presented by the testimony of witnesses examined in open court." *Kuhl v. District Court*, 139 M 536, 366 P 2d 347, 351.

**95-2204. Content of investigation.** Whenever an investigation is required, the probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish the probation officer on request the defendant's criminal record and other relevant information. The investigation shall include a physical and mental examination of the defendant when it is desirable in the opinion of the court.

**History:** En. 95-2204 by Sec. 1, Ch. 196,  
L. 1967.

**95-2205. Availability of the report to defendant and others.** The judge may, in his discretion, make the investigation report or parts of it available to the defendants or others, while concealing the identity of persons who provided confidential information. If the court discloses the identity of persons who provided information, the judge may, in his discretion, allow the defendant to cross-examine those who rendered information. Such reports shall be part of the record but shall be sealed and opened only on order of the court.

If a defendant is committed to a state institution the investigation report shall be sent to the institution at the time of commitment.

**History:** En. 95-2205 by Sec. 1, Ch. 196,  
L. 1967.

**Examination of Witnesses in Open Court**

The sentence of a defendant, who pleaded guilty to grand larceny, to four years in the state prison was reduced to one year by the supreme court where trial court passed sentence upon receipt of private reports without allowing defendant

or his counsel to learn of the representations in the reports and a hearing to present evidence to refute such representations. *Kuhl v. District Court*, 139 M 536, 366 P 2d 347, 365.

If and when the trial judge requests a written report of investigation, he must be governed by statutes relating to such reports. *Kuhl v. District Court*, 139 M 536, 366 P 2d 347, 363.

**95-2206. Sentence.** Whenever any person has been found guilty of a crime or offense upon a verdict or plea the court may impose any of the following sentences:

- (1) Release the defendant on probation;
- (2) Defer the imposition of sentence for a period not to exceed three (3) years;
- (3) Suspend the execution of the sentence up to the maximum sentence allowed for the particular offense. However, if any restrictions or conditions are violated, any elapsed time shall not be a credit against the sentence, unless the court shall otherwise order.
- (4) Impose a fine as provided by law for the offense;
- (5) Commit the defendant to a correctional institution with or without a fine as provided by law for the offense;
- (6) Impose any combination of the above. The court may also impose any restrictions or conditions on the above sentences which it deems necessary.

Any judge who has suspended the execution of a sentence or deferred the imposition of a sentence of imprisonment under this section, or his



successor, is authorized thereafter, in his discretion, during the period of such suspended sentence or deferred imposition of sentence to revoke such suspension or impose sentence and order such person committed, or may, in his discretion, order the prisoner placed under the jurisdiction of the state board of pardons as provided by law, or retain such jurisdiction with this court. Prior to the revocation of an order suspending or deferring the imposition of sentence, the person affected shall be given a hearing.

**History:** En. 95-2206 by Sec. 1, Ch. 196, L. 1967.

**Floating—Sentence To Leave County—Void as Attempted Exercise of Pardoning Power**

The provision of suspending sentence on condition that defendant leave and remain out of county has no force or effect other than to suspend sentence, and court has no power to pronounce a sentence in the absence of specific statutory authority. The prisoner is, by law, subject only to the rules and regulations of state board of pardons, and floating is void as an attempted exercise of pardoning power. *Ex parte Sheehan*, 100 M 244, 255, 49 P 2d 438.

**Jury May Not Suspend Sentence**

While the jury may, if they see fit, assess and declare the punishment in their verdict, it is the court which pronounces judgment and sentences the defendant, and the court only can suspend the execution of the sentence and place the defendant on probation. *State v. Simanton*, 100 M 292, 310, 49 P 2d 981, overruled on other grounds in *State v. Knox*, 119 M 449, 453, 175 P 2d 774.

**Justice Courts**

Provisions of former act were clearly applicable to all persons prosecuted for public offenses in justice courts as well as district courts, irrespective of the fact that section appeared in portion of code dealing with district courts, and although a justice of the peace has no clerk as referred to in former sections, he may get blanks from the clerk of district court. *Ex parte Sheehan*, 100 M 244, 251, 255, 49 P 2d 438.

**Revocation of Suspension**

Where relator was sentenced to four years' confinement and the execution of the sentence was then suspended which suspension was later revoked, the sentence commenced to run for all purposes on the date when judgment of conviction was entered. Any time between imposition of suspended sentence and its revocation should have been credited to relator and failure to do so resulted in his illegal confinement. *State ex rel. Wetzel v. Ellsworth*, 143 M 54, 387 P 2d 442.

**Subsequent Imprisonment**

Where order placing petitioner on probation provided that he would be "jail-based" and referred to him as a "prisoner," the substance of the order and not its form or descriptive terminology determined its effect and meaning so that subsequent imprisonment did not place petitioner in double jeopardy in violation of the federal constitution or section 18, article III of the Montana constitution. In *re Williams' Petition*, 145 M 45, 399 P 2d 732.

**Suspended Sentence, Effect Of**

The effect of an order of the district court suspending the sentence of one convicted of a misdemeanor is to place him under the control and management of the state board of prison commissioners and subject to such rules and regulations as it may see fit to make. *State ex rel. Foot v. District Court*, 72 M 374, 377, 233 P 957.

**Suspension of Sentence**

Assuming that the court had the power to suspend the execution of accused's sentence and to place him upon probation, that power, too, must have been exercised at the time the sentence was pronounced. When an order suspending sentence is made, it is, in effect, a part of the judgment itself. It is the court's direction as to how the judgment shall be carried into effect. *State ex rel. Reid v. District Court*, 68 M 309, 310, 311, 218 P 558.

Under former section, the district court had authority to suspend sentence and place the defendant on probation whether found guilty of a crime or a misdemeanor. *State ex rel. Foot v. District Court*, 72 M 374, 377, 233 P 957.

Order of suspension must be made before the defendant is committed to the institution wherein he is to serve his sentence. *State ex rel. Bottomly v. District Court*, 73 M 541, 543 et seq., 237 P 525.

The statute providing for the suspension of sentences in criminal actions is designed to afford first offenders an opportunity for reformation and should be liberally construed. *State ex rel. Bottomly v. District Court*, 73 M 541, 543, 237 P 525.

Defendant was convicted of a violation of the liquor law and sentenced to serve sixty days in jail and pay a fine. He at once perfected an appeal, secured a certificate of probable cause and was admitted to bail. Five months thereafter his appeal was dismissed and the trial court on the day the certificate of dismissal was received suspended his sentence. Held, on application for writ of supervisory control, that defendant never having been committed, the court could properly, after entry of judgment, suspend the sentence at the time it did. *State ex rel. Bottomly v. District Court*, 73 M 541, 543, 237 P 525.

#### **When Motion To Change Plea to Not Guilty Property Denied**

Where defendant pleaded guilty on two

charges of murder, was sentenced to life imprisonment on each, and three years later filed motions for leave to withdraw his pleas of guilty and substitute pleas of not guilty by reason of insanity caused by alcoholism, alleging in his affidavit that he pleaded on advice of his attorney, and was unaware of the effect of former section requiring consecutive terms if person had been convicted of two or more offenses before sentence had been pronounced for either held, that the evidence was sufficient to deny the motions, that the court did not abuse its discretion in finding him sane when he pled, that he was faithfully represented, and that he was aware that he couldn't escape jury trial and possible death sentence if he had done otherwise. *State v. Hukoveh*, 115 M 125, 131, 139 P 2d 538.

### **DECISIONS UNDER FORMER LAW**

#### **Repealed by Implication**

Former chapter governing suspension of sentences repealed by implication former section governing when term of imprison-

ment commences, as far as any application to suspended sentence was concerned. *State ex rel. Wetzel v. Ellsworth*, 143 M 54, 387 P 2d 442.

**95-2207. Withdrawal of plea on a deferred imposition.** Whenever the court has deferred the imposition of sentence, and after termination of the time period during which imposition of sentence has been deferred upon motion of the court, the defendant or the defendant's attorney, the court may allow the defendant to withdraw his plea of guilty, or may strike the verdict of guilty from the record, and order that the charge or charges against him be dismissed.

**History:** En. 95-2207 by Sec. 1, Ch. 196, L. 1967.

**95-2208. Judgment to pay fine constitutes a lien.** The judgment shall be reduced to writing and signed by the judge. A judgment that the defendant pay a fine or costs constitutes a lien upon the real estate of the defendant, which lien dates from the date of the defendant's arrest.

**History:** En. 95-2208 by Sec. 1, Ch. 196, L. 1967.

#### **Constitutionality**

A former statute, containing substantially similar provisions, held constitutional. *Silver Bow County v. Strumbaugh*, 9 M 81, 22 P 453.

**95-2209. Entry of judgment and judgment roll.** When judgment upon a conviction is rendered the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of prior convictions (if any), and must, within five (5) days, annex together and file the following papers, which will constitute the judgment roll:

- (1) The indictment or information and a copy of the minutes of the arraignment, pleas and motions.
- (2) A copy of the minutes of the trial.

(3) The instructions given or refused and the endorsements thereon.

(4) A copy of the judgment.

**History:** En. 95-2209 by Sec. 1, Ch. 196, L. 1967.

### Appeal Record

Under former subdivision similar to subdivision (1) except that no provision was made for inclusion of copy of minutes of arraignment and under former provision for settlement of bills of exceptions, the original and first amended information, and demurrers to them which were sustained, and a motion to dismiss the prosecution, and order overruling it, were not part of the appeal record where they were not embodied in the bill of exceptions. *State v. Stickney*, 29 M 523, 526, 75 P 201.

The "record of the action" in a criminal case cannot be brought up on appeal in the body of a bill of exceptions. *State v. Morrison*, 34 M 75, 79, 85 P 738.

The merits of an appeal in a criminal case will not be considered where the papers constituting the record are included in a bill of exceptions and not certified as the record nor identified in any way by the certificate of the clerk of the district court or the trial judge. *State v. Farriss*, 34 M 424, 425, 87 P 177.

The record on appeal in a criminal case must, among other things, contain the judgment roll in which must be included a copy of the judgment. The state, on the theory that an objection of defendant to the introduction of evidence on the ground of the insufficiency of the information is in effect a demurrer to the information and an order sustaining a demurrer constitutes the judgment, attempted to appeal from such an order as from the judgment, but the record did not contain a copy of the order in the form of a minute entry, which in such a case constitutes the judgment. Held, that the supreme court was without jurisdiction to entertain the appeal. *State v. Nilan*, 75 M 397, 400, 243 P 1081.

### Copy of Order Constituting Judgment

An appeal by the state in a criminal prosecution from an order made at the close of the state's case in chief, directing

the jury to return a verdict in favor of defendant, was not subject to dismissal on the ground that the record on appeal did not contain a copy of the judgment where it did contain a copy of the order which had all the attributes of a judgment and constituted the judgment. *State v. Thierfelder*, 114 M 104, 108, 132 P 2d 1035, overruled on other grounds in *State v. Labbitt*, 117 M 26, 35, 156 P 2d 163.

### Failure to State Degree Not Fatal

A judgment is not rendered invalid for failure to state the degree of the crime for which defendant was convicted. *State ex rel. Williams v. Henry*, 119 M 271, 174 P 2d 220, 222.

### Judgment Roll

Held, that while the trial court erred in permitting the state on a perjury trial to introduce the judgment roll in the cause in which the alleged false testimony was given, containing papers not properly part thereof under statute, the procedure amounted to a mere irregularity which could not in any manner have prejudiced the defendant. *State v. Jackson*, 88 M 420, 429, 293 P 309.

### Where Record on Appeal Contained Requirements

On appeal from order sustaining demurrer to information, record consisting of information, demurrer and ruling thereon, notice of appeal, copy of minute entries and certificate of clerk of court was held sufficient; no bill of exceptions was necessary since no exception was required to ruling on demurrer. *State v. Safeway Stores, Inc.*, 106 M 182, 197, 76 P 2d 81.

### Where Statement of Degree of Offense Unnecessary

Since there was no indeterminate sentence legislation at the time of this conviction, it was not necessary to state in the judgment the degree of burglary of which the defendant was convicted. *State v. Hill*, 46 M 24, 126 P 41.

**95-2210. Information from courts.** It shall be the duty of the court disposing of any criminal case to cause to be transmitted to the board of pardons statistical data in accordance with regulations issued by the board regarding all dispositions of defendants whether found guilty or discharged.

**History:** En. 95-2210 by Sec. 1, Ch. 196, L. 1967.



**95-2211. Review of sentence.** Every sentence shall be subject to review in accordance with chapter 25, review of sentence.

**History:** En. 95-2211 by Sec. 1, Ch. 196, L. 1967.

**95-2212. Sentence to be imposed by judge.** All sentences under this chapter shall be imposed exclusively by the judge of the court.

**History:** En. 95-2212 by Sec. 1, Ch. 196, L. 1967.

#### Correction of Error

An error made by the trial court in the imposition of sentence for crime may be corrected by it. In re Lewis, 51 M 539, 154 P 713.

### DECISIONS UNDER FORMER LAW

#### Assessment of Sentence by Jury

Except for judgments rendered upon guilty pleas, former section requiring court to assess punishment if jury did not do so or assessed an unauthorized punishment was applicable only where jury had made every finding necessary to enable them to fix the punishment, but could not agree upon the extent of it within the limitations prescribed by the statutes. In such cases, if they failed or neglected to fix it, the court might declare it, but not otherwise. State v. Mish, 36 M 168, 177, 92 P 459.

The jury returned the following verdict: "We, the jury in the above-entitled action, find the defendant, Louis L. Fowler, guilty of the crime of sedition in the manner and form as charged in the information and fix and assess his punishment at the discretion of the court." The contention is made that it is rendered so defective by the misspelling of the word "discretion" that judgment should not be rendered upon it. There can be no doubt what the jury intended, viz., to find the defendant guilty as charged, and to leave the punishment to be fixed by the court. Former section authorized that to be done. If it be conceded, however, that the latter part of the verdict is unintelligible, this may be omitted entirely, leaving a categorical finding of guilty of the crime as charged in the information. Under former statute it was the duty of the court to eliminate that part of the verdict and to assess the punishment which in its discretion it thought proper, within the limits prescribed by the statute. (In re Collins, 51 M 215, 152 P 40; In re Gomez, 52 M 189, 156 P 1078.) State v. Fowler, 59 M 346, 355, 196 P 992.

Former statute empowering the trial judge to assess the punishment, when the jury had failed to agree thereon, though convicting the accused party, applied also when the attempt by the jury to fix the punishment was rendered unsuccessful by its omitting the minimum, after stating the maximum, number of years it

would have the party imprisoned. In re Gomez, 52 M 189, 191, 156 P 1078.

Complaint was made of the verdict and of the judgment entered thereon, because the verdict rendered on the first and third counts purported to fix the punishment for each "at thirty days," without specifying where the time should be served. No objection was made by the defendant to the verdict at the time of its rendition, and the court was not requested to send the jury out again, under proper instructions, to supply the omission, if there were any. Therefore, whether a verdict in this form is in itself sufficient was not considered in view of former section and the holding of this court in In re Gomez, 52 M 189, 156 P 1078. State v. Marchindo, 65 M 431, 457, 211 P 1093.

Held, on certiorari, that the power given the district court to reduce the extent of punishment fixed by the jury in a criminal prosecution, must be exercised prior to or at the time judgment is pronounced, and that therefore an order reducing a fine and jail sentence after the judgment had been in process of execution for a number of days was void as in excess of jurisdiction, and an encroachment upon the pardoning power reposed by the constitution in the governor and the state pardoning board. State ex rel. Reid v. District Court, 68 M 309, 311, 218 P 558.

Accused has right to have jury assess punishment upon a correct statement of the law as to the penalty prescribed for the offense, and therefore an instruction that the penalty for unlawfully possessing and transporting intoxicating liquor was a fine of not more than \$500, or imprisonment for not more than six months, or both such fine and imprisonment, whereas under section 11075, R. C. M. 1921, (since repealed) for the first offense a fine of not more than \$500 could be imposed, was prejudicially erroneous. State v. Miller, 69 M 1, 6, 220 P 97.

Under chapter 202, Laws of 1921, (section 3202, R. C. M. 1921, since repealed) the jury may fix the punishment by their

verdict by a fine not exceeding \$1,000 or "by imprisonment for not more than three years, or by both such fine and imprisonment." The court instructed the jury that in case they found defendant guilty they must assess a fine of not less than \$500 nor more than \$3,000 and imprisonment for not less than one nor more than five years. Held, prejudicially erroneous. *State v. Mark*, 69 M 18, 27, 220 P 94.

In order to fix the punishment for the aggravated offense, it was indispensable that the jury know: (a) That prior convictions were charged and the nature of the offenses referred to in the charge; (b) that the charge was established by evidence or the admission of the defendant; and (c) what punishment was prescribed

by law for the aggravated offense. To withhold from the jury all information concerning the charge of prior convictions would deny to the jury the right to fix the punishment and would, in effect, annul the provisions of former section. *State v. O'Neill*, 76 M 526, 533, 248 P 215.

While the jury may, if they see fit, assess and declare the punishment in their verdict, it is the court which pronounces judgment and sentences the defendant, and the court only can suspend the execution of the sentence and place the defendant on probation *State v. Simanton*, 100 M 292, 310, 49 P 2d 981, overruled on other grounds in *State v. Knox*, 119 M 449, 453, 175 P 2d 774.

**95-2213. Merger of sentences.** (a) Unless the judge otherwise orders, (1) when a person serving a term of commitment imposed by a court in this state is committed for another offense, the shorter term or shorter remaining term shall be merged in the other term, and (2) when a person under suspended sentence or on probation or parole for an offense committed in this state is sentenced for another offense, the period still to be served on suspended sentence, probation, or parole shall be merged in any new sentence of commitment or probation.

(b) The court merging the sentences shall forthwith furnish each of the other courts and penal institutions in which the defendant is confined under sentence with authenticated copies of its sentence, which shall cite the sentences being merged.

(c) If an unexpired sentence is merged pursuant to subdivision (a), the court which imposed such sentence shall modify it in accordance with the effect of the merger.

(d) Separate sentences of two (2) or more crimes shall run concurrently unless the court otherwise orders.

**History:** En. 95-2213 by Sec. 1, Ch. 196, L. 1967.

#### Sequence of Consecutive Sentences

Where petitioner was sentenced to serve consecutive sentences for escape and using an automobile without the consent of the

owner, and the warden executed the sentences in a sequence reverse to that indicated by the court, there was no infringement on his rights and his petition for writ of habeas corpus was denied. *Petition of Cheadle*, 143 M 327, 389 P 2d 579.

### DECISIONS UNDER FORMER LAW

#### Consecutive or Concurrent Terms

Where defendant was sentenced to one year in prison on each of two counts of forgery without mention of whether the

sentences were to run concurrently or consecutively, defendant was required to serve consecutive terms. *Hensley v. State*, 144 M 507, 398 P 2d 69.

**95-2214. Credit for time served.** Where defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts. In calculating the time imprisoned, the person so convicted shall have the credit for all the time earned in diminution of

sentence as provided under Montana statutes, section 80-1905, unless the sentencing authority in its discretion may choose to deny such credit.

**History:** En. 95-2214 by Sec. 1, Ch. 196, L. 1967.

sequent imposition of a new sentence. *Morsette v. Ellsworth*, 151 M 319, 443 P 2d 28.

#### Where Applicable

Where habeas corpus was granted to petitioner who had served a considerable portion of his sentence and commitment was set aside and petitioner was permitted to withdraw guilty plea, held that this section should be observed upon any sub-

#### Law Review

Agata, *Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis For Decision*, 25 Mont. L. Rev. 1 (1963).

### DECISIONS UNDER FORMER LAW

#### Second Conviction

Relator was convicted of the crime of burglary in the first degree. After serving one year and six days he was released from prison pending appeal. The conviction was reversed upon such appeal and a new trial ordered. Upon the new trial

he was again convicted and sentenced for the same period as the first, ten years. During his second incarceration he was not entitled to credit against the second sentence for time served under the first sentence. *State ex rel. Nelson v. Ellsworth*, 141 M 78, 375 P 2d 316, 318.

**95-2215. Credit for incarceration prior to conviction.** (a) Any person incarcerated on a bailable offense and against whom a judgment of imprisonment is rendered shall be allowed credit for each day of incarceration prior to or after conviction except that in no case shall the time allowed as a credit exceed the term of the prison sentence rendered.

(b) Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of ten dollars (\$10.00) for each day so incarcerated prior to conviction except that in no case shall the amount so allowed or credited exceed the amount of the fine.

**History:** En. 95-2215 by Sec. 1, Ch. 196, L. 1967.

#### Forfeiture of Good Time Allowance

Under former provision that "no person convicted and sentenced before the effective date shall have his rights and earned good time reduced by the application of this act" which in no matter attempted to prohibit the board of prison commissioners from exercising their discretionary power as to the allowance or forfeiture of good time and their power

to make such rules and regulations as were reasonable in connection with this power, the board could deprive a prisoner of his good time for parole violations. In *re Pelke's Petition*, 139 M 354, 365 P 2d 932, 934; In *re Owens' Petition*, 139 M 637, 365 P 2d 935.

#### Law Review

Agata, *Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis For Decision*, 25 Mont. L. Rev. 1 (1963).

**95-2216. Jail work release program.** (a) A court, after having sentenced a person to confinement in a county jail, may, in its discretion, upon request of the county attorney and sheriff of such county, and with the consent of the convicted person, order that any part of the imprisonment so imposed be served in confinement, with parole during the hours or periods the convicted person is actually employed.

(b) Upon the issuance of such an order under this act, the sheriff shall arrange for the convicted person to continue his regular employment without interruption in so far as is reasonably possible; provided, however, that said prisoner shall be confined in the county jail during the hours when he is not employed.



(c) The earnings of the prisoner shall be collected by the sheriff. From such earnings, the sheriff shall pay the prisoner's board and personal expenses, both inside and outside the jail and, to the extent directed by the court, pay the support of his dependents, if any, and any balance shall be retained until his discharge.

(d) The committing court may, in its discretion, upon request of the county attorney and sheriff of such county, reduce the sentence of the prisoner up to one-fourth ( $\frac{1}{4}$ ) of the full term, if, in the opinion of the court, the prisoner's conduct, diligence and general attitude merit such diminution.

(e) In cases where the convicted person violates the conditions of said sentence, he shall be returned to the court; the court may then require that the balance of his sentence be spent in full confinement and, further, the court may cancel any diminution of sentence granted under this act.

(f) The court may, by order, authorize the sheriff of the sentencing county to arrange with a sheriff of any other county within the state of Montana, to have the convicted person transferred to the other county where it appears the convicted person can continue his regular employment in the latter county; provided, however, when such transfer has been made to another county, the sheriff of the sentencing county shall still collect all moneys earned by the convicted person, and shall dispose of said moneys as provided by subsection (c) of this section.

**History:** En. 95-2216 by Sec. 1, Ch. 196, L. 1967.

#### Condition of Probation

Provisions in probation order permitting petitioner to have employment outside county jail, absolving the sheriff from liability in permitting petitioner to be absent from his custody without bail, and re-

quiring that petitioner pay his own board at the jail from his earnings, while similar to some former provisions relating to convicted misdemeanants serving county jail sentences did not convert a condition of probation into a term of imprisonment. In re Williams' Petition, 145 M 45, 399 P 2d 732.

**95-2217. Prisoner furlough program—purpose and intent.** The purpose and intent of this act is to establish a program for the rehabilitation, education, and betterment of selected prisoners confined in the state prison; to increase their responsibility to society; to make it possible that they may, while serving their sentences, work gainfully to support their dependents in whole or in part; and providing for a minimum wage of one and 40/100 (\$1.40) dollars an hour to be paid to said convicts while so employed; continue their education or training; and at the same time fulfill the obligations of the sentence of imprisonment imposed; placing the establishment, regulation, guidance, and control of such program under the direction of the warden of the state prison with the advice and consent of the state board of pardons, which program shall operate by supplementing and not replacing established penal procedures now or hereafter established by law. This act is to be liberally construed to effect the over-all objectives set forth above.

**History:** En. Sec. 1, Ch. 288, L. 1969.

**95-2218. Definitions.** As used in this act, unless the context indicates otherwise:

(1) "Board" means the state board of pardons;

- (2) "State prison" means the Montana state prison at Deer Lodge;
- (3) "Prisoner" means a person sentenced by a district court to a term of confinement in the state prison;
- (4) "Sheriff" means any county sheriff including all deputies or other persons working under his direction or guidance;
- (5) "Jail" means any county jail;
- (6) "Warden" means the superintendent of the state prison appointed by the board of institutions.

History: En. Sec. 2, Ch. 288, L. 1969.

**95-2219. Warden to establish program and rules—privileges granted prisoners.** The warden is authorized and directed to establish a furlough program and rules to implement and control the same. A prisoner sentenced to the state prison may be granted the privilege of:

- (1) Working at paid employment for a rate of pay not less than one and 40/100 (\$1.40) dollars an hour, or
- (2) Participating in an educational or training program.

History: En. Sec. 3, Ch. 288, L. 1969.

**95-2220. Application for participation in furlough program.** Any prisoner confined in the state prison may make application to participate in the furlough program according to rules adopted by the warden with the advice and consent of the board.

History: En. Sec. 4, Ch. 288, L. 1969.

**95-2221. Consideration of application—furlough plan—consent of sheriff necessary.** (1) The board shall approve or deny the application of the prisoner after careful study of the prisoner's conduct, attitude and behavior in the prison in which the prisoner is confined, his criminal history, and all other pertinent case material.

(2) If the application is approved, the warden shall adopt a furlough plan for the prisoner, which shall constitute an extension of the limits of confinement.

(3) No prisoner shall be released without the written consent of the sheriff of the county receiving the prisoner.

History: En. Sec. 5, Ch. 288, L. 1969.

**95-2222. Disposition of prisoner's earnings—trust fund—schooling costs.** (1) A prisoner employed in the community under a work furlough plan shall surrender to the sheriff his total earnings less payroll deductions required by law. The sheriff shall deduct from such earnings in the following order of priority:

(a) A standard charge for all prisoners determined by the county commissioners to be the cost to the county of providing food, lodging and clothing for such prisoner;

(b) The actual and necessary travel and other expenses of such prisoner under furlough from actual confinement under the program; and

(c) Such amount as the prisoner may be determined by the district judge to pay for the support of his dependents, which amount shall be paid to such dependents; and

(d) A minimal allowance for personal items.

(2) Any balance remaining after such deductions and payments shall be deposited to an interest-bearing account held in trust for said prisoner and shall be paid to him upon release.

(3) The above costs of a prisoner under furlough who is in training or school shall be the responsibility of the state.

**History:** En. Sec. 6, Ch. 288, L. 1969.

**95-2223. Administrative rules — co-operation by state agencies.** (1)

The warden is authorized to make rules for the administration of the provision of this act with the advice and consent of the board.

(2) All state agencies shall co-operate with the warden and sheriff in the administration of the furlough program.

**History:** En. Sec. 7, Ch. 288, L. 1969.

**95-2224. Prisoner not agent, employee or involuntary servant of warden or sheriff.** No prisoner employed in the community under the provisions of this act shall be deemed to be an agent, employee, or involuntary servant of the warden or sheriff while released from confinement pursuant to the terms of the furlough program.

**History:** En. Sec. 8, Ch. 288, L. 1969.

**95-2225. Eligibility for parole unaffected.** Nothing in this act shall be construed to affect eligibility for parole. Time served in the furlough program shall be considered as a part of the imposed sentence of such prisoner.

**History:** En. Sec. 9, Ch. 288, L. 1969.

**95-2226. Sheriff's responsibility—cancellation or revocation of furlough.** (1) The sheriff of the county to which the prisoner has been released shall be responsible for the activities of the prisoner according to the rules approved by the board. The sheriff shall keep the warden informed.

(2) If any prisoner released from actual prison confinement under the furlough program shall fail to comply with the rules and regulations of the furlough program, such furlough shall be canceled and such prisoner shall be returned to prison to complete his sentence. No prisoner shall be returned to prison to complete his sentence without first being charged with a violation of the rules and regulations of the furlough program in the district court of the county in which said violation took place and such prisoner shall be entitled to have counsel appointed to represent him at said hearing. Provided however, if said prisoner, while not disabled from working by temporary illness, is unemployed for a period of thirty (30) days, or more, after his availability for employment is reported in writing by the sheriff of the county to which said prisoner is released, to the Montana unemployment compensation commission office serving such area, and to the union to which said prisoner belongs, if any, then the warden, upon request of said sheriff and upon a showing having been made by the sheriff of said county in the district court that said employee has been so unemployed, or on a showing that said prisoner has become so disabled



that he is unemployable, or when said warden shall revoke said furlough and said prisoner is returned to said prison, or if said prisoner is on an education furlough and said prisoner has demonstrated for a period of six (6) weeks or more that he is unable to benefit from such schooling or training, then upon such a showing being made by the sheriff of the county to which said prisoner has been furloughed in a district court of said county, then the warden shall revoke such furlough and said prisoner shall be returned to the prison.

**History:** En. Sec. 10, Ch. 283, L. 1969.

## CHAPTER 23

### EXECUTION OF SENTENCE

- Section** 95-2301. Commitment of defendant.  
 95-2302. Execution of a fine.  
 95-2303. Execution of death.  
 95-2304. Lack of mental fitness of the defendant.  
 95-2305. Proceedings upon finding of lack of mental fitness.  
 95-2306. Proceedings when female is claimed to be pregnant.  
 95-2307. Proceedings upon the finding of pregnancy.  
 95-2308. Western Interstate Corrections Compact—contents.  
 95-2309. Commitment or transfer of inmate to institution outside of state.  
 95-2310. Effectuation of purposes of compact.  
 95-2311. Hearings requested by other states—power of board of pardons and paroles and state department of institutions to hold.  
 95-2312. Governor—power to enter into contracts.

**95-2301. Commitment of defendant.** Upon rendition of judgment after pronouncement of a sentence imposing punishment of imprisonment or death the court shall commit the defendant to the custody of the sheriff who shall deliver the defendant to the place of his confinement or execution.

**History:** En. 95-2301 by Sec. 1, Ch. 196, L. 1967.

#### Authority To Detain

The certified copy of the judgment is the evidence of the warden's authority for detaining the prisoner. *Stephens v. Conley*, 48 M 352, 367, 138 P 189.

Proceedings in contempt are in their nature criminal, and the order adjudging one in contempt is in its nature a final

judgment, but the sheriff cannot execute a judgment in a criminal matter or proceeding "without competent authority," as provided in section 16-2818; hence, where one has been committed for contempt, and the sheriff does not hold a certified copy of the order of commitment, he is not authorized to detain the person so committed. In *re Mettler*, 50 M 299, 305, 146 P 747.

**95-2302. Execution of a fine.** (a) If the judgment is for a fine alone, execution may issue thereon as on a judgment in a civil case.

(b) If the judgment is for a fine and imprisonment until fine be paid, the defendant must be committed to the custody of the proper officer, and by him detained until the judgment is complied with. The imprisonment must not exceed one day for every ten dollars (\$10.00) of the fine.

**History:** En. 95-2302 by Sec. 1, Ch. 196, L. 1967.

#### Alteration of Judgment

The warden of the state prison has no authority to change or alter a judgment of conviction in any particular. *State ex rel. Nelson v. Ellsworth*, 141 M 78, 375 P 2d 316, 319.

#### Cross-Reference

Penalty assessments for traffic offenses, sec. 75-5304.

**Contempt**

An attorney found guilty of contempt was properly subject to punishment by fine and imprisonment until the fine was paid. *State ex rel. Coleman v. District Court*, 51 M 195, 201, 149 P 973.

**Credit for Fine**

Where defendant was convicted of a felony under the first portion of a consolidated information and of a misdemeanor under the second portion and the trial court decreed that the sentences could be served concurrently, the sentence for the felony should be served in the state prison, credit for the misdemeanor fine should be given at the same time, and any remaining time under the misdemeanor at the end of the state prison term should be served in the county jail. *State v. Bogue*, 142 M 459, 384 P 2d 749.

**Fine or Imprisonment**

A judgment in a case of misdemeanor, imposing a fine of \$500, and providing that in default of payment the defendant

be imprisoned "for the term of one day for each \$2 of said fine," is sufficiently definite and certain. *State ex rel. Poindexter v. District Court*, 51 M 186, 149 P 958.

The district court has the power, under former statute, to impose a sentence of imprisonment in the county jail for a certain number of days, defendant in addition to pay a fine in a stated amount, and, in default of payment, to stand committed one day for every two dollars of the fine after expiration of the term of imprisonment, until the fine is paid. *In re Londres*, 54 M 418, 170 P 1045.

A judgment that defendant convicted on three counts of the information charging violations of the liquor law pay a fine of \$200 and serve sixty days in the county jail on each count, and that if the fines be not paid, he serve them out at the rate of one day for each two dollars of the fines, held not uncertain or ambiguous, it meaning that he be imprisoned for a total of 180 days, and serve one day for each two dollars of the fines aggregating \$600. *In re Pyle*, 72 M 494, 498, 234 P 254.

**DECISIONS UNDER FORMER LAW****Fine Only**

Former section governing duration of imprisonment on judgment to pay a fine held applicable to a case where a fine only was the penalty imposed. *State ex rel. Poindexter v. District Court*, 51 M 186, 149 P 958.

**Pauper Prisoner**

Where the record discloses that a judgment has been rendered imposing fine, and

imprisonment until fine is satisfied, the justice of the peace is without authority to issue an execution provided for by former section authorizing discharge of pauper prisoner after confinement of one day for every two dollars owed on fine, notwithstanding that section was applicable to some extent to practice in the justice courts. *Petelin v. Kennedy*, 29 M 466, 75 P 82.

**95-2303. Execution of death.** (a) The punishment of death must be inflicted by hanging the defendant by the neck until he is dead.

(b) In pronouncing the sentence of death, the court shall set the date of execution which must not be less than thirty (30) days nor more than sixty (60) days from the date the sentence is pronounced.

(c) A sentence of death must be executed within the walls or yard of a jail or some convenient private place in the county where the trial took place.

(d) The sheriff of the county must be present and shall supervise such execution which shall be conducted in the presence of a physician, the county attorney of the county, and at least twelve (12) reputable citizens to be selected by the sheriff. The sheriff shall at the request of the defendant, permit such priests or ministers, not exceeding two (2), as the defendant may name and only persons, relatives or friends, not to exceed five (5), to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. No other persons than those mentioned in this subsection can be present at the execution, nor can any person under age be allowed to witness the same.

(e) After the execution, the sheriff must make a return upon the death warrant, showing time, mode and manner in which it was executed.

**History:** En. 95-2303 by Sec. 1, Ch. 196  
L. 1967.

**95-2304. Lack of mental fitness of the defendant.** If, after judgment of death, there is good reason to suppose that the defendant lacks mental fitness, the mental fitness of the defendant will be determined in accordance with the provisions of chapter 5, Competency of the Accused.

**History:** En. 95-2304 by Sec. 1, Ch. 196,  
L. 1967.

#### DECISIONS UNDER FORMER LAW

##### Sanity of One Sentenced to Death

Where, after judgment of death has been pronounced upon a defendant, there is good reason to suppose that he has become insane, the sheriff, with the concurrence of the judge of the court by which the judgment was rendered, may summon

a jury to inquire into the question of his sanity but where during the course of the trial or before judgment of conviction is pronounced a doubt arises as to his mental condition, the procedure outlined by former sections was controlling. *State v. Vetere*, 77 M 66, 71, 249 P 666.

**95-2305. Proceedings upon finding of lack of mental fitness.** If it is found that defendant is mentally fit as provided in section 95-2304, the sheriff must execute the judgment; but if it is found that he lacks fitness, the execution of judgment must be suspended and the court shall commit him to the custody of the superintendent of the Montana state hospital, to be placed in an appropriate institution of the state department of public institutions for so long as such lack of fitness shall endure. When the court, on its own motion or upon application of the superintendent of the Montana state hospital, or the county prosecuting officer, or the defendant or his legal representative, determines after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the sheriff shall be directed by the court to carry out the execution. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant, that it would be unjust to proceed with execution of the sentence, the court may suspend the execution of the sentence and may order the defendant to be discharged.

**History:** En. 95-2305 by Sec. 1, Ch. 196,  
L. 1967.

**95-2306. Proceedings when female is claimed to be pregnant.** If there is good reason to suppose a woman against whom a judgment of death is rendered is pregnant, the sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, must summon a jury of three (3) physicians to inquire into the supposed pregnancy. Immediate notice of this inquiry must be given to the county attorney of the county who must attend the inquiry and may produce his own witnesses.

**History:** En. 95-2306 by Sec. 1, Ch. 196,  
L. 1967.

**95-2307. Proceedings upon the finding of pregnancy.** If it is found by the inquiry that the woman is not pregnant, the sheriff must execute the judgment; if it is found that the woman is pregnant, the sheriff must



suspend the execution of judgment, and transmit the inquisition to the governor. When the governor is satisfied that the woman is no longer pregnant, he may issue his warrant appointing a day for the execution of the judgment.

**History:** En. 95-2307 by Sec. 1, Ch. 196,  
L. 1967.

**95-2308. Western Interstate Corrections Compact—contents.** The Western Interstate Corrections Compact as contained herein is hereby enacted into law and entered into on behalf of this state with any and all other states legally joining therein in a form substantially as follows:

1. **Purpose and Policy.** The party states, desiring by common action to improve their institutional facilities and provide programs of sufficiently high quality for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on the basis of co-operation with one another, thereby serving the best interests of such offenders and of society. The purpose of this compact is to provide for the development and execution of such programs of co-operation for the confinement, treatment and rehabilitation of offenders.

2. **Definitions.** As used in this compact, unless the context clearly requires otherwise:

(a) "State" means a state of the United States, or subject to the limitation contained in subsection 7, Guam.

(b) "Sending state" means a state party to this compact in which conviction was had.

(c) "Receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction was had.

(d) "Inmate" means a male or female offender who is under sentence to or confined in a prison or other correctional institution.

(e) "Institution" means any prison, reformatory or other correctional facility (including but not limited to a facility for the mentally ill or mentally defective) in which inmates may lawfully be confined.

**3. Contracts.**

(a) Each party state may make one (1) or more contracts with any one (1) or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states. Any such contract shall provide for:

(i) Its duration.

(ii) Payments to be made to the receiving state by the sending state for inmate maintenance, extraordinary medical and dental expenses, and any participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs or treatment not reasonably included as part of normal maintenance.

(iii) Participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom.

(iv) Delivery and retaking of inmates.

(v) Such other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.

(b) Prior to the construction or completion of construction of any institution or addition thereto by a party state, any other party state or states may contract therewith for the enlargement of the planned capacity of the institution or addition thereto, or for the inclusion therein of particular equipment or structures, and for the reservation of a specific per centum of the capacity of the institution to be kept available for use by inmates of the sending state or states so contracting. Any sending state so contracting may, to the extent that moneys are legally available therefor, pay to the receiving state, a reasonable sum as consideration for such enlargement of capacity, or provision of equipment or structures, and reservation of capacity. Such payment may be in a lump sum or in installments as provided in the contract.

(c) The terms and provisions of this compact shall be a part of any contract entered into by the authority of or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

#### 4. Procedures and Rights.

(a) Whenever the duly constituted judicial or administrative authorities in a state party to this compact, and which has entered into a contract pursuant to subsection 3, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary in order to provide adequate quarters and care or desirable in order to provide an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

(b) The appropriate officials of any state party to this compact shall have access, at all reasonable times, to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

(c) Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of subsection 3.

(d) Each receiving state shall provide regular reports to each sending state on the inmates of that sending state in institutions pursuant to this compact including a conduct record of each inmate and certify said record to the official designated by the sending state, in order that each inmate may have the benefit of his or her record in determining and altering the

disposition of said inmate in accordance with the law which may obtain in the sending state and in order that the same may be a source of information for the sending state.

(e) All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be cared for and treated equally with such similar inmates of the receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

(f) Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state. Costs of records made pursuant to this subdivision shall be borne by the sending state.

(g) Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate, and the sending and receiving states, shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

(h) Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state.

(i) The parent, guardian, trustee, or other person or persons entitled under the laws of the sending state to act for, advise, or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect of any inmate confined pursuant to the terms of this compact.

##### 5. Acts Not Reviewable in Receiving State—Extradition.

(a) Any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon and not reviewable within the receiving state, but if at the time the sending state seeks to remove an inmate from an institution in the receiving state there is pending against the inmate within such state any



criminal charge or if the inmate is suspected of having committed within such state a criminal offense, the inmate shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport inmates pursuant to this compact through any and all states party to this compact without interference.

(b) An inmate who escapes from an institution in which he is confined pursuant to this compact shall be deemed a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for institution of extradition proceedings shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

6. Federal Aid. Any state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or any contract pursuant hereto and any inmate in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have made contractual provision provided that if such program or activity is not part of the customary correctional regimen the express consent of the appropriate official of the sending state shall be required therefor.

7. Entry into Force. This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two contiguous states from among the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. For the purposes of this article, Alaska and Hawaii shall be deemed contiguous to each other; to any and all of the states of California, Oregon and Washington; and to Guam. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states, or any other state contiguous to at least one party state upon similar action by such state. Guam may become party to this compact by taking action similar to that provided for joinder by any other eligible party state and upon the consent of congress to such joinder. For the purposes of this article, Guam shall be deemed contiguous to Alaska, Hawaii, California, Oregon and Washington.

8. Withdrawal and Termination. This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal shall not take effect until two (2) years after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this compact.

9. **Other Arrangements Unaffected.** Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party state authorizing the making of co-operative institutional arrangements.

10. **Construction and Severability.** The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

**History:** En. 95-2308 by Sec. 1, Ch. 196,  
L. 1967.

**95-2309. Commitment or transfer of inmate to institution outside of state.** Any court or state agency having power to commit or transfer an inmate (as defined in section 95-2308, subsection 2 (d) of the Western Interstate Corrections Compact) to any institution for confinement may commit or transfer such inmate to any institution outside this state if this state has entered into a contract or contracts for the confinement of inmates in said institution pursuant to section 95-2308, subsection 3 of the Western Interstate Corrections Compact.

**History:** En. 95-2309 by Sec. 1, Ch. 196,  
L. 1967.

**95-2310. Effectuation of purposes of compact.** The courts, departments, agencies and officers of this state and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdictions including but not limited to the making and submission of such reports as are required by the compact.

**History:** En. 95-2310 by Sec. 1, Ch. 196,  
L. 1967.

**95-2311. Hearings requested by other states—power of board of pardons and paroles and state department of institutions to hold.** The board of pardons and paroles and the state department of institutions are hereby authorized and directed to hold such hearings as may be requested by any other party state pursuant to section 95-2308, subsection 4 (f) of the Western Interstate Corrections Compact.

**History:** En. 95-2311 by Sec. 1, Ch. 196,  
L. 1967.

**95-2312. Governor—power to enter into contracts.** The governor is hereby empowered to enter into such contracts recommended by the

department of institutions on behalf of this state as may be appropriate to implement the participation of this state in the Western Interstate Corrections Compact pursuant to section 95-2308.

**History:** En. 95-2312 by Sec. 1, Ch. 196,  
L. 1967.

## CHAPTER 24

### APPEAL BY STATE AND DEFENDANT

- Section 95-2401. Application of chapter.  
 95-2402. Suspension of the rules.  
 95-2403. Scope of appeal.  
 95-2404. Scope of appeal.  
 95-2405. Procedure on appeal.  
 95-2406. Stay of execution and relief pending appeal.  
 95-2407. Effect of an appeal by the state.  
 95-2408. The record on appeal.  
 95-2409. Transmission of the record.  
 95-2410. Docketing the appeal—filing of the record.  
 95-2411. Effect of dismissal.  
 95-2412. Ruling against respondent may be reviewed.  
 95-2413. Filing and service.  
 95-2414. Computation and extension of time.  
 95-2415. Motions.  
 95-2416. Briefs.  
 95-2417. Brief of an amicus curiae.  
 95-2418. The appendix to the briefs.  
 95-2419. Filing and service of briefs.  
 95-2420. Form of briefs, the appendix, motions and other papers.  
 95-2421. Oral argument.  
 95-2422. Entry and notice of orders and judgments.  
 95-2423. Petitions for rehearing.  
 95-2424. Calendar—withdrawal of records.  
 95-2425. Substantial and insubstantial errors on appeal.  
 95-2426. Determination of appeal.  
 95-2427. Issuance of mandate, return of record and termination of jurisdiction.  
 95-2428. Indigent appeals.  
 95-2429. Appeal by one defendant.  
 95-2430. Defendant discharged on reversal of judgment.

**95-2401. Application of chapter.** (a) This chapter shall govern review in all criminal cases.

(b) All existing methods of review in criminal cases in the state are abolished. Hereafter the only method of review in criminal cases shall be by notice of appeal.

**History:** En. 95-2401 by Sec. 1, Ch. 196,  
L. 1967.

**95-2402. Suspension of the rules.** In the interest of expediting decision upon any matter before it, or for other good cause shown, the supreme court may suspend the requirements or provisions of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction.

**History:** En. 95-2402 by Sec. 1, Ch. 196,  
L. 1967.

**95-2403. Scope of appeal.** (a) Except as authorized by this code, the state may not appeal in a criminal case.



(b) The state may appeal from any court order or judgment the substantive effect of which results in:

- (1) dismissing a case;
  - (2) modifying or changing the verdict as provided in section 95-2101
- (c) (3);
- (3) granting a new trial;
  - (4) quashing an arrest or search warrant;
  - (5) suppressing evidence;
  - (6) suppressing a confession or admission; or
  - (7) granting or denying change of venue.

**History:** En. 95-2403 by Sec. 1, Ch. 196, L. 1967.

#### Authority for Appeal

The right of appeal in a criminal case, unknown to the common law, exists only by virtue of constitutional or statutory enactment. *State v. Peck*, 83 M 327, 329, 271 P 707.

Statutes granting the right of appeal to the state in criminal actions must be strictly construed and the right limited to the instances mentioned; if the right is not clearly and unequivocally conferred, an appeal does not lie, nor can the right, if conferred, be enlarged by construction of the statute. *State v. Peck*, 83 M 327, 329, 271 P 707.

#### Construction

Defendant was convicted in a justice court of engaging in the business of plumbing without obtaining a license; he appealed to the district court where, after trial, the court entered judgment that the statute in question was unconstitutional and discharged defendant. The state appealed. Held, that the judgment did not fall within any one of the provisions of former section, granting the state the right of appeal in a criminal case, and appeal dismissed. *State v. Wright*, 91 M 427, 429, 8 P 2d 646.

#### Limited Right of Appeal by State

The right of appeal by the state should be strictly construed and limited to those instances mentioned in the statute. *Territory v. Laun*, 8 M 322, 325, 20 P 652; *State v. Northrup*, 13 M 522, 530, 35 P 228.

The state has no appeal in criminal cases, unless the same is expressly granted by law. *Territory v. Laun*, 8 M 322, 325, 20 P 652; *State v. Northrup*, 13 M 522, 530, 35 P 228.

Where defendant was convicted in jus-

tice of peace court and appealed to district court in which court the action was dismissed on defendant's motion, state had no right of appeal. *State v. McCluskey*, 125 M 20, 229 P 2d 169.

A district court's order of dismissal of the complaint following an appeal from a conviction in a justice of the peace court did not fall within the provisions of former section and therefore was not an appealable order. *State v. Becko*, 125 M 76, 230 P 2d 768, 769.

#### Order Arresting Judgment

Regarding the substance of things, an order arresting judgment is, in its nature and results, a judgment for defendant. It is a denying of a judgment to the state, and a discharge and acquittal of defendant from any possible consequences that threatened to flow from the information. *State v. Northrup*, 13 M 522, 537, 35 P 228.

#### Order Made after Judgment

State could not appeal from an order of the district court sustaining a defendant's plea of former acquittal and jeopardy, after the reversal of a conviction for manslaughter under an indictment charging murder in the first degree. *State v. O'Brien*, 19 M 6, 47 P 103.

#### Order Setting aside Information

An appeal cannot be taken by the state from an order setting aside an information. *State v. O'Brien*, 20 M 191, 50 P 412.

#### Order Sustaining Demurrer to Information Constitutes Judgment

An order sustaining a demurrer to an information constitutes a judgment; former statute authorized appeal by state from adverse judgment on demurrer to indictment or information. *State v. Safeway Stores, Inc.*, 106 M 182, 197, 76 P 2d 81.

### DECISIONS UNDER FORMER LAW

#### Appeal from Directed Verdict

Former statute provided that the state might appeal in a criminal case, *inter alia*,

from an order directing the jury to find for the defendant. At the close of the testimony in such a case the court ordered

defendant discharged on the ground of failure of proof, the state appealing from the order. Held, under the rule of strict construction, that the order could not be held appealable as one "in effect" directing the jury to find for defendant and, such an order not being enumerated as one from which the state might appeal, the appeal would, on defendant's motion, be dismissed. *State v. Peck*, 83 M 327, 331, 271 P 707.

#### **Demurrer to Complaint**

Under former section authorizing state to appeal from adverse judgment on a demurrer to indictment or information, state could not appeal from a judgment for defendant on demurrer to a complaint charging a misdemeanor. *State v. Morris*, 22 M 1, 3, 55 P 360.

An order sustaining a demurrer to a complaint did not fall within any of the provisions of former section and there-

fore was not an appealable order. *State v. Slater*, 130 M 630, 302 P 2d 470.

#### **Directed Verdict**

Statute provided that the state may appeal in a criminal case, inter alia, from an order directing the jury to find for the defendant. At the close of the testimony in such a case the court ordered defendant discharged on the ground of failure of proof, the state appealing from the order. Held, under the rule of strict construction, that the order was not held appealable as one "in effect" directing the jury to find for defendant and, such an order not being enumerated as one from which the state might appeal, the appeal would on defendant's motion be dismissed. *State v. Peck*, 83 M 327, 329, 271 P 707.

An appeal by the state from the order of the court directing the jury to find for the defendant was expressly provided for by former section. *State v. Rother*, 130 M 357, 303 P 2d 393, 394.

### **95-2404. Scope of appeal. When may be taken by the defendant.**

(a) An appeal may be taken by the defendant only from a final judgment of conviction, and orders after judgment which affect the substantial rights of the defendant.

(b) Upon appeal from a judgment, the court may review the verdict or decision, and any order or decision objected to which involves the merits, or necessarily affects the judgment.

**History:** En. 95-2404 by Sec. 1, Ch. 196, L. 1967.

#### **Appeals from Justice Courts**

The supreme court does not have appellate jurisdiction to review the judgments or orders of the justice courts. *State ex rel. Estes v. Justice Court of Jefferson County*, 129 M 136, 284 P 2d 249, 250.

#### **Denial of New Trial**

On appeal under former statute, from the judgment of conviction only, an assignment of error for denial of defendant's motion for a new trial could not be considered. *State v. Ritz*, 65 M 180, 189, 211 P 298; *State v. English*, 71 M 343, 350, 229 P 727.

#### **Denial of Petition for Writ of Error Coram Nobis**

Leave to file an appeal from a denial of petition for a writ of error coram nobis by the district court was denied by the supreme court since no leave to file an appeal is required under the law and if an appeal was available from the district court order, the time therefor had not expired. *Brown v. State*, 140 M 289, 371 P 2d 262, 263.

#### **Intermediate Orders**

An order overruling a motion in arrest of judgment is an intermediate order affecting the judgment, and may be reviewed only on appeal from the judgment. *State v. Beeskove*, 34 M 41, 48, 85 P 376; *State v. Brown*, 38 M 309, 311, 99 P 954.

The supreme court on appeal from the judgment, may not review the sufficiency of the evidence to warrant conviction, in the absence of any intermediate order or ruling involving the merits or which may have affected the judgment. *State v. Asher*, 63 M 302, 308, 206 P 1091.

#### **Motion in Arrest of Judgment**

An appeal from an order overruling a motion in arrest of judgment does not lie on behalf of defendant. *State v. Beeskove*, 34 M 41, 48, 85 P 377; *State v. Brown*, 38 M 309, 311, 99 P 954.

#### **Order after Judgment**

Defendant may appeal from an order made after final judgment. *State v. Fowler*, 59 M 346, 196 P 992.

#### **Order Denying Petition for Writ of Prohibition**

Order of district court denying petition of defendant for writ of prohibition to

restrain justice court from further proceedings in criminal action was not a judgment and could not be appealed. *State ex rel. Aho v. Justice Court of Laurel Township*, 131 M 585, 313 P 2d 542, 543.

#### **Perfecting Appeal While New Trial Motion Pending**

The act of defendant in a criminal prosecution in perfecting an appeal from the judgment of conviction while his motion for a new trial was pending, did not deprive the trial court of jurisdiction thereafter to pass upon the motion, nor the su-

preme court of jurisdiction to consider the subsequent appeal from the order denying the new trial. *State v. Harkins*, 85 M 585, 590, 281 P 551.

#### **Question of Law**

The defendant, on appeal from a judgment of conviction, may, by bill of exceptions, bring before the court errors in the decision upon questions of law arising during the course of the trial, exclusive of those embraced within the provisions of the statute providing for new trials. *State v. Francis*, 58 M 659, 666, 194 P 304.

### **DECISIONS UNDER FORMER LAW**

#### **Appeal from Judgment of Conviction Only**

On appeal under former statute, from the judgment of conviction only, a specification of error based upon the order denying their motion for new trial on the ground of misconduct of one of the jurors, cannot be considered. *State v. Maggert*, 64 M 331, 337, 209 P 989.

On appeal from the judgment of conviction only an assignment of error for denial of defendant's motion for a new trial cannot be considered. *State v. Ritz*, 65 M 180, 189, 211 P 298.

#### **Construction**

Former section stating what might be reviewed on appeal by defendant was taken verbatim from the California code and was adopted with the construction placed upon it by the courts of that state. *State v. O'Brien*, 18 M 1, 6, 43 P 1091, 44 P 399; *State v. Brantingham*, 66 M 1, 7, 212 P 499.

#### **Denial of Habeas Corpus**

Former sections providing that defendant might appeal to supreme court from any judgment against him and stating that defendant could appeal from a final judgment of conviction did not authorize appeal from an order denying habeas corpus, since the complainant in such a proceeding was not a defendant, and the determination of the court was not a "judgment," within the meaning of those sections. *State ex rel. Jackson v. Kennie*, 24 M 45, 50, 60 P 589.

#### **Directed Verdict**

Former section providing the state might appeal from order directing jury to find for defendant was constitutional. *State v. Thierfelder*, 114 M 104, 116, 132 P 2d 1035, overruled on other grounds in *State v. Labbitt*, 117 M 26, 35, 156 P 2d 163.

#### **Evidentiary Matters**

Under former statute, rulings of the trial court upon matters of law in the exclusion or admission of testimony, dur-

ing the progress of the trial might be brought before the supreme court by bill of exceptions on an appeal from the judgment without a motion for a new trial; but the statute did not permit the review, on an appeal from the judgment only, of matters embraced within any of the cases for which a new trial may be granted, except errors in the decision of questions of law during the trial, which might be reviewed either by appeal from the judgment or from an order denying a motion for a new trial. *State v. O'Brien*, 18 M 1, 5, 6, 43 P 1091, 44 P 399.

#### **Judgment**

Judgment mentioned in former section providing that defendant might appeal to supreme court from any judgment against him was the final judgment or other orders referred to in another former section stating when appeal could be taken by defendant and embraced only those judgments and orders which become res adjudicata and final as to all matters involved in the controversy; order denying habeas corpus was not such an order. *State ex rel. Jackson v. Kennie*, 24 M 45, 50, 60 P 589.

#### **Motion for New Trial**

Under former section permitting review of intermediate rulings, an appellant may by bill of exceptions bring before the supreme court for review any order or ruling of the trial court in admitting or rejecting testimony, or in deciding any question of law not a matter of discretion or in instructing the jury, but the sufficiency of the evidence to justify the verdict may be reviewed only on appeal from an order denying a new trial, unless the record discloses that there is no evidence even remotely to prove the elements of the crime charged. *State v. Smart*, 81 M 145, 148, 262 P 158.

#### **Timeliness of Appeal**

Part of defendant's appeal claiming that the trial court erred in denying motion



of defendant for a mistrial was properly before the supreme court where it was taken within six months after the rendi-

tion of the judgment of conviction as prescribed by former statute. *State v. Tiedemann*, 139 M 237, 362 P 2d 529, 530.

**95-2405. Procedure on appeal.** (a) An appeal shall be taken by filing a notice of appeal in the court in which the judgment or order appealed from is entered or filed.

(b) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; and shall designate the judgment or order appealed from.

(c) Service of Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or if a party is not represented by counsel, to the party at his last known address, and shall mail a copy of the notice of appeal to the clerk of the supreme court. The clerk of the district court shall note on each copy served the date on which the notice of appeal was filed. If an appellant is represented by counsel his counsel shall provide the clerk with sufficient copies of the notice of appeal to permit the clerk to comply with the requirements of this rule. Failure of the clerk to serve notice shall not affect the validity of the appeal. The notice shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

(d) The party appealing shall be known as the appellant and the adverse party as the respondent but the title of the case shall not be changed in consequence of the appeal.

(e) An appeal from a judgment may be taken within sixty (60) days after its rendition.

**History:** En. 95-2405 by Sec. 1, Ch. 196, L. 1967.

#### **Copy of Transcript**

Where person convicted in district court petitioned supreme court for writ of mandate to compel district to furnish "copy of trial and court record transcript" for purpose of appeal in forma pauperis, writ was denied where no timely application had been filed. *State ex rel. Treat v. District Court*, 124 M 234, 221 P 2d 436, 437.

#### **Denial of Motion for Mistrial**

Part of defendant's appeal claiming that the trial court erred in denying motion of defendant for a mistrial was properly before the supreme court where it was taken within time allowed by statute. *State v. Tiedemann*, 139 M 237, 362 P 2d 529, 530.

#### **Motion of Motion for New Trial**

Denial of state to strike defendant's third specification of error, contending that there was no substantial evidence to

support the verdict or judgment of conviction, was granted where appeal was not taken within sixty days after the order denying the motion for a new trial. *State v. Tiedemann*, 139 M 237, 362 P 2d 529, 530.

#### **Excuse for Failure To Take Appeal**

Under former statute allowing six months to appeal from a judgment, death of defense counsel nearly a year after the trial and order of commitment was not sufficient showing to justify an original writ of habeas corpus in supreme court. *Dryman v. State*, 139 M 141, 361 P 2d 959.

#### **Failure To File Timely Notice of Appeal**

Where district court appointed counsel for the defendant and ordered preparation of the record for an appeal to the supreme court, all at public expense, defendant having had no voice in the choice, in the interest of justice it was incumbent upon the supreme court to consider the contended errors although court-ap-

pointed counsel failed to timely file the notice of appeal. *State v. Frodsham*, 139 M 222, 362 P 2d 413, 418.

#### Notice of Appeal

Motion of attorney general to dismiss appeals was well taken where appeals were not taken within time allowed by statute, no notice of appeal was filed or served, no proper record on appeal was filed and no papers on the appeals were

served upon either the county attorney or attorney general. *State v. Martin*, 147 M 548, 416 P 2d 22.

#### Oral Request for Appeal Ineffective

Oral request of intention to appeal made orally in open court is wholly ineffectual to give the supreme court jurisdiction. *State ex rel. Treat v. District Court*, 124 M 234, 221 P 2d 436, 437.

### DECISIONS UNDER FORMER LAW

#### Clerk's Duties

Requirements of former statute were that the clerk of the district court must, as soon as notice of appeal is filed, prepare a copy of the record and other papers and transmit the same within ten days from the date of the notice, or, in case there is a bill of exceptions to be settled,

then within ten days of the date of settlement, to the clerk of the supreme court, without charge to the appellant. A praecipe enumerating the papers constituting such technical record need not be lodged with the clerk. *State ex rel. Connors v. Foster*, 36 M 278, 280, 92 P 761.

**95-2406. Stay of execution and relief pending appeal.** (a) Death. If an appeal is taken a sentence of death shall be stayed by order of the trial court until final order by the supreme court.

(b) Imprisonment. If an appeal is taken and the defendant is admitted to bail, a sentence of imprisonment shall be stayed by the trial court.

(c) Fine. If an appeal is taken, a sentence to pay a fine, or a fine and costs, shall be stayed by the trial court or by the reviewing court.

(d) Probation. If an appeal is taken and the accused was admitted to probation, he shall remain on probation or post bail.

**History:** En. 95-2406 by Sec. 1, Ch. 196, L. 1967.

### DECISIONS UNDER FORMER LAW

#### Probable Cause for Appeal

No appeal lies from a refusal of a district judge to grant a certificate of probable cause. *State v. Broadbent*, 27 M 63, 65, 69 P 323.

Under former statute authorizing stay in execution of judgment in noncapital cases if a judge of convicting court or supreme court certified that there was probable cause for appeal, petitions to a justice of the supreme court for certificates of probable cause must be verified by the oath of the petitioner, or of some person in his behalf. *State v. Broadbent*, 27 M 63, 65, 69 P 323.

Where the transcript discloses a fairly debatable question, the solution of which in defendant's favor by the supreme court would necessitate a reversal, a certificate of probable cause will be granted. *State v. Broadbent*, 27 M 63, 65, 69 P 323.

Execution of a judgment in a criminal case is not stayed by appeal, but may be

stayed by filing with the clerk a certificate of probable cause issued by the judge or a justice of the supreme court. *State v. Fowler*, 59 M 346, 358, 196 P 992.

The effect of a certificate of probable cause granted to one convicted of crime pending appeal, is to suspend execution of the judgment and entitles defendant to his liberty upon furnishing bond, and the certificate should be granted by the district court whenever the question whether or not the conviction will be sustained on appeal is fairly debatable, thus avoiding the necessity of defendant applying to the supreme court for relief in that behalf. *State v. Dahlgren*, 74 M 217, 235, 239 P 775.

On appeal from conviction for embezzlement, presenting the question of former jeopardy, the trial court denied defendant a certificate of probable cause. Whereupon he applied to the supreme court for such certificate and for a stay of proceedings

until a bill of exceptions could be prepared, settled and allowed (the supreme court needing the same to determine the question of probable cause). The stay was granted to present the bill of exceptions and transcript in aid of the application for the certificate of probable cause. *State v. Parmenter*, 111 M 290, 291, 108 P 2d 600.

A certificate of probable cause should be granted by the district court whenever the question of whether or not the conviction will be sustained on appeal is fairly debatable. *State ex rel. Nelson v. Ellsworth*, 141 M 78, 375 P 2d 316, 319.

**95-2407. Effect of an appeal by the state.** An appeal taken by the state in no case stays or affects the operation of the judgment or order in favor of the defendant until judgment or order is reversed.

**History:** En. 95-2407 by Sec. 1, Ch. 196, L. 1967.

**95-2408. The record on appeal.** (a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) The Transcript of Proceedings; Duty of Appellant to Order, Notice to Respondent if Partial Transcript is Ordered; Cost of Producing. Within ten (10) days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. In all cases where the appellant intends to urge insufficiency of the evidence to support the verdict, order or judgment in the district court, it shall be the duty of the appellant to order the entire transcript of the evidence. Wherever the sufficiency of the evidence to support a special verdict or answer by a jury to an interrogatory, or to support a specific finding of fact by the trial court, is to be raised on the appeal by the appellant, he shall be under a duty to include in the transcript all evidence relevant to such verdict, answer or finding. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the respondent a description of the parts of the transcript which he intends to include in the record and a statement of the issues which he intends to present on the appeal. If the respondent deems a transcript of other parts of the proceedings to be necessary he shall within ten (10) days after such filing and service order such parts from the reporter or procure an order from the district court requiring the appellant to so do.

The cost of producing the transcript shall be paid by the appellant, or he shall make satisfactory arrangements with the reporter for the payment of such cost; but, if the appellant considers that any part of the record designated by the respondent for inclusion is unnecessary for the determination of the issues presented, he shall advise the respondent, and the district court may impose upon the respondent the cost of producing any part which it deems unnecessary for the determination of the issues.

The reporter shall certify the correctness of the transcript.



(c) Statement of the Evidence or Proceedings When No Report was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may, within ten (10) days from the hearing or trial or such time extended as the district court may for good cause shown permit, prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the respondent, who may serve objections or propose amendments thereto within ten (10) days after service. Thereupon, the statement and any objections or proposed amendments shall be submitted for settlement and approval to the district judge who handled the proceedings, and as settled and approved shall be included by the clerk of the district court in the record on appeal. A judge may settle and approve such records after he ceases to be a judge. If such judge before the statement is settled and approved dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle and approve the statement, it shall be settled and approved in such manner as the supreme court may direct.

(d) Agreed Statement as the Record on Appeal. In lieu of the record on appeal as defined in subsection (a) of this section, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issue presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the supreme court as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by section 95-2409. Copies of the agreed statement may be filed as the appendix required by section 95-2418.

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the supreme court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the supreme court.

**History:** En. 95-2408 by Sec. 1, Ch. 196, L. 1967.

#### **Duty of Defense Counsel**

Where court-appointed counsel failed to advise the clerk's office as to what would be required for the record on appeal from conviction of burglary and there was no record before the supreme court, defend-

ant had been denied his right to effective representation by counsel on his appeal and the cause was remanded to the district court with directions to revoke appointment of present counsel and appoint a competent and effective counsel to properly prosecute the appeal. *State v. Bunnash*, 139 M 517, 366 P 2d 155, 158.

**Record**

The supreme court was without jurisdiction to consider an appeal where the record did not contain a copy of the notice of appeal. *City of Butte v. Call*, 23 M 94, 95, 57 P 726.

Where the record on appeal does not contain the judgment the appeal is subject to dismissal on motion. *State v. Mott*, 29 M 292, 308, 74 P 728.

The merits of an appeal in a criminal case will not be considered where the papers constituting the record are included in a bill of exceptions and not certified as the record, nor identified in any way by the certificate of the clerk of the district

court or the trial judge. *State v. Fariss*, 34 M 424, 425, 87 P 177.

Record on appeal from an order sustaining a demurrer to the information, consisting of the information, demurrer and ruling thereon, notice of appeal, copy of minute entries and certificate of the clerk of court, held, sufficient as against contention that it should consist of a bill of exceptions duly settled; the record containing all that was required by former section, except instructions, none having been given; no exception being required to court's ruling on demurrer, bill of exceptions therefore idle act. *State v. Safeway Stores, Inc.*, 106 M 182, 197, 76 P 2d 81.

**DECISIONS UNDER FORMER LAW****Copy of Judgment**

Where the record in a criminal case on appeal by the state from a judgment sustaining a demurrer to the information contains the minute entry allowing the demurrer, the appeal is not subject to dismissal on the ground that the transcript does not contain a copy of the judgment, the order entered in the minutes constituting the judgment in such a case. *State v. Atlas*, 75 M 547, 549, 244 P 477.

State's appeal from order made at close of its case in chief directing return of verdict in favor of defendant was not subject to dismissal on ground that record on appeal did not contain a copy of judgment since it did contain a copy of order with attributes constituting judgment. *State v. Thierfelder*, 114 M 104, 108, 111, 132 P 2d 1035, overruled on other grounds, in *State v. Labbitt*, 117 M 26, 35, 156 P 2d 163.

**Judgment Rolls**

The record on appeal in a criminal case must, among other things contain the judgment roll in which must be included a copy of the judgment. The state on the theory that an objection of defendant to the introduction of evidence on the ground of the insufficiency of the information is in effect a demurrer to the information and an order sustaining a demurrer constitutes the judgment, attempted to appeal from such an order as from the judgment, but the record did not contain a copy of the order in the form of a minute entry, which in such a case constitutes the judgment. Held, that the supreme court was without jurisdiction to entertain the appeal. *State v. Nilan*, 75 M 397, 400, 243 P 1081.

**95-2409. Transmission of the record.** (a) Time for Transmission; Duty of Appellant. The record on appeal, including the transcript necessary for the determination of the appeal, shall be transmitted to the supreme court within forty (40) days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subsection (c) of this section. Promptly after filing the notice of appeal the appellant shall comply with the provisions of section 95-2408 (b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is filed, each appellant shall comply with the provisions of section 95-2408 (b) and this subsection, and a single record shall be transmitted within forty (40) days after the filing of the final notice of appeal.

(b) Duty of Clerk to Transmit the Record. When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the supreme court. The clerk shall number the documents comprising the record and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. Documents in bulky containers and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to

do so by a party or by the clerk of the supreme court. A party must make advance arrangements with the clerk of the district court for the transportation of bulky or weighty exhibits and with the clerk of the supreme court for their receipt. Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the supreme court. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the supreme court.

(c) Extension of Time for Transmission of the Record—Reduction of Time. The district court may extend the time for transmitting the record. The request for extension must be made within the time originally prescribed or within an extension previously granted, and the district court shall not extend the time to a day more than ninety (90) days from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has denied a request therefor, the supreme court may on motion extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. A motion for an extension of time for transmitting the record made in either court shall show that the inability of the appellant to cause timely transmission of the record is due to causes beyond his control or to circumstances which may be deemed excusable neglect. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given.

The district court or the supreme court may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

(d) Retention of the Record in the District Court by Order of Court. The supreme court may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record and shall transmit a copy of the order and of the docket entries together with such parts as the parties may designate.

If the record is retained in the district court by order of either court, the clerk of the district court shall retain it subject to the order of the supreme court, and transmission of the copy of the docket entries shall constitute transmission of the record.

(e) Stipulation of Parties that Parts of the Record be Retained in the District Court. The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the supreme court shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

**History:** En. 95-2409 by Sec. 1, Ch. 196,  
L. 1967.



**95-2410. Docketing the appeal—filing of the record.** (a) The clerk shall enter the appeal upon the docket at or before the time of filing the record. An appeal shall be docketed under the title given to the action in the district court with such addition as is necessary to indicate the identity of the appellant.

(b) **Filing of the Record.** Upon receipt of the record by the clerk of the supreme court following its timely transmittal, and after the appeal has been timely docketed, the clerk shall file the record without the necessity of a docketing fee. The clerk shall immediately give notice to all parties of the date on which the record was filed.

(c) **Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal.** If the appellant shall fail to cause timely transmission of the record, any respondent may file a motion in the supreme court to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the district court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, and the expiration date on which the notice of appeal was filed, and the expiration date of any order extending the time for transmitting the record; and by proof that seven (7) days' notice in writing has been served on the appellant that application will be made for dismissal of the appeal. Instead of filing a motion to dismiss the appeal, the respondent may cause the record to be transmitted and may docket the appeal, in which event the appeal shall proceed as if the appellant had caused it to be docketed.

**History:** En. 95-2410 by Sec. 1, Ch. 196,  
L. 1967.

**95-2411. Effect of dismissal.** The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

**History:** En. 95-2411 by Sec. 1, Ch. 196,  
L. 1967.

**95-2412. Ruling against respondent may be reviewed.** Whenever the record on appeal shall contain any order, ruling, or proceeding of the trial court against the respondent, affecting his substantial rights on the appeal of said cause, together with any required objection of such respondent, the supreme court on such appeal shall consider such orders, rulings, or proceedings, and the objections thereto, and shall reverse or affirm the cause on said appeal according to the substantial rights of the respective parties, as shown upon the record. No cause shall be reversed by reason of any error committed by the trial court against the appellant, unless the record shows that the error was prejudicial.

**History:** En. 95-2412 by Sec. 1, Ch. 196,  
L. 1967.

**95-2413. Filing and service.** (a) **Filing.** Papers required or permitted to be filed must be placed in the custody of the clerk within the time fixed for filing. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are actually received within the time fixed for filing. If a motion requests relief which

may be granted by a single judge the judge may permit the motion to be filed with him in which event he shall note thereon the dates of filing and shall thereafter transmit it to the clerk.

(b) Service of All Papers Required. Copies of all papers, including any transcript, filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by the party or person acting for him on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

(c) Manner of Service. Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) Proof of Service. Papers presented for filing shall contain acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment of proof of service but shall require such to be filed promptly thereafter.

**History:** En. 95-2413 by Sec. 1, Ch. 196,  
L. 1967.

**95-2414. Computation and extension of time.** (a) Computation of Time. In computing any period of time prescribed by this chapter, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday or a legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Additional Time after Service by Mail. Whenever a party is required or permitted to do any act within a prescribed period after service of a paper upon him and the paper is served by mail, three (3) days shall be added to the prescribed period.

**History:** En. 95-2414 by Sec. 1, Ch. 196,  
L. 1967.

**Cross-References**

Computation of time, sec. 90-407.

Legal holiday defined, sec. 19-107.

**95-2415. Motions.** Unless another form is prescribed by this chapter, an application for an order or other relief shall be made by filing a motion in writing for such order or relief. The motion shall state with particularity the grounds therefor and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Motions for procedural orders may be determined ex parte. The supreme court may authorize disposition of motions for procedural orders by a single judge. If a motion seeks dismissal of the appeal or other substantial relief, any party may file an answer in opposition within seven (7) days after service of the motion, or within such time as the court may direct. Motions, supporting papers and any response thereto may be typewritten.

At the time of filing a motion counsel shall present a proposed order, together with sufficient copies for service upon all counsel of record.

**History:** En. 95-2415 by Sec. 1, Ch. 196,  
L. 1967.

**95-2416. Briefs.** (a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case and its disposition in the court below.

There shall follow a statement of the facts relevant to the issues presented for review, with references to the pages of the parts of the record at which material facts appear (see section (e) hereof).

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and pages of the record relied on.

(5) A short conclusion stating the precise relief sought.

(b) Brief of the Respondent. The brief of the respondent shall conform to the requirements of subsection (a), subdivisions (1) to (4), except that a statement of the issues or of the case need not be made unless the respondent is dissatisfied with the statement of the appellant.

(c) Reply Brief. The appellant may file a brief in reply to the brief of the respondent. The reply brief must be confined to new matter raised in the brief of the respondent. No further briefs may be filed except with leave of court.

(d) References in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such formal designations as "appellant" and "respondent." It promotes clarity to use names or descriptive terms such as "accomplice," "decedent," etc.

(e) References in Briefs to the Record. When a reference is made in the briefs to the record, the reference must be to particular parts of the record, suitably designated, and to specific pages of each part, e.g., Answer, p. 7; Motion for Suppression of Evidence, p. 3; Transcript, p. 231. Intelligible abbreviations may be used. If reference is made to an exhibit, reference shall be made to the pages of the transcript on which the exhibit was identified, offered, and received or rejected.

(f) Reproduction of Statutes, Rules, Regulations, etc. If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, they may be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in



pamphlet form. No such reproduction is required, unless ordered by the supreme court.

(g) **Length of Briefs.** Except by permission of the court briefs shall not exceed fifty (50) pages of standard typographic printing or seventy (70) pages of printing by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc.

**History:** En. 95-2416 by Sec. 1, Ch. 196,  
L. 1967.

**95-2417. Brief of an amicus curiae.** A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. A motion of an amicus curiae for leave to participate in the oral argument will be granted only for extraordinary reasons.

**History:** En. 95-2417 by Sec. 1, Ch. 196,  
L. 1967.

**95-2418. The appendix to the briefs.** (a) **Use of an Appendix.** At any time before final decision, the supreme court may order an appendix to any brief. Also, either the appellant or respondent may, if he deems it desirable, prepare, file and serve with his brief an appendix.

(b) **Contents of the Appendix.** Unless otherwise ordered by the supreme court, an appendix shall contain:

- (1) the relevant docket entries in the proceeding below;
- (2) any relevant pleading and relevant portions of the charge, finding and opinion;
- (3) the judgment, order or decision in question; and
- (4) such other parts of the record as any party deems it essential for the judges of the court to read in order to decide the issues presented. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference or examination and shall not engage in unnecessary designation.

(c) **Arrangement of the Appendix.** At the beginning of the appendix there shall appear a chronological list of the parts of the record which it contains. Each part of the record shall be listed by the descriptive title given to that part by the reference made to it in the briefs. The page or pages of the appendix at which each part of the record thus listed appears shall be set out opposite each listing in a column at the right, so as to permit immediate location in the appendix of the parts of the record referred to in the briefs and contained in the appendix.

The relevant docket entries in the proceeding below shall follow the list of contents. Thereafter, the parts of the record shall be set out in chronological order. The original paging of each part of the record set out in the appendix shall be indicated by placing in brackets the number of the original page at the place where the page begins. Omissions in the

text of papers or of testimony must be indicated by asterisks. A question and its answer may be contained in a single paragraph.

(d) Reproduction of Exhibits. Exhibits may be contained in a separate volume, suitably indexed.

**History:** En. 95-2418 by Sec. 1, Ch. 196, L. 1967.

**95-2419. Filing and service of briefs.** (a) Time for Filing Briefs. The appellant shall serve and file his brief within thirty (30) days after the date on which the record is filed. The respondent shall serve and file his brief within thirty (30) days after service of the brief of the appellant. The appellant may serve and file a reply brief within fourteen (14) days after service of the brief of the respondent, but, except for good cause shown, a reply brief must be served and filed at least three (3) days before argument.

(b) Number of Copies to be Filed and Served. Six (6) copies of each brief shall be filed with the clerk of the supreme court unless otherwise ordered by the court, and one (1) copy of each brief shall be served on counsel for each party separately represented. The clerk will not accept a brief for filing unless it is accompanied by acknowledgment or proof of service as required by section 95-2413.

(c) Consequences of Failure to File Briefs. If an appellant fails to file his brief within the time provided by this section, or within the time extended, a respondent may move for dismissal of the appeal. If a respondent fails to file his brief, he will not be heard at oral argument except by permission of the court.

**History:** En. 95-2419 by Sec. 1, Ch. 196, L. 1967.

**95-2420. Form of briefs, the appendix, motions and other papers.** (a) Form of Briefs, Appendices and Separate Volumes of Exhibits. Briefs, appendices and separate volumes of exhibits may be produced by standard typographic printing or by any duplicating or copying process capable of producing a clear black image on white paper. Typewritten copies of briefs, appendices and separate volumes of exhibits may not be submitted without permission of the chief justice of the supreme court, except in behalf of parties allowed to proceed in forma pauperis. Pica solid is the smallest letter and the most compact form of composition allowed for all printed matter. Briefs, appendices and separate volumes of exhibits shall be on white uncalendered book paper in book or booklet form. If produced by the standard typographic printing process, the pages shall be ten (10) inches long and seven (7) inches wide, with a margin on the outer edge not less than one (1) inch wide and on the inner edge not less than two (2) inches wide. If produced by a duplicating or copying process, the pages shall be eleven (11) inches long and eight and one-half (8½) inches wide, with a margin on the outer edge not less than one (1) inch wide and on the inner edge not less than two (2) inches wide. The pages shall be fastened at the side and numbered at the top.

(b) Typewritten Papers and Motions. Papers not required to be produced in a manner prescribed by subsection (a) of this section shall be

plainly and legibly written by a typewriter with a new black ribbon and new black carbon paper of good grade, in double spacing, except that quotations may be single spaced, on one (1) side only of white typewriter paper, eight and one-half (8½) inches wide and thirteen (13) inches long, numbered at the bottom, with a ruled margin of one and one-half (1½) inches on the left-hand side of the page and one (1) inch on the right-hand side, and numbered lines, not more than thirty-two (32) lines to the page. The pages shall be bound at the left-hand side into volumes not containing more than two hundred fifty (250) pages; provided, however, that if the pages number fifty (50) or less they may be bound at the top.

In collating typewritten papers the copies shall not be mixed, but each copy shall consist throughout of uniform pages. Each page of every copy shall be opaque and each line of print thereon plainly legible. The difficulty of examining transparent, illegible and nonuniform typewritten copies has become so great that this section will be strictly applied and papers not complying with it will not be received.

(c) First Page and Cover. All papers shall be bound in cardboard or pasteboard covers, unless bound at the top under subsection (b) of this section, in which case they may be bound in cover paper. On the first page and cover of all papers must be stated the title of the supreme court, the title of the case as in the court below, adding to the words "plaintiff" and "defendant," the words "appellant" and "respondent" as the case may require, the names of counsel for appellant and respondent, the title of the papers, as "Appellant's Brief," "Appendix to Appellant's Brief," etc., and the venue from which the appeal is taken.

**History:** En. 95-2420 by Sec. 1, Ch. 196,  
L. 1967.

**95-2421. Oral argument.** (a) Notice of Hearing — Postponement. The clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the hearing must be made by motion filed reasonably in advance of the date fixed for hearing.

(b) Time Allowed for Argument. Upon oral argument of an appeal or original proceeding, forty (40) minutes will be allowed appellant or applicant and thirty (30) minutes to respondent. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary by motion filed reasonably in advance of the date fixed for hearing. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(c) Order and Content of Argument. The appellant or applicant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case, and the closing argument shall be limited to rebuttal of respondent's argument. Counsel will not be permitted to read at length from briefs, records or authorities.

(d) Nonappearance of Counsel—Failure to File Briefs. If counsel for a party fails to appear to present argument, the court may hear argu-



ment on behalf of a party whose counsel is present, and the case will be decided on the briefs and the argument heard. If no counsel appear for any party, the case will be decided on the briefs unless the court shall otherwise order.

(e) Submission on Briefs. By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(f) Use of Physical Exhibits at Hearing—Removal. If physical exhibits other than documents are to be used at the hearing, counsel shall arrange to have them placed in the courtroom before the court convenes on the date of the hearing. After the hearing counsel shall cause the exhibits to be removed from the courtroom unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

**History:** En. 95-2421 by Sec. 1, Ch. 196, L. 1967.

#### DECISIONS UNDER FORMER LAW

##### Necessity for Argument

Word "argument" in former statute providing that judgment might be affirmed, but not reversed, without argument meant argument, whether written or oral, and where a case had been submitted on briefs, the court was required to decide the cause upon its merits and reverse or affirm the judgment, just as it would have done if there had been a full oral argument, since the statute simply meant that if the ap-

pellant failed to disclose by appropriate argument wherein the lower court had committed prejudicial error, the judgment might be affirmed but not reversed. *State v. Guerin*, 51 M 250, 256, 152 P 747.

Where appellant in a criminal cause fails to file his brief and on the day set for argument no appearance in behalf of either side is made, the judgment appealed from will be affirmed. *State v. Cassill*, 72 M 381, 382, 233 P 908.

**95-2422. Entry and notice of orders and judgments.** The notation of a judgment or order in the docket constitutes entry thereof. Upon entry of a judgment or order, the clerk shall promptly mail to all parties a copy of the judgment or order, and notice of the date of entry thereof.

**History:** En. 95-2422 by Sec. 1, Ch. 196, L. 1967.

**95-2423. Petitions for rehearing.** A petition for rehearing may be filed within ten (10) days after the decision of the supreme court has been rendered, unless the time is shortened or enlarged by order, and the adverse party shall have seven (7) days thereafter in which to serve and file his objections thereto. Extensions of time will be granted only upon showing of unusual merit and in no event in excess of ten (10) days. A petition for rehearing may be presented upon the following grounds and none others: That some facts, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed. Oral argument in support of the petition will not be permitted. No reply to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of

such a request. Six (6) copies of the petition, produced in accordance with section 95-2420 (a), shall be filed with the clerk.

**History:** En. 95-2423 by Sec. 1, Ch. 196, L. 1967.

**95-2424. Calendar—withdrawal of records.** (a) Placing Causes upon Calendar. Thirty (30) days after the appellant's brief has been filed, the cause shall be placed on the calendar as ready for oral argument.

(b) Setting Causes for Argument. Causes against defendants held in custody will be set for argument by the court in advance of causes against defendants on bail unless for good cause the court shall otherwise order.

(c) Permission to Take Record from Clerk's Office. The records and other papers of the supreme court shall not be taken therefrom except by counsel pursuant to a written order of a justice of the court, which order shall specify the time the same may be retained out of the clerk's office; provided, that the court or a justice thereof may require the same to be returned within a shorter period upon notice. The clerk shall preserve each order and counsel's receipt until the papers therein mentioned shall be returned.

**History:** En. 95-2424 by Sec. 1, Ch. 196, L. 1967.

#### **Appeal, When Tried**

Where appellant filed his transcript, and

subsequently received seven separate orders for extensions of time to file his brief, court would refuse appellant's application to vacate the hearing of the appeal. *State v. Cockrell*, 130 M 552, 305 P 2d 337, 338.

**95-2425. Substantial and insubstantial errors on appeal.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. Defects affecting jurisdictional or constitutional rights may be noticed although they were not brought to the attention of the trial court.

**History:** En. 95-2425 by Sec. 1, Ch. 196, L. 1967.

#### **Technical Errors**

A judgment of conviction will not be reversed for error in the trial proceedings that did not prejudice, or tend to prejudice, defendant in respect to a substantial right. *State v. Rhys*, 40 M 131, 134, 105 P 494.

A judgment of conviction will not be reversed unless the error prejudiced, or tended to the prejudice of, defendant. *State v. Vanella*, 40 M 326, 345, 106 P 364.

In criminal cases no judgment will be reversed for technical errors or defects which do not affect the substantial rights of the defendant and where the record is sufficient to establish the guilt of the defendant, a new trial will not be granted, even though there was error, unless it clearly appears that the error complained of actually prejudiced the defendant in his right to a fair trial. *State v. Dixon*, 80 M 181, 213, 260 P 138; *State v. Ray*, 88 M 436, 446, 294 P 368.

#### **Technical Errors—Absence of Juror**

Failure of a properly notified juror to be present when the jury was impaneled did not invalidate the trial as the defendant had the right only to reject jurors and not to select any particular juror. *State v. Moran*, 142 M 423, 384 P 2d 777.

#### **Technical Errors—Admission of Evidence**

An erroneous ruling of the court in admitting evidence which could not affect the substantial rights of the parties must be disregarded. *Church v. Zywert*, 58 M 102, 107, 190 P 291.

#### **Technical Errors—Apex Juris**

Where no substantial right of the defendant has been disregarded, a mere apex juris is not sufficient cause for the reversal or modification of the judgment. *State v. Connors*, 27 M 227, 229, 70 P 715.

#### **Technical Errors—Challenge to Juror**

Held in a prosecution for receiving stolen property that where a juror on his

voir dire in answer to questions propounded by the state admitted that he was a close friend of defendant but could try him as if he were a stranger, but that he would like to be excused, and then stated that he would not convict him even if he believed him guilty beyond a reasonable doubt, thereafter, however, on examination by defendant's counsel, again asserting that he would vote for conviction regardless of his friendship for defendant if proper under the law and the evidence, the court's ruling excusing the juror may not be held reversible error even though it be conceded that technical error was committed in sustaining the challenge on an improper ground. *State v. Huffman*, 89 M 194, 198, 296 P 789.

#### Technical Errors—Curing Prejudice

Withdrawal of evidence in criminal case, of similar offenses, on motion or by instruction is ineffective to cure prejudice unless supreme court on inspection of record can say that the effect of the evidence was clearly removed; and where a general objection was interposed, failure to move to strike or withdraw it from jury's consideration is immaterial. *State v. Simanton*, 100 M 292, 309, 49 P 2d 981, overruled on related issue in *State v. Knox*, 119 M 449, 453, 175 P 2d 774.

#### Technical Errors—Defective Information

An information charging an attempt to obtain money by false pretenses, though defective in form and containing immaterial averments, is sufficient to sustain a conviction, when it is apparent that the defendant has suffered no prejudice. *State v. Phillips*, 36 M 112, 118, 92 P 299.

#### Technical Errors—Degrees of Offense

Where under the evidence submitted at a trial for assault in the second degree, the defendant might have been convicted of assault in either the second or third degree, but was found guilty of the lower degree, the judgment will not be reversed for a purely technical error in giving an instruction. *State v. Tracey*, 35 M 552, 555, 90 P 791.

#### Technical Errors—Endorsing Name of Witness

Where a county attorney violated express statutory injunction by endorsing the name of a witness as "John Doe Mitchell," whereas he knew his true name to be "James Mitchell," defendant was not entitled to a new trial in the absence of a showing that he had been prejudiced by the officer's delinquency. *State v. McDonald*, 51 M 1, 7, 149 P 279.

#### Technical Errors—Erroneous Instruction

Erroneous instructions are not cause for

reversal in the absence of any prejudice. *State v. Hay*, 120 M 573, 194 P 2d 232, 236.

#### Technical Errors—Evidentiary Exhibits

Where exhibits consisting of photographs of the automobile in which some of the shots resulting in the killing of deceased had been fired and of the body of deceased, a pistol taken from defendant after the shooting, revolver clips, etc., all of which had been admitted in evidence without objection by defendant, were taken to the jury room, at the close of the trial, apparently without the affirmative consent of defendant and without an order of court permitting it to be done, but there was no showing that by the procedure the jury were given any other information than that obtained at the trial, it may not be presumed that the procedure resulted to the prejudice of the defendant. *State v. Cates*, 97 M 173, 198, 205, 33 P 2d 578.

#### Technical Errors—Impeachment of Accused

The right of one on trial for crime forbidding his impeachment in any other manner than that prescribed by section 93-1901-11 is a substantial one. *State v. Shannon*, 95 M 280, 292, 26 P 2d 360.

#### Technical Errors—Improper Evidence and Cross-examination

Errors in the admission of improper evidence or in the permission of improper cross-examination have been held in and of themselves sufficiently prejudicial to justify the reversal of a judgment. *State v. Patton*, 102 M 51, 63, 55 P 2d 1290.

#### Technical Errors—Instructions to Jury

Under this case, held, on appeal from a judgment of conviction for forgery, that, while it was error to advise the jury in an instruction as to the purpose for which testimony of other like acts had been admitted, that testimony had been admitted relating to certain "forgeries," since whether or not a forgery had been committed was the fact to be determined by the jury, in view of other portions of the charge carefully safeguarding the rights of defendant, the inadvertent use of the term "forgeries" could not have worked to his prejudice. *State v. Daems*, 97 M 486, 500, 37 P 2d 322.

#### Technical Errors—Judge's Remarks

A remark of the trial judge in passing upon an objection to a question asked a witness for the defense in a criminal cause to the effect: "I don't think that is very material; let him answer," while improper, held technical error and nonprejudicial when considered in connection with the particular circumstances. *State v. Cassill*,



71 M 274, 283, 229 P 716; *State v. Sedlacek*, 74 M 201, 216, 239 P 1002.

### Technical Errors—Larceny

In a prosecution for the larceny of two calves, refusal of the court to strike the testimony of a cattleman that two cows, the condition of the bags of which indicated that they had lost their calves but a short time theretofore, were acting as though they were looking for them, held not reversible error under the circumstances, among them that defendant killed the calves after being charged with their theft and thus blocked the test proposed by the stock inspector by getting the cows and seeing whether they would claim the calves. *State v. Grimsley*, 96 M 327, 335, 30 P 2d 85.

### Technical Errors—Leading Questions

Under the rule that the supreme court will not reverse a judgment of conviction for mere technical irregularities not affecting injuriously the substantial rights of appellant, for alleged error in overruling objections to several questions claimed to have been leading but which were of no special importance but merely explanatory in character, a new trial will not be ordered. *State v. Wong Fong*, 75 M 81, 88, 241 P 1072.

### Technical Errors—Necessity of Transcript of Evidence

In order to give effect to predecessor section to determine whether the erroneous instructions were merely technical errors, or affected the substantial rights of the accused, it was necessary that the supreme court have before it a transcript of the evidence. *State v. Hay*, 120 M 573, 194 P 2d 232, 237.

### Technical Errors—Presence of Accused at Trial

The presence of defendant at his trial was a matter which affected the substantial rights of both parties and therefore the provision requiring the supreme court to give judgment on appeal without regard to technical errors or defects not affecting the substantial rights of the parties, had no application. *State v. Reed*, 65 M 51, 61, 210 P 756.

### Technical Errors—Presence of Jurors

Where the record in a criminal cause did not show that the jurors were not all present when the verdict was delivered, and from the minutes no other fair inference could be drawn than that they were actually present at the time, the omission from the minutes of a statement that their names were called prior to delivery of the verdict was not an error which prejudiced defendant in his substantial

rights. *State v. De Lea*, 36 M 531, 536, 93 P 814.

### Technical Errors—Presumption of Prejudice

Query, as to whether the rule, that "error appearing, prejudice will be presumed," as announced prior to the adoption of the codes in 1895, was abrogated by statutes declaring that no judgment shall be held invalid for mere technical errors not affecting the substantial rights of the defendant. *State v. Gordon*, 35 M 458, 466, 90 P 173; see *State v. Byrd*, 41 M 585, 592, 111 P 407.

It ought no longer to be the rule in criminal cases in this state that, error being shown, prejudice will be presumed, as was held prior to 1895, when the codes were adopted. The former practice resulted in altogether too many reversals of criminal cases for technical errors which did not affect the substantial rights of the defendant. *State v. Byrd*, 41 M 585, 592, 111 P 407.

Prejudice to appellant in a criminal cause cannot be presumed, but must be made to appear, either affirmatively by the record, or by a denial or invasion of some substantial right from which the law imputes prejudice. *State v. Hall*, 55 M 182, 188, 175 P 267.

Prejudice in a criminal case will not be presumed, but rather must appear from the denial or invasion of a substantial right from which the law imputes prejudice. *State v. Straight*, 136 M 255, 347 P 2d 482, 488; *State v. Bubnash*, 142 M 377, 382 P 2d 830.

### Technical Errors—Prior Conviction

A technical error in pleading a prior conviction will not work a reversal, if the punishment imposed does not exceed the limit which could properly be imposed. *State v. Paisley*, 36 M 237, 248, 92 P 566.

### Technical Errors—Questions

In a prosecution for first degree assault, question posed by the prosecution relating to potential criminal bribery, if error, was technical error which did not provide a basis for a reversal, in view of fact that questions posed were not evidence, that they were answered in the negative and that the court had instructed the jury not to consider the remarks of counsel. *State v. Gallagher*, 151 M 501, 445 P 2d 45.

### Technical Errors—Rape

In a prosecution for attempted rape, the introduction in evidence of the clothing worn by the prosecuting witness, though immaterial, was not reversible error, where there was no evidence that the articles were muddy, torn and blood-stained, as claimed, and thus likely to inflame the

minds of the jurors, and where the original exhibits were not certified to the supreme court for inspection; prejudice cannot be presumed, but must be made to appear affirmatively. *State v. Prouty*, 60 M 310, 313, 199 P 281; *Lindeberg v. Howe*, 67 M 195, 199, 215 P 230.

#### **Technical Errors—Supreme Court To Determine**

It is for the supreme court to determine whether an error affects the substantial rights of the defendant. If the point can be decided from an inspection of the record, the court may act accordingly; if the defendant claims prejudice, it is his duty to demonstrate that fact from the record. *State v. Byrd*, 41 M 585, 592, 111 P 407.

To warrant the supreme court in interfering with the judgment in a criminal case, it must appear that the substantial rights of the defendant have been injuriously affected. *State v. Crean*, 43 M 47, 60, 114 P 603.

Supreme court will not reverse a judgment of conviction on account of technical errors or defects in the information, where defendant was fully advised of the nature of the charge against him to enable him to prepare to meet that charge, and his substantial rights were not affected by the defect. *State v. Wehr*, 57 M 469, 188 P 930.

Supreme court on appeal in a criminal cause must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the defendant. *State v. McConville*, 64 M 302, 309, 209 P 987.

If person has gone to trial under indictment on which witnesses' names were

designated as Richard Roe and John Doe and convicted, the supreme court would be required to sustain the conviction if possible and burden would be on defendant to show prejudice. *State ex rel. Porter v. District Court*, 124 M 249, 220 P 2d 1035, 1043.

It is up to the supreme court to decide whether an error affects the substantial rights of the defendant, and the defendant must demonstrate prejudice from the record. *State v. Straight*, 136 M 255, 347 P 2d 482, 488; *State v. Bubnash*, 142 M 377, 382 P 2d 830.

#### **Technical Errors—Unresponsive Answer**

Though refusal to strike out an unresponsive answer in which the witness volunteers a statement of facts from which the complaining party has probably suffered prejudice will result in a reversal of the judgment, such refusal is harmless error where the objectionable statement was volunteered on cross-examination after having been twice before made on his direct examination. *State v. Jones*, 48 M 505, 515, 139 P 441.

#### **Waiver of Error**

References by county attorney as to the nature of the trial, an appeal from justice court, claimed as prejudicial error in the district court, was waived by counsel for defendant when he approved instructions to be given by the court which included reference to justice court proceedings and thereafter obtained deletion from the instructions of the phrase which read "and was found guilty following a jury trial." *State v. Gilbert*, 139 M 204, 362 P 2d 221, 224.

### **95-2426. Determination of appeal.** On appeal the reviewing court may:

- (1) Reverse, affirm or modify the judgment or order from which the appeal is taken;
- (2) Set aside, affirm or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken;
- (3) Reduce the degree of the offense of which the appellant was convicted;
- (4) Reduce the punishment imposed by the trial court; or
- (5) Order a new trial if justice so requires.

**History:** En. 95-2426 by Sec. 1, Ch. 196, L. 1967.

#### **Degree Presumed Correct**

In the absence of testimony, it will be presumed on appeal that the trial court, in a burglary case, had evidence before it justifying a finding that, if guilty at all, the defendant was guilty of an attempt to commit burglary in the nighttime, which constitutes the first degree of the offense,

and that the punishment inflicted was proper. *State v. Mish*, 36 M 168, 175, 92 P 459.

Where the judgment was silent as to the degree of burglary of which defendant was convicted and the sentence imposed was such as might be imposed for first degree burglary only, supreme court would presume, where no appeal was taken, that the court ascertained that defendant was guilty of burglary in the first degree. *State*

ex rel. Williams v. Henry, 119 M 271, 174 P 2d 220, 222.

v. District Court, 130 M 57, 294 P 2d 907. (Dissenting opinion, 130 M 57, 294 P 2d 907, 911.)

### Fair Trial Criterion

Where on appeal in a homicide case three of the justices of the supreme court, a majority, are of the opinion that the trial court committed error resulting in denial of a fair trial to defendant, but are unable to agree as to any one of the grounds urged by him in his assignment of errors being sufficient to warrant a reversal of the judgment, a retrial will be ordered; under such circumstances it is immaterial that the majority do not agree as to any particular error set forth in his assignment of errors—a mere procedural requirement — the real question being whether or not defendant had a fair trial. State v. Le Due, 89 M 545, 580, 300 P 919.

### Mandate, on Remand, Binding

Where supreme court reversed conviction of defendant and remanded cause to district court with directions that if defendant have a new trial the district court should first make inquiry into the defendant's insanity but if the prosecution is dismissed that the district court deliver the defendant to the court of another county which has continuing jurisdiction over the defendant so that the latter court may inquire into his mental condition and make such disposition of the defendant as is required by law; and thereafter the prosecution was dismissed, the trial court then was compelled to deliver the defendant to the other district court and county attorney could not file a new information. The trial court was bound to follow the mandate of the supreme court as found in the remittitur and mandamus will lie to require that the district court follow such mandate. State ex rel. Kitchens

### Modification of Judgment

A judgment of conviction for crime, which erroneously included payment by defendant of the costs of prosecution, is not on that account void as a whole; but the same may be modified by striking therefrom the provision as to costs, and, as so modified, be allowed to stand. State v. Stone, 40 M 88, 93, 105 P 89.

### Reduction of Degree of Offense

Supreme court has the power to reduce a verdict of murder in the first degree to make it fit the crime established by the evidence, to wit, murder in the second degree. State v. Gunn, 89 M 453, 464, 300 P 212.

### Reduction of Sentence

The sentence of a defendant, who pleaded guilty to grand larceny, to four years in the state prison, pursuant to section 94-2706, was reduced to one year by the supreme court where trial court passed sentence upon receipt of private reports without allowing defendant or his counsel to learn of the representations in the reports and a hearing to present evidence to refute such representations. Kuhl v. District Court, 139 M 536, 366 P 2d 347, 365.

### Remand for New Trial

When a judgment of acquittal is reversed on appeal it is proper for the supreme court to remand the case to the district court for a new trial, where the defendant may then, if he desires, plead former acquittal in bar of such new trial. State v. Herron, 12 M 300, 30 P 140.

**95-2427. Issuance of mandate, return of record and termination of jurisdiction.** Upon termination of the appeal the supreme court shall remand the cause with proper instruction, together with the opinion of the court; and the clerk shall return all original documents to the trial court.

After the cause has been remanded to the trial court, the appellate court has no further jurisdiction of the appeal or the proceedings thereon, and all orders necessary to carry the judgment into effect must be made by the court to which the cause is remanded.

**History:** En. 95-2427 by Sec. 1, Ch. 196, L. 1967.

### Supreme Court's Loss of Jurisdiction

Where supreme court reversed conviction and the remittitur went down in due course and was filed with the lower court, the supreme court at that time lost juris-

diction in the case. Specifically it lost any jurisdiction it may have had theretofore to alter in any particular either the opinion or the mandate which followed upon that opinion, certainly unless the remittitur were first recalled. State ex rel. Kitchens v. District Court, 130 M 57, 294 P 2d 907, 908.

**95-2428. Indigent appeals.** (a) Upon imposition of any sentence in a criminal case a defendant may file in the trial court a petition request-



ing that he be furnished with a transcript of the proceeding at his trial. The petition shall be verified by the petitioner and shall state facts showing that he is at the time of filing the petition without financial means to pay for the transcript. If the trial judge who imposed sentence or in his absence any judge of the court finds that the defendant is without financial means with which to obtain the transcript of the proceedings at his trial he shall order the official court reporter to transcribe an original and copy of his notes of the proceedings at the trial. The original of the report of proceedings shall be filed with the clerk of the trial court and the copy shall be delivered to the defendant without charge.

(b) Application to the Supreme Court. If the petition provided for in subsection (a) is denied by the trial court, a petition so to proceed may be filed in the supreme court within thirty (30) days after entry of the denial. The petition shall be accompanied by a copy of the verification filed in the trial court and of the statement of reasons for denial given by the trial court.

**History:** En. 95-2428 by Sec. 1, Ch. 196,  
L. 1967.

**95-2429. Appeal by one defendant.** When several defendants are tried jointly, any one (1) or more of them may take an appeal; but those who do not join in the appeal shall not be affected thereby.

**History:** En. 95-2429 by Sec. 1, Ch. 196,  
L. 1967.

**95-2430. Defendant discharged on reversal of judgment.** If a judgment against the defendant is reversed without ordering a new trial, the appellate court must, if he is in custody, direct him to be discharged therefrom; or if on bail, that his bail be exonerated; or if money was deposited instead of bail, that it be refunded to the defendant.

**History:** En. 95-2430 by Sec. 1, Ch. 196,  
L. 1967.

## CHAPTER 25

### APPELLATE REVIEW OF LEGAL SENTENCES

Section 95-2501. Review division of the supreme court for review of certain sentences.  
95-2502. Procedure for review.  
95-2503. Review—decision.  
95-2504. Scope of act.

**95-2501. Review division of the supreme court for review of certain sentences.** The chief justice of the supreme court of Montana shall appoint three (3) district court judges to act as a review division of the supreme court and shall designate one of such judges to act as chairman thereof. The clerk of the Montana supreme court shall record such appointment and shall give notice thereof to the clerk of every district court. This review division shall meet at least four (4) times a year or more as its business requires as determined by the chairman. The decision of any two (2) of such judges shall be sufficient to determine any matter before the review division. No judge shall sit or act on a review of sentence

imposed by him. In any case in which review of a sentence imposed by any of the judges serving on the review division is to be acted on by said division, the chief justice of the supreme court of Montana may designate another judge to act in place of such judge. The review division shall hold its meetings at Deer Lodge, and may adopt any rules and regulations which will expedite their review of sentences. The division is also authorized to appoint a secretary and such clerical help as it deems adequate and fix their compensation.

**History:** En. 95-2501 by Sec. 1, Ch. 196,  
L. 1967.

**95-2502. Procedure for review.** Any person sentenced to a term of one (1) year or more in the state prison by any court of competent jurisdiction may, within sixty (60) days from the date such sentence was imposed, except in any case in which a different sentence could not have been imposed, file with the clerk of the district court in the county in which judgment was rendered, an application for review of the sentence by the review division. Upon imposition of the sentence the clerk shall give written notice to the person sentenced of his right to make such a request. Such notice shall include a statement that review of the sentence may result in decrease or increase of the sentence within limits fixed by law. The clerk shall transmit such application to the review division and shall notify the judge who imposed the sentence, and the county attorney of the county in which the sentence was imposed. Such judge may transmit to the review division a statement of his reasons for imposing the sentence, and shall transmit such a statement within seven (7) days, if requested to do so by the review division. The review division may for cause shown consider any late request for review of sentence and may grant such request. The filing of an application for review shall not stay the execution of the sentence.

**History:** En. 95-2502 by Sec. 1, Ch. 196,  
L. 1967.

**95-2503. Review—decision.** The review division shall, in each case in which an application for review is filed in accordance with 95-2502, review the judgment so far as it relates to the sentence imposed, either increasing or decreasing the penalty, and any other sentence imposed on the person at the same time, and may order such different sentence or sentences to be imposed as could have been imposed at the time of the imposition of the sentence under review, or may decide that the sentence under review should stand. In reviewing any judgment, said division may require the production of presentence reports and any other records, documents or exhibits relevant to such review proceedings. The appellant may appear and be represented by counsel, and the state may be represented by the county attorney of the county in which the sentence was imposed. If the review division orders a different sentence, the court sitting in any convenient county shall resentence the defendant as ordered by the review division. Time served on the sentence reviewed shall be deemed to have been served on the sentence substituted. The decision of the review division in each case shall be final and the reasons for such decision shall be

stated therein. The original of each decision shall be sent to the clerk of the court for the county in which the judgment was rendered and a copy shall be sent to the judge who imposed the sentence reviewed, the person sentenced, the principal officer of the institution in which he is confined and the decision shall be reported in the Montana Reports.

**History:** En. 95-2503 by Sec. 1, Ch. 196,  
L. 1967.

**95-2504. Scope of act.** A person who on the effective date of this act is imprisoned under a sentence to the state prison and who is not eligible for parole may, notwithstanding the partial execution of such sentence, file for a review of such sentence and of any other sentence imposed at that time; provided, that at the time of such request for review such person shall execute a written consent to such sentence as may be imposed by the review division on such review, including an increased term. No such application shall be considered if taken later than two (2) years after the effective date of this act nor in any case in which a different sentence could not have been imposed.

**History:** En. 95-2504 by Sec. 1, Ch. 196,  
L. 1967.

**Compiler's Note**

The "effective date of this act" is January 1, 1968. See note following sec. 95-2716.

## CHAPTER 26

### POST-CONVICTION HEARING

- Section 95-2601. Petition in the trial court.  
95-2602. Proceedings commenced by petition.  
95-2603. Contents of the petition.  
95-2604. When motion may be made.  
95-2605. Proceedings on the petition.  
95-2606. Record must be kept.  
95-2607. Successive petitions not allowed.  
95-2608. Review.

**95-2601. Petition in the trial court.** Any person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims sentence was imposed in violation of the constitution or the laws of this state or the Constitution of the United States, or that the court was without jurisdiction to impose such sentence, or that sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, upon any ground of alleged error available under writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy may move the court which imposed the sentence or the supreme court or any justice of the supreme court to vacate, set aside, or correct the sentence.

**History:** En. 95-2601 by Sec. 1, Ch. 196,  
L. 1967.

**95-2602. Proceedings commenced by petition.** The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place or the clerk of the supreme court a verified petition. The clerk



shall docket the petition upon its receipt and bring the same promptly to the attention of the court.

**History:** En. 95-2602 by Sec. 1, Ch. 196,  
L. 1967.

**95-2603. Contents of the petition.** The petition shall identify the proceeding in which the petitioner was convicted, give date of the rendition of the final judgment complained of, and clearly set forth the alleged violation or violations. The petition shall have attached thereto affidavits, records or other evidence supporting its allegations or shall state why the same are not attached. They shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Arguments and citations and discussion of authorities shall be omitted from this petition.

**History:** En. 95-2603 by Sec. 1, Ch. 196,  
L. 1967.

**95-2604. When motion may be made.** A motion for such relief may be made at any time after conviction.

**History:** En. 95-2604 by Sec. 1, Ch. 196,  
L. 1967.

**95-2605. Proceedings on the petition.** Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the county attorney in the county in which the conviction took place, grant a prompt hearing thereon, determine the issue and make findings of fact and conclusions with respect thereto.

The court may receive proof by affidavits, depositions, oral testimony or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to reassignment, retrial, custody, bail or discharge as may be necessary and proper. If the court finds for the state the petitioner shall be returned to the custody of the person to whom the writ was directed.

**History:** En. 95-2605 by Sec. 1, Ch. 196,  
L. 1967.

**95-2606. Record must be kept.** A court which entertains a motion pursuant to this chapter must keep a record of the proceedings and enter its findings and conclusions.

**History:** En. 95-2606 by Sec. 1, Ch. 196,  
L. 1967.

**95-2607. Successive petitions not allowed.** All grounds for relief claimed by a petitioner under this act must be raised in his original or amended petition, and any grounds, other than constitutional grounds not so raised are waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

**History:** En. 95-2607 by Sec. 1, Ch. 196,  
L. 1967.

**95-2608. Review.** Either the petitioner or the state may appeal to the supreme court of Montana from an order entered on the motion. The appeal shall be taken within six (6) months from the entry of the order.

**History:** En. 95-2608 by Sec. 1, Ch. 196, L. 1967.

## CHAPTER 27

### HABEAS CORPUS

- Section** 95-2701. Who may prosecute writ.  
 95-2702. Writ for purpose of bail.  
 95-2703. Application for, how made.  
 95-2704. By whom issued and before whom returnable.  
 95-2705. Writ granted without delay.  
 95-2706. Refusal to obey writ.  
 95-2707. Content of writ.  
 95-2708. Service of the writ.  
 95-2709. Return, what to contain.  
 95-2710. Production of person—exception for infirmity or illness.  
 95-2711. Hearing on return.  
 95-2712. Production of evidence—depositions.  
 95-2713. Disposition of petitioner.  
 95-2714. Appeal on order of judgment on habeas corpus.  
 95-2715. Writ and process may issue at any time.  
 95-2716. No release for technical defects.

**95-2701. Who may prosecute writ.** Every person imprisoned or otherwise restrained of his liberty, within this state, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint, and if illegal to be delivered therefrom.

**History:** En. 95-2701 by Sec. 1, Ch. 196, L. 1967.

habeas corpus, *Petition of Erickson*, 146 M 456, 409 P 2d 447.

#### Cross-Reference

Application of Montana Rules of Civil Procedure to this chapter, see Table A, M. R. Civ. P.

#### Child Custody

While the welfare of a child in the matter of its custody is of paramount interest in habeas corpus proceeding involving custody, neither such interest nor the child's wish will justify a court in denying its custody to the surviving parent, in the absence of a showing of unfitness or inability to support the child, and turning it over to a stranger. *August v. Burns*, 79 M 198, 213, 255 P 737.

#### Curable Defects in Process

Where committing order stated that defendant was convicted for the crime of burglary, together with a prior conviction of a felony, but defendant was properly convicted and sentenced for robbery, and had a prior conviction of felony, erroneous use of the word burglary, which had been the prior felony for which defendant had been convicted, did not constitute such defect as to allow for writ of

#### Defective Indictment Not Ground for Relief

On application for habeas corpus the court will not determine whether the indictment upon which complainant was convicted was defective, since the writ cannot be used as a substitute for a demurrer or a motion to quash, its inquiry being confined to a determination of the validity of the process on its face and whether the court had jurisdiction of the offense charged. *State ex rel. Boone v. Tullock*, 72 M 482, 493, 234 P 277.

#### Denial of Federal Constitutional Rights

A writ of habeas corpus is not available in the state courts of Montana to correct denials of federal constitutional rights. *Brown v. State*, 202 F Supp 29, 30.

#### Denial of Writ

The writ of habeas corpus is directed at unlawful imprisonment or restraint of liberty, and where, even if the writ had been issued, it would not have resulted in the release of petitioner from confinement since he was confined under a five-year sentence imposed concurrently with

his original ten-year sentence, habeas corpus was denied. In *re Wagner's Petition*, 145 M 101, 399 P 2d 761.

#### Effect as Res Judicata

While a proceeding in habeas corpus involving the custody of a child is civil in its nature and the decision of the court awarding its custody is final, except for abuse of discretion, its decision is res judicata only as to those matters properly determined by it on the merits. *August v. Burns*, 79 M 198, 213, 255 P 737.

#### Insufficient Commitment to Jail

Where a justice of the peace upon adjudging one guilty of contempt for disobeying a subpoena imposed a fine of \$100 and upon refusal of payment committed him to jail until payment be made, but thereafter accepted a cash bond in lieu of fine and imprisonment pending final disposition of a certiorari proceeding and appeal to supreme court, the objection that the commitment was insufficient under statute requiring imprisonment until payment of fine would not lie since if the sheriff should presume to hold contemnour thereunder the proper remedy would be habeas corpus. *State ex rel. Mercer v. Woods*, 116 M 533, 542, 155 P 2d 197.

#### Legality of Custody

Where a petitioner for habeas corpus was convicted of murder, and oral judgment was rendered, confining him to prison for twenty-five years, without any record being made, but at a special term, after notice to petitioner and his counsel, the minutes were corrected to show the judgment as rendered, and on the judgment thus entered a commitment was issued, the petitioner was legally in custody, for the purposes of the judgment, and not entitled to his discharge. In *re Dye*, 32 M 132, 136, 79 P 689.

#### Motives of Prosecution

On a hearing of a habeas corpus sued out for the liberation of one who is sought to be extradited for the violation in another state it is not admissible to hear evidence upon, or to inquire into, the motives or purposes of the prosecution. *State v. Booth*, 134 M 235, 328 P 2d 1104, 1111.

#### Not of a Criminal Nature

Habeas corpus is not a special proceeding of a criminal nature. *State ex rel. Brandegee v. Clements*, 52 M 57, 59, 155

P 271; see also *State ex rel. Newell v. Newell*, 13 M 302, 305, 34 P 28; *State ex rel. Jackson v. Kennie*, 24 M 45, 60 P 589, and *State ex rel. Hepner v. District Court*, 40 M 17, 104 P 872.

#### Petitioner, Not Defendant

The term "defendant" is not a proper designation for a petitioner in a habeas corpus proceeding. *State ex rel. Jackson v. Kennie*, 24 M 45, 50, 60 P 589.

#### Petit or Grand Larceny

Where a person, after a preliminary examination, is committed for grand larceny, and, upon his suing out a writ of habeas corpus, on the ground that he is guilty of petit larceny only, it appears from the evidence before the justice that he was guilty at least of petit larceny, and that there was a reasonable basis for the belief that he was guilty of grand larceny, it is the imperative duty of the court to remand him. In *re Jones*, 46 M 122, 125, 126 P 929.

#### Purpose

The purpose of a writ of habeas corpus is to determine the legality or illegality of the restraint alleged to be exercised; it is available only to persons unlawfully imprisoned or restrained of their liberty, and is independent of the legal proceeding under which the detention is sought to be justified. *August v. Burns*, 79 M 198, 213, 255 P 737.

#### Trial Court Jurisdiction

Where the court imposed a prison sentence for a misdemeanor, its judgment was void as being in excess of its jurisdiction, and the prisoner was entitled to habeas corpus. *State v. District Court*, 35 M 321, 326, 89 P 63.

On application for writ of habeas corpus, which presents the inquiry whether the trial court had jurisdiction of the subject matter of the prosecution and of the defendant and to render such a judgment as the law authorizes in the particular case, the presumption of jurisdiction is conclusive unless want of it appears on the face of the record, and express recitals of jurisdictional facts cannot be rebutted by evidence dehors the record. In *re Shaffer*, 70 M 609, 613, 227 P 37.

#### Law Review

The Writ of Habeas Corpus, 26 Mont. L. Rev. 57 (1964).

**95-2702. Writ for purpose of bail.** When a person is imprisoned or detained in custody on any criminal charge, for want of bail, such person is entitled to a writ of habeas corpus for the purpose of giving bail, upon averring that fact in his petition, without alleging that he is illegally confined.



**History:** En. 95-2702 by Sec. 1, Ch. 196, L. 1967.

#### When Bail Allowable

It is proper to allow bail, in a homicide case, in the absence of a showing,

by the county attorney, that the proof of the defendant's guilt is evident or the presumption thereof great. State ex rel. Murray v. District Court, 35 M 504, 507, 90 P 513.

**95-2703. Application for, how made.** Application for the writ is made by petition, signed either by the party for whose relief it is intended, or by some person in his behalf, and must specify:

(a) That the person in whose behalf the writ is applied for is unlawfully imprisoned or restrained of his liberty, why the imprisonment or restraint is unlawful, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties if they are known, or describing them if they are not known.

(b) The petition must be verified by the oath or affirmation of the party making the application.

**History:** En. 95-2703 by Sec. 1, Ch. 196, L. 1967.

#### Denial of Speedy Trial

Petition for writ of habeas corpus by petitioner being held on detainer from another state, alleging that delay by other state in lodging a detainer deprived pe-

titioner of right to a speedy trial, was denied on grounds that petitioner had deprived himself of a speedy trial by fleeing from the other state and his petition disclosed no factual basis as required by the statute on which to base the issuance of a writ. Petition of Ferguson, 150 M 178, 432 P 2d 773.

**95-2704. By whom issued and before whom returnable.** The writ of habeas corpus may be granted:

(a) By the supreme court, or any justice thereof, upon petition by or on behalf of any person restrained of his liberty in this state. When so issued it may be made returnable before the court, or any justice thereof, or before any district court or judge thereof.

(b) By the district courts or a judge thereof, upon petition by or on behalf of any person restrained of his liberty in their respective counties or districts.

**History:** En. 95-2704 by Sec. 1, Ch. 196, L. 1967.

#### Cross-References

District judge may issue and determine at chambers, secs. 93-802, 93-803.

Supreme court justices may issue, secs. 93-217, 93-801.

Writ of habeas corpus, Mont. Const. Art. VIII, §§ 3, 11, 21.

**95-2705. Writ granted without delay.** Any court or judge authorized to grant the writ, to whom a petition therefor is presented, must if it appears that the writ ought to issue, grant the same without delay.

**History:** En. 95-2705 by Sec. 1, Ch. 196, L. 1967.

#### Mandamus To Compel Action by District Court

A writ of mandate to compel district

court to take action on a petition for a writ of habeas corpus was denied by the supreme court where petitioner did not establish a clear legal right to have the writ of habeas corpus issued. Petition of John J. Tomich, 139 M 624, 365 P 2d 950.

**95-2706. Refusal to obey writ.** If the person commanded by the writ refuses to obey he shall be adjudged in contempt of court.

**History:** En. 95-2706 by Sec. 1, Ch. 196, L. 1967.

**95-2707. Content of writ.** (a) The writ must be directed to the person having custody of or restraining the person on whose behalf the application is made, and must command him to have the body of such person before the court, or judge, before whom the writ is returnable, at a time and place therein specified.

(b) The issue or issues to be determined upon return of the writ may be stated, either in the writ or in an order attached to the writ. If the issue or issues to be determined upon return of the writ are not stated therein, or in an order attached thereto then a copy of the petition must be attached to the writ.

**History:** En. 95-2707 by Sec. 1, Ch. 196,  
L. 1967.

**95-2708. Service of the writ.** (a) The writ must be served upon the person to whom it is directed. If the person to whom the writ is directed represents a state institution, a copy of the writ shall be served upon the attorney general. If such person represents a county institution, a copy of the writ shall be served upon the county attorney.

(b) The writ shall be served by the clerk of court, the sheriff or any other officer directed to do so by the court.

(c) The writ shall be served in the same manner as a summons in civil actions, except when otherwise expressly directed by the court or judge.

**History:** En. 95-2708 by Sec. 1, Ch. 196,  
L. 1967.

**95-2709. Return, what to contain.** The person upon whom the writ is served must make a return and state in his return:

(a) Whether he has the party in his custody or under his power or restraint.

(b) If he has the party in his custody or under his power or restraint, he shall state the authority for and cause of such custody or restraint. If the detention is by legal process a copy thereof must be annexed to the response.

(c) If he had the party in his custody or under his power or restraint at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return must state particularly to whom, at what time and place, for what cause and by what authority such transfer took place.

(d) The return must be signed by the person making the same, and, except when such person is a sworn public officer, and makes such return in his official capacity, it must be verified by his oath.

**History:** En. 95-2709 by Sec. 1, Ch. 196,  
L. 1967.

**95-2710. Production of person—exception for infirmity or illness.** The person commanded by the writ shall bring the detained person according to the command of the writ unless it is made to appear by affidavit that because of sickness or infirmity such person cannot be brought before the judge without danger to his health. If the judge is satisfied with the truth of the affidavit he may proceed and dispose of the case as if the

party had been produced, or the hearing may be postponed until the party can be present.

History: En. 95-2710 by Sec. 1, Ch. 196,  
L. 1967.

**95-2711. Hearing on return.** (a) The court or judge before whom the writ is returned must, immediately after the return, proceed to hear and examine the return.

(b) The hearing on the writ may be summary in nature.

History: En. 95-2711 by Sec. 1, Ch. 196,  
L. 1967.

**95-2712. Production of evidence—depositions.** Evidence may be produced and compelled as in civil actions. Depositions taken in accordance with the Rules of Civil Procedure may be read as evidence at the hearing on the writ.

History: En. 95-2712 by Sec. 1, Ch. 196,  
L. 1967.

#### Cross-References

Depositions under Rules of Civil Procedure, see Chapter 93-2701, Rules 26 to 32.

**95-2713. Disposition of petitioner.** If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceeding and such supplementary orders as to reassignment, retrial, custody, bail or discharge as may be necessary and proper. If the court finds for the state the petitioner shall be returned to the custody of the person to whom the writ was directed.

History: En. 95-2713 by Sec. 1, Ch. 196,  
L. 1967.

**95-2714. Appeal on order of judgment on habeas corpus.** An appeal may be taken to the supreme court by the state from an order of judgment discharging the petitioner. The court may admit the petitioner to bail pending appeal. The appeal shall be taken in the same manner as in civil actions.

History: En. 95-2714 by Sec. 1, Ch. 196,  
L. 1967.

**95-2715. Writ and process may issue at any time.** Any writ or process authorized by this chapter may be issued and served on any day or at any time.

History: En. 95-2715 by Sec. 1, Ch. 196,  
L. 1967.

**95-2716. No release for technical defects.** A person may not be released on a writ of habeas corpus due to any technical defect in commitment not affecting his substantial rights.

History: En. 95-2716 by Sec. 1, Ch. 196,  
L. 1967.

#### Repealing Clause

Section 2 of Ch. 196, Laws 1967 read  
"Sections 94-4716, 94-4716.1, 94-4717, 94-  
4803, 94-4805, 94-4901, 94-4902, 94-4903,



95-2716

285

of acts in conflict herewith are hereby repealed."

#### Effective Date

Section 3 of Ch. 196, Laws 1967 read "The Montana Code of Criminal Procedure is effective January 1, 1968, and its provisions apply to all proceedings in prosecutions for crimes alleged to have been committed on or after that date."

#### Separability Clause

Section 4 of Ch. 196, Laws 1967 read "It is the intent of the legislative assembly that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its

applications, the part remains in effect in all valid applications that are severable from the invalid applications."

#### Legality of Custody

Where a petitioner for habeas corpus was convicted of murder, and oral judgment was rendered, confining him to prison for twenty-five years, without any record being made, but at a special term, after notice to petitioner and his counsel, the minutes were corrected to show the judgment as rendered, and on the judgment thus entered a commitment was issued, the petitioner was legally in custody, for the purposes of the judgment, and not entitled to his discharge. In re Dye, 32 M 132, 136, 79 P 689.

## CHAPTER 28

### ADOPTION OF RULES OF CRIMINAL PROCEDURE

- Section 95-2801. Supreme court to promulgate rules of pleading, practice and procedure in criminal actions—effect on substantive rights.  
 95-2802. Appointment of advisory committee—members—duties.  
 95-2803. Suggestions on proposed rules before adoption—distribution to other groups—petitions—hearings.  
 95-2804. Present laws and rules to remain in force until modified or superseded.  
 95-2805. Effective date of rules—expiration of supreme court's rule-making power.  
 95-2806. Legislature's right to adopt rules not abridged.

**95-2801. Supreme court to promulgate rules of pleading, practice and procedure in criminal actions—effect on substantive rights.** The supreme court of this state shall have the power to regulate the pleadings, practice, procedure, and the forms thereof in criminal actions in all courts of this state, by rules promulgated by it from time to time, for the purpose of simplifying criminal proceedings in the courts of Montana and for promoting the speedy determination of such proceedings upon their merits. Such rules shall not abridge, enlarge, or modify the substantive rights of either the state or a defendant and shall not be inconsistent with the constitution of the state of Montana.

**History:** En. Sec. 1, Ch. 193, L. 1967.

**95-2802. Appointment of advisory committee—members—duties.** Before any rules are adopted the supreme court shall appoint an advisory committee consisting of six (6) members of the bar of the state, three (3) of whom shall be county attorneys and three (3) judges of the district courts to assist the court in considering and preparing such rules as it may adopt.

**History:** En. Sec. 2, Ch. 193, L. 1967.

**95-2803. Suggestions on proposed rules before adoption—distribution to other groups—petitions—hearings.** Before any rule is adopted, the supreme court shall distribute copies of the proposed rule to the bench and bar of the state for their consideration and suggestions and give due con-

sideration to such suggestions as they may submit to the court. The Montana bar association or the association of Montana judges may file with the supreme court a petition specifying their suggestions concerning any existing or proposed rule and requesting a hearing thereon within six (6) months after the filing of the petition.

**History:** En. Sec. 3, Ch. 193, L. 1967.

**95-2804. Present laws and rules to remain in force until modified or superseded.** All present laws and rules relating to criminal pleading, practice and procedure, shall be effective as rules of court until modified or superseded by subsequent court rule, and upon the adoption of any rule pursuant to this act such laws and rules, in so far as they are in conflict therewith, shall thereafter be of no further force and effect.

**History:** En. Sec. 4, Ch. 193, L. 1967.

**95-2805. Effective date of rules—expiration of supreme court's rule-making power.** All rules promulgated under this act shall be effective at a time fixed by the supreme court, but such rule-making power shall expire January 1, 1969.

**History:** En. Sec. 5, Ch. 193, L. 1967.

**95-2806. Legislature's right to adopt rules not abridged.** This act shall not abridge the right of the legislature to enact, modify, or repeal any statute or modify or repeal any rule of the supreme court adopted pursuant thereto.

**History:** En. Sec. 6, Ch. 193, L. 1967.











# REVISED CODES OF MONTANA

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### *Indexing*

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# INDEX

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References are to Title and Section numbers

## A

### ABSTRACTERS OF TITLE

Compensation of members of board of examiners, 66-2104

Moneys received by board of examiners, deposit and use, 66-2104

### ACADEMY

Law enforcement academy, 75-5201 to 75-5208—See COLLEGES AND UNIVERSITIES, Law enforcement academy

### ACCORD AND SATISFACTION

Affirmative defense, M. R. Civ. P., Rule 8(c)

### ACCOUNTANTS

Corporations for practice of accountancy, 15-2101 to 15-2116—See PROFESSIONAL SERVICE CORPORATIONS

Investment advice exempt from securities act, 15-2004

### ACCOUNTS RECEIVABLE

Sale of accounts subject to Uniform Commercial Code, 87A-9-102—See also SECURED TRANSACTIONS

### ACTIONS

Commencement of action by complaint, M. R. Civ. P., Rule 3

Dismissal of action

class actions, court approval required for dismissal or compromise, M. R. Civ. P., Rule 23(c)

costs when dismissed action is again commenced, M. R. Civ. P., Rule 41(d)

failure to issue or serve summons as ground, M. R. Civ. P., Rule 41(e)

involuntary dismissal, M. R. Civ. P., 41(b)

voluntary dismissal, M. R. Civ. P., Rule 41(a)

Form of action, M. R. Civ. P., Rule 2

Offer of judgment before trial, effect on costs, M. R. Civ. P., Rule 68

Shareholders' derivative actions, allegations required, M. R. Civ. P., Rule 23(b)

Uniform Commercial Code rights and obligations, action to enforce, 87A-1-106

### ADJUTANT GENERAL

Assistant adjutants-general, appointment, rank, and duties, 77-117

Salary, 77-117

Selection, 77-117

### ADOPTION

Adults, procedure for adoption, 61-140

Birth certificate, issuance of substitute on adoption, 69-4420

recording of substitute certificate, 69-4421

restoration of original certificate on annulment of adoption, 69-4421

Minor natural parent, right to relinquish child for adoption, 61-218

Registrar of vital statistics, report to, 69-4433

Rules of civil procedure, application to proceedings, M. R. Civ. P., Rule 81(a), Table A

Service of process on natural parents, 61-211



## INDEX

References are to Title and Section numbers

### ADULTERATION

Food, drugs and cosmetics, 27-701 to 27-723—See FOOD AND DRUGS, Food, Drug and Cosmetic Act

### ADVERTISING

Consumer loan licensees, limitations on, 47-219

Highways, advertising and zoning regulation, 32-4701 to 32-4714—See HIGHWAYS, BRIDGES AND FERRIES, Zoning regulation along highways

### AERONAUTICS

City and county establishment of airports

acquisition of land for airports, 1-801

creation of board to govern airport, 1-803

eminent domain, power to exercise, 1-802

expenses, how defrayed, 1-803

land deemed acquired for public use, 1-802

Insurance required of commercial air operators, 1-314

amount set by commission, 1-315

continuation in force required, 1-318

definition of terms

“aircraft” defined, 1-312

“commercial air operator” defined, 1-311

“person” defined, 1-313

evidence of insurance deposited with commission, 1-316

copies of policies acceptable as evidence, 1-317

unauthorized insurers’ policies acceptable, 1-321

violations of act as misdemeanor, 1-320

Intrastate air carriers, certification and regulation by commission, 1-323

definition of terms, 1-322

federally certified carriers exempt, 1-322

notice by publication, 1-324

Landing without consent of landowner prohibited, exception, 1-603

Passenger service charges at municipal airports, 1-829 to 1-832

Reckless flying prohibited, 1-603

State aeronautics commission

expenses, payment of costs, 1-501

rules, insurance of commercial air operators, 1-319

### AGENCY

Uniform Commercial Code supplemented by general principles of law, 87A-1-103

### AGRICULTURE

Agricultural marketing co-ordinator, 3-116 to 3-123

advisory body, 3-121

co-operation, 3-123

definitions, 3-117

duties, 3-119

purpose of act, 3-116

qualifications and responsibilities, 3-118

recommendations, commissioner’s reports, 3-122

supervision of commissioner, 3-120

Bean warehousemen, license required, 3-704

Coloration of wheat, oats, rye or barley

required when products treated with injurious or toxic substances, 94-35-271.1

sale or offering for sale in violation of act prohibited, 94-35-271.2

violation of act requiring coloration, penalty, 94-35-271.3

Commercial feeds, 3-2012 to 3-2024

administration of act by commissioner of agriculture, 3-2012

adulteration of feeds prohibited, 3-2018

analysis of feeds, 3-2020

condemnation and confiscation of noncomplying feeds, 3-2022

customer-formula feeds, definition and application of act to, 3-2017

invoice, required contents, 3-2015

## INDEX

References are to Title and Section numbers

### AGRICULTURE (Continued)

#### Commercial feeds (Continued)

- definition of terms, 3-2013
- fees for inspection, 3-2016
- information in reports confidential, 3-2024
- injunction to restrain violations, 3-2023
- judicial review of commissioner's actions, 3-2023
- labeling of feeds, required contents, 3-2015
- misbranded feeds, distribution prohibited, 3-2019
- publication of information by commissioner, 3-2024
- records to be kept by distributors, 3-2016
- registration of feeds, 3-2014
  - cancellation and revocation of registration, procedure, 3-2021
- reports of annual value of feeds distributed, 3-2016
- rules and regulations, promulgation and enforcement, 3-2021
- sampling and analysis of feeds, 3-2020
- violations of act, penalties and prosecution, 3-2023
- withdrawal from sale orders, 3-2022

#### Commercial fertilizers

- appeal from commissioner's act, order or ruling, 3-1727
- cancellation of registration
  - grounds for cancellation, 3-1724
  - hearing on cancellation, 3-1723
- definition of terms under fertilizer law of 1957, 3-1714
- fees for inspection, 3-1717
- labeling of soil amendments, 3-1716
- license for distributor to mix materials to order, 3-1715
- registration of brands, grades, and soil amendments, 3-1715
- reports of distributors as to amount distributed, 3-1717
- rules and regulations, 3-1723

#### Commissioner of agriculture

- appeals from commissioner's decisions in commercial fertilizer cases, 3-1727
- classifications of seeds, revision of, 3-821
- oath of office, 3-103
- poultry improvement, powers of commissioner, 3-2201
- salary, 3-103

#### Department of agriculture

- division of wheat research and marketing, 3-2903
- enforcement of act regarding labeling of paints and paint products, 3-1513
- power to contract, 3-107

#### Eggs and egg dealers, disposition of fees from licenses, 3-2302, 3-2315

#### Fruit pest control, disinfection and destruction of packages and other materials, 3-1103

#### Fur-bearing animals, production defined as agriculture, 3-110.1

#### Grading and branding of farm products, 3-1404

#### Grain storage as basis for farm credit

- expense of administration of act, manner of payment, 3-420
- fees and compensation of inspectors, 3-408

#### Grain testing, fees and charges, 3-233

- protein testing, 3-510

#### Grain warehousemen

- bailment, possession of warehouseman construed as, 3-226
- bond, 3-228
- definition of terms, 3-201
- insurance coverage, required, 3-228
- judicial process for debts of warehouseman, exemption from, 3-226
- license fee, 3-228
- penalty for false report or failure to file reports, 3-227
- penalty for operation without license, 3-228
- reports to commissioner, 3-227

#### Montana quality label, procurement and use, fees, 3-2503

#### Mustard seed

- administration of act by commissioner of agriculture, 3-1906
- funds accruing, disposition, 3-1910

#### Nurseries and nurserymen, license required, fees, 3-1212

## INDEX

References are to Title and Section numbers

### AGRICULTURE (Continued)

- Poultry improvement, 3-2201 to 3-2205, 3-2207, 3-2209 to 3-2212—See POULTRY
- Public warehousemen for farm storage, license required, 3-602
- Rodent pest control, purchase and sale of supplies, 3-2704
- Rural rehabilitation trust assets, administration, 3-2803
- Sealers of grain, fee for filing of certificate, 3-904
- Seeds—See SEEDS
- Wheat research and marketing
  - annual report filed by division chief and commissioner, 3-2914
  - assessment on wheat sold or pledged, 3-2911
    - federal government as purchaser, assessment inapplicable, 3-2912
    - payment of assessment, 3-2913
  - bonds of division chief, deputy and assistant, 3-2916
  - committee appointed by governor, 3-2905
    - chairman, selection, 3-2908
    - compensation of members, 3-2906
    - meetings of committee, 3-2908
    - powers of committee, 3-2909
    - removal of committee members by governor, 3-2907
  - contracts for carrying out research, 3-2918
  - declaration of policy, 3-2902
  - definitions, 3-2904
  - division as part of department of agriculture, 3-2903
  - duration of act, 3-2920
  - gifts, grants or donations for research, 3-2915
  - invoice delivered by buyer to seller, 3-2913
  - office established by department, 3-2910
  - revolving account in department of agriculture, 3-2917
    - reversion on expiration of act, 3-2920
  - short title of act, 3-2901
  - violations of act, penalty, 3-2919

### AIR POLLUTION CONTROL

- Administration of act by state board of health, 69-3907
- Advisory council, members and powers, 69-3908
- Definitions, 69-3906
- Director of air pollution control, appointment, powers and duties, 69-3907
- Emergency procedure, 69-3915
- Exemptions, application for and grounds, 69-3916
- Inspection of premises, power to enter, 69-3912
- Limitations on effect of act, 69-3922
- Limitations on emission of pollutants, 69-3913
- Local air pollution control programs, 69-3919
  - federal aid, 69-3920
  - state aid, 69-3920
- Penalties for violation, 69-3921
- Permits required for installation of machinery and other articles that contaminate air, 69-3911
- Policy and purpose of act, 69-3905
- Prohibition of air contaminating sources, 69-3911
- Records, confidentiality, 69-3918
- Rules, public hearing and judicial review, 69-3917
- Short title of act, 69-3904
- Sources of contamination, classification and reporting, 69-3910
- State board of health powers, 69-3909
  - enforcement, 69-3914
  - limitations on pollutants emission, adoption of more stringent rules, 69-3913
- Taxation, classification of property, 69-3923

### AIRPORTS

See AERONAUTICS

### ALCOHOLIC BEVERAGES

Alcoholic and drug dependency, commission on, 69-6201 to 69-6207—See DEPARTMENT OF HEALTH



## INDEX

References are to Title and Section numbers

### ALCOHOLIC BEVERAGES (Continued)

- Bottle clubs
  - abatement as nuisance, 4-173
  - definition, 4-172
  - penalty for violation, 4-173
  - prohibited, 4-172
- Definition of terms, 4-102
- Dentist, administration of beverage by, 4-137
- Druggist, possession and sale of liquor by, 4-134
- Hospital, administration of beverage by, 4-139
- Identification cards, false procurement, penalty, 94-2014
- Interdiction order, procedure and effect, 4-201
  - notice and filing of order, 4-202
  - presence of interdicted person prohibited where liquor sold, 4-164
- License proceedings, application of rules of civil procedure, M. R. Civ. P., Rule 81(a), Table A
- Liquor control board
  - compensation of members, 4-105
  - composition of board, 4-104
  - employees of board, salaries, 4-108
  - meetings of board, 4-105
  - samples of beverages received, reports required, 4-153
  - terms of office of members, 4-104
- Manufacture of beverages permitted to federal licensees, 4-140
- Montana beer act
  - brewers
    - barrelage tax, 4-317
    - financial interest in retailer prohibited, 4-349
    - fixtures, furniture, equipment, etc., brewers not to supply to retailers, exception, 4-349
    - persons to whom brewers may sell beer, 4-317
  - cash sales for beer delivered to retail licensee, 4-349
  - closing hours for licensed retail establishments, 4-303
  - credit, limitation on brewer or wholesaler from extending to retailer, 4-349
  - days establishments to be closed, 4-303
  - fair associations, special permits for, 4-332
  - fraternal organizations, special permits to, 4-332
  - imported beer, tax on, 4-324
  - licenses
    - fees for licenses, 4-341
    - grocery or drugstore, licensing, 4-333
    - issuing for operation on seasonal basis, 4-333
    - lapse for nonuse, 4-333
    - wholesaler's license, 4-318
  - retail sales for consumption off premises, 4-329
  - veterans' organizations, special permits to, 4-332
  - wholesalers, fixtures, furniture and equipment not to be furnished by, exception, 4-349
- Physician, prescription or administration by, 4-136
- Retail liquor license act
  - days retail establishments to be closed, 4-414
  - fraternal organizations, special permits for sale, 4-409.1
  - hearing on application for license, 4-407.1
  - hours retail establishments to be closed, 4-414
  - lapse of license for nonuse, 4-403
  - license for seasonal operation, 4-403
  - notice of application for license, publication by board, 4-407.1
  - number of licenses authorized, 4-403
  - veterans' organizations, special permits for sale, 4-409.1
- Sale of beverages by vendor, 4-116
- State liquor stores, disposition of proceeds of sales, 4-229
- Veterinary, administration of beverage by, 4-138
- Wage Protection Act for bars and taverns, 41-2001 to 41-2011—See WAGES, Restaurant, Bar and Tavern Wage Protection Act

## INDEX

References are to Title and Section numbers

### ALCOHOLISM SERVICES CENTER

Location, purpose and powers of center, 80-2404

### ALIENATION OF AFFECTIONS

Acts within state not to give rise to cause of action, 17-1203

Cause of action abolished, 17-1201

Litigation and threat of litigation prohibited, 17-1204

Penalty for bringing action, 17-1206

Settlements and compromises void, 17-1205

### AMBULANCE

Establishment of service by county, city or town authorized, 69-3601

Joint service authorized, 69-3601

Methods of operation of service, 69-3602

Previously existing service unaffected, 69-3603

### ANIMALS

Dead animals, unlawful disposition, penalty for violations, 69-4518, 69-4519

Fur-bearing animals, production defined as agricultural pursuit, 3-110.1

Roadside menageries or zoos, 26-1205 to 26-1212—See FISH AND GAME, Menageries, roadside

Shelter, failure to provide as cruelty, 94-1201

### ANNEXATION

Contiguous tracts or parcels of land, annexing to cities, procedure, 11-403

### APPEALS

Briefs filed in supreme court

amicus curiae briefs, when permitted, M. R. App. Civ. P., Rule 24

appellant's brief, contents and arrangement, M. R. App. Civ. P., Rule 23(a)

appendices to briefs, when filed, M. R. App. Civ. P., Rule 25(a)

arrangement of appendix, M. R. App. Civ. P., Rule 25(c)

contents of appendix, M. R. App. Civ. P., Rule 25(b)

costs allowed for briefs, M. R. App. Civ. P., Rule 23(g)

cross-appeals, briefs in cases involving, M. R. App. Civ. P., Rule 23(h)

dismissal of appeal on failure to file brief, M. R. App. Civ. P., Rule 26(c)

exhibits, reproduction in separate volume, M. R. App. Civ. P., Rule 25(d)

length of briefs, M. R. App. Civ. P., Rule 23(g)

number of copies filed and served, M. R. App. Civ. P., Rule 26(b)

parties, references to in briefs, M. R. App. Civ. P., Rule 23(d)

record, references to in briefs, M. R. App. Civ. P., Rule 23(e)

reply brief, contents, M. R. App. Civ. P., Rule 23(c)

respondent's brief, contents, M. R. App. Civ. P., Rule 23(b)

statutes, rules and regulations, reproduction in briefs, M. R. App. Civ. P., Rule 23(f)

time for filing briefs, M. R. App. Civ. P., Rule 26(a)

title of case, statements on cover and first page, M. R. App. Civ. P., Rule 27(c)

typewritten briefs, format, M. R. App. Civ. P., Rule 27(b)

typographical form of briefs, M. R. App. Civ. P., Rule 27(a)

Calendar, placement of causes on, M. R. App. Civ. P., Rule 39(a)

advancement of causes having precedence, M. R. App. Civ. P., Rule 39(c)

setting causes for argument, M. R. App. Civ. P., Rule 39(b)

Commercial fertilizer decisions, appeal from, 3-1727

Constitutional questions raised on appeal, notice to attorney general, M. R. App. Civ. P., Rule 38

Consumer loan commissioner, appeals from, 47-225

Costs on appeal taxed by court, M. R. App. Civ. P., Rule 33(a)

briefs and appendices, restriction on costs, M. R. App. Civ. P., Rule 33(b)

district court costs, M. R. App. Civ. P., Rule 33(c)

notation of costs by clerk, M. R. App. Civ. P., Rule 33(f)

unnecessary costs not recovered, M. R. App. Civ. P., Rule 33(e)

Criminal cases, 95-2401 to 95-2430—See CRIMINAL PROCEDURE, Appeals  
review of legal sentences, 95-2211, 95-2501 to 95-2504

Cross-appeal, reversal on, M. R. App. Civ. P., Rule 14

Damages for appeal without merit, M. R. App. Civ. P., Rule 32

## INDEX

References are to Title and Section numbers

### APPEALS (Continued)

- Decision on appeal, notice to parties, M. R. App. Civ. P., Rule 35(a)
- Decision subject to review on appeal from judgment, M. R. App. Civ. P., Rule 2
- Dismissal of appeals, effect, M. R. App. Civ. P., Rule 12
  - brief, failure to file as ground for dismissal, M. R. App. Civ. P., Rule 26(c)
  - record, failure to transmit as ground for dismissal, M. R. App. Civ. P., Rule 11(c)
  - voluntary dismissal, M. R. App. Civ. P., Rule 36
- District courts, appeals to, applicability of rules, M. R. Civ. P., Rule 81(b)
  - appellate rules not applicable, M. R. App. Civ. P., Rule 42(b)
  - justices' or police courts, trial of criminal cases on appeal, 95-2009
- Docketing of appeal, M. R. App. Civ. P., Rule 11(a)
  - respondent docketing appeal, M. R. App. Civ. P., Rule 11(c)
- Entry and notice of judgments and orders, M. R. App. Civ. P., Rule 30(a)
- Exceptions unnecessary to lay ground work for appeal, M. R. Civ. P., Rule 46
- Executors' and administrators' acts pending appeal validated, M. R. App. Civ. P., Rule 13
- Filing of papers with supreme court, manner of accomplishment, M. R. App. Civ. P., Rule 20(a)
- Guardians' acts pending appeal validated, M. R. App. Civ. P., Rule 13
- Habeas corpus, appeal from order discharging petitioner, 95-2714
- Injunction granted by supreme court on ex parte proceedings, M. R. App. Civ. P., Rule 40
- Interest on judgments, M. R. App. Civ. P., Rule 31
- Intermediate orders and decisions subject to review on appeal from judgment, M. R. App. Civ. P., Rule 2
- Judgment on appeal, entry by clerk and notice to parties, M. R. App. Civ. P., Rule 30(a)
  - transmission to and entry by clerk of district court, M. R. App. Civ. P., Rule 16
- Judgments subject to appeal, M. R. App. Civ. P., Rule 1
- Justices' courts, appeal of criminal cases, 95-2009
- Milk control board, judicial review of orders, 27-428
- Motions in supreme court, contents and manner of filing, M. R. App. Civ. P., Rule 22
- Notice of appeal filed in district court, M. R. App. Civ. P., Rule 4(a)
  - content of notice, M. R. App. Civ. P., Rule 4(c)
  - form for notice, M. R. App. Civ. P., Appendix of Forms, Form 1
  - joint or separate notice on joint appeals, M. R. App. Civ. P., Rule 4(b)
  - neglect in filing notice, extension of time, M. R. App. Civ. P., Rule 5
  - service of notice, M. R. App. Civ. P., Rule 4(d)
  - time for filing notice, M. R. App. Civ. P., Rule 5
- Occupational disease act, appeals under, 92-1362 to 92-1365
- Oral argument before supreme court
  - agreement of parties to dispense with argument, M. R. App. Civ. P., Rule 29(f)
  - consolidation of cross and separate appeals for argument, M. R. App. Civ. P., Rule 29(d)
  - exhibits, use during argument, M. R. App. Civ. P., Rule 29(g)
  - failure of counsel to appear for argument, M. R. App. Civ. P., Rule 29(e)
  - notice of time and place of argument, M. R. App. Civ. P., Rule 29(a)
  - order and content of argument, M. R. App. Civ. P., Rule 29(c)
  - postponement of argument, request for, M. R. App. Civ. P., Rule 29(a)
  - time allowed for argument, M. R. App. Civ. P., Rule 29(b)
- Orders subject to appeal, M. R. App. Civ. P., Rule 1
- Parties to appeal, designation, M. R. App. Civ. P., Rule 1
  - public officer as party to appeal, M. R. App. Civ. P., Rule 37(c)
  - substitution of parties for death or other cause, M. R. App. Civ. P., Rule 37
- Pauper's form of appeal
  - application to district court to proceed in forma pauperis, M. R. App. Civ. P., Rule 18(a)
  - application to supreme court to proceed in forma pauperis, M. R. App. Civ. P., Rule 18(b)
  - form for application, M. R. App. Civ. P., Appendix of Forms, Form 2
  - typewritten form permitted for papers filed, M. R. App. Civ. P., Rule 18(c)
- Police courts, appeal of criminal cases, 95-2009
- Prehearing conference to simplify issues before court, M. R. App. Civ. P., Rule 28
- Record on appeal, papers and exhibits constituting, M. R. App. Civ. P., Rule 9(a)
  - agreed statement as record on appeal, M. R. App. Civ. P., Rule 9(d)
  - correction of the record, M. R. App. Civ. P., Rule 9(c)
  - dismissal of appeal for failure to file in time, M. R. App. Civ. P., Rule 11(c)



## INDEX

References are to Title and Section numbers

### APPEALS (Continued)

#### Record on appeal (Continued)

- fee for filing of record, time of payment, M. R. App. Civ. P., Rule 11(a)
- filing of record by supreme court clerk, M. R. App. Civ. P., Rule 11(b)
- modification of the record, M. R. App. Civ. P., Rule 9(e)
- preliminary hearing in supreme court, transmission of record for, M. R. App. Civ. P., Rule 10(f)
- retention of record in district court, M. R. App. Civ. P., Rule 10(d)
  - stipulation of parties for retention, M. R. App. Civ. P., Rule 10(e)
- statement of proceedings in lieu of transcript, preparation and settlement, M. R. App. Civ. P., Rule 9(c)
- time for transmission of record, M. R. App. Civ. P., Rule 10(a)
  - extension of time, M. R. App. Civ. P., Rule 10(c)
  - reduction of time, M. R. App. Civ. P., Rule 10(c)
- transcript of proceedings, preparation and certification, M. R. App. Civ. P., Rule 9(b)
  - transmission of record by clerk of district court, M. R. App. Civ. P., Rule 10(b)
- Rehearing, grounds and time for filing petition, M. R. App. Civ. P., Rule 34
- Remittitur to clerk of district court, M. R. App. Civ. P., Rule 16
  - time of issuance, M. R. App. Civ. P., Rule 35(b)
- Removal of papers from clerk's office, restrictions, M. R. App. Civ. P., Rule 39(d)
- Reversal on appeal, remedial powers of supreme court, M. R. App. Civ. P., Rule 15
  - fiduciary acts pending appeal validated, M. R. App. Civ. P., Rule 13
  - opinion to accompany remittitur, M. R. App. Civ. P., Rule 35(b)
  - substantial error required for reversal, M. R. App. Civ. P., Rule 14
- Rules of Appellate Civil Procedure, Title 93, Chapter 3001
  - application of rules and statutes to appeals to supreme court, M. R. Civ. P., Rule 72
  - citation of rules, M. R. App. Civ. P., Rule 43(a)
  - effective date of rules, M. R. App. Civ. P., Rule 43(b)
  - exemption of special statutory proceedings from rules, M. R. App. Civ. P., Rule 42(a)
    - pending proceedings, application of rules to, M. R. App. Civ. P., Rule 43(b)
  - scope of rules, M. R. App. Civ. P., Rule 1
  - statutes superseded by rules, M. R. App. Civ. P., Rules 42(c), 43(c)
  - suspension of rules by supreme court, M. R. App. Civ. P., Rule 3
- Service of papers filed in supreme court required on all parties, M. R. App. Civ. P., Rule 20(b)
  - personal service or mail, M. R. App. Civ. P., Rule 20(c)
  - proof of service, M. R. App. Civ. P., Rule 20(d)
- Stay of judgment or order pending appeal, M. R. App. Civ. P., Rule 7(a)
  - judgments and orders not subject to stay, M. R. App. Civ. P., Rule 7(c)
  - perishable property, sale and deposit of proceeds, M. R. App. Civ. P., Rule 7(b)
- Substantial rights of parties to be considered on appeal, M. R. App. Civ. P., Rule 14
- Supersedeas bond to stay judgment or order pending appeal, M. R. App. Civ. P., Rule 7(a)
  - form for bond, M. R. Civ. P., Appendix of Forms, Form 23
  - justification of sureties on bond, M. R. App. Civ. P., Rule 8(b)
  - liability of surety on bond, enforcement, M. R. App. Civ. P., Rule 8(a)
- Time allowed for proceedings in supreme court
  - computation of days, M. R. App. Civ. P., Rule 21(a)
  - extension of time allowed by court, M. R. App. Civ. P., Rule 21(b)
  - filing of appeal, M. R. App. Civ. P., Rule 5
  - mail service, additional time allowed after, M. R. App. Civ. P., Rule 21(c)
- Tort actions against state, 83-703
- Undertaking for costs on appeal, contents and filing, M. R. App. Civ. P., Rule 6(a)
  - justification of sureties on undertaking, M. R. App. Civ. P., Rule 8(b)
  - liability of surety on undertaking, enforcement, M. R. App. Civ. P., Rule 8(a)
- United States Supreme Court, action on receipt of mandate from, M. R. App. Civ. P., Rule 35(c)
- Verdict subject to review on appeal from judgment, M. R. App. Civ. P., Rule 2

### APPEARANCE

Acts constituting appearance by defendant, 93-8505

Criminal cases, appearance of arrested person, duties of person who made arrest and of court, 95-901, 95-902

## INDEX

References are to Title and Section numbers

### APPEARANCE (Continued)

Jurisdiction of person acquired by voluntary appearance in court, M. R. Civ. P., Rule 4B(2)

### APPORTIONMENT

Legislative apportionment, VI, 2 and 3

Representative apportionment, 43-106.2

Senatorial apportionment, 43-106.1

### APPRENTICESHIP COUNCIL

Appointments and terms of members, 41-1201

Chairman and vice-chairman, 41-1201

Composition of council, 41-1201

Director and staff, appointment, 41-1201

Duties of council, 41-1202

### ARBITRATION AND AWARD

Affirmative defense, M. R. Civ. P., Rule 8(c)

Rules of civil procedure, application to proceedings, M. R. Civ. P., Rule 81(a), Table A

### ARBOR DAY

Date of observance, 75-2212

### ARCHITECTS

Compensation of members of examining board, 66-109

Corporations for practice of architecture, 15-2101 to 15-2116—See PROFESSIONAL SERVICE CORPORATIONS

Examination fees, disposition, 66-108

Insurance against errors and omissions required on public contracts, 66-114

License fees, disposition, 66-109

Plans of public buildings, architect's seal and signature required, 66-114

Report of examining board to governor, 66-109

State building programs, appointment of architect, 82-3319

restrictions on architectural work by state, 82-3320

### ARRAIGNMENT

See CRIMINAL PROCEDURE, Arraignment, 95-1601 to 95-1608

### ARRESTS

Appearance of arrested person, duties of person who made arrest and of court, 95-901, 95-902

Bail

defendant taken to nearest judge to fix bail, 95-1105

issuance of warrant for failure to comply with conditions, 95-1107

peace officer, acceptance of bail, procedure, 95-1103, 95-1104

sureties or surety company, arrest powers, 95-1115

Close pursuit act, 95-619

Complaint, requirements for issuance and service of warrant, 95-603

Corporations, issuance and service of summons, procedure on failure to appear, 95-615

Definitions, Code of Criminal Procedure, 95-601

Exemptions, persons privileged from arrest, 95-616

Fingerprints and description taken on felony arrest, 80-2003

failure to furnish information to state, officer's salary withheld, 80-2004

Force permitted, 95-602

Indictment found, issuance of warrant, 95-1410

"Magistrate" defined, 95-208

Method of arrest, 95-602

Notice to appear, issuance, when authorized, form, failure to appear, 95-614

Oral order for arrest, authority of magistrate, 95-208

Peace officer, arrest by, 95-608

assisting peace officer, powers of officer and duties of person commanded to aid officer, 95-609

bail, acceptance of, 95-1103, 95-1104

duties of officer, 95-604, 95-606

release by officer of person arrested, when, 95-610

## INDEX

References are to Title and Section numbers

### ARRESTS (Continued)

- Private person, when arrest by authorized, 95-611
- Radar arrest cases—See MOTOR VEHICLES, Radar arrests
- Roadblocks, arrest at, 95-618
- Search and seizure authorized as incident to arrest, 95-701
- Summons, issuance, when authorized, form, service, 95-612
  - definition of summons, 95-601
  - failure to appear, issuance of warrant of arrest, 95-613
- Time of making arrest, 95-607
- Warrant of arrest
  - arrest without warrant, duties of peace officer, 95-606
  - release by officer, when, 95-610
  - bail, setting and accepting under warrant, 95-1104
  - complaint, requirements for issuance and service of warrant, 95-603
  - defective warrant, procedure, 95-605
  - definition, 95-601
  - duties of peace officer on arrest with warrant, 95-604

### ARTS COUNCIL

- Appointment and qualifications of members, 82-3602
- Biennial report to governor, 82-3606
- Chairman and vice-chairman of council, 82-3603
- Contracts for services and co-operative endeavors, 82-3608
- Creation of council, 82-3601
- Duties of council, 82-3606
- Executive committee, selection, functions, 82-3604
- Expenses of members, 82-3603
- Fund-raising drives, deposit and use of proceeds, 82-3609
- Gifts and donations, acceptance authorized, deposit and use, 82-3607
- Officers and employees, compensation, 82-3605
- Purpose of council, 82-3601
- Terms of members, 82-3603

### ASSAULTS

- Second degree, definition, penalty, 94-602

### ASSIGNMENT FOR BENEFIT OF CREDITORS

- Bulk Transfer chapter inapplicable to assignments, 87A-6-103
- Rules of civil procedure, application to proceedings, M. R. Civ. P., Rule 81(a), Table A

### ASSIGNMENTS

- Accounts, assignments subject to Uniform Commercial Code, 87A-9-102—See also SECURED TRANSACTIONS
- Cause of action assigned, defenses available against assignee, 93-2802
- Claims against state, assignment of, 83-901 to 83-904
- Consumer loan act, wage assignments, 47-220
- Contract right assignments subject to Uniform Commercial Code, 87A-9-102—See also SECURED TRANSACTIONS
- Definition of term, 19-103
- Wage assignments excluded from Uniform Commercial Code, 87A-9-104

### ASSOCIATIONS

- Business trusts, 15-2501 to 15-2508—See BUSINESS TRUSTS
- Service of process on unincorporated associations, M. R. Civ. P., Rule 4D(2)

### ASSUMPTION OF RISK

- Affirmative defense, M. R. Civ. P., Rule 8(c)

### ATTACHMENT

- Affidavit filed to secure attachment before judgment, 93-4302
- Availability of remedy before and during action, M. R. Civ. P., Rule 64
- Compensation under occupational disease act exempt from, 92-1329
- Document of title covering goods, surrender or injunction required for attachment, 87A-7-602
- Game wardens' retirement benefits, exemption from attachment, 68-1420
- Investment securities, levy against, 93-4307



## INDEX

References are to Title and Section numbers

### **ATTACHMENT (Continued)**

- Personal property subject to security interest, levy against, 93-4338
- Range livestock, method of taking possession, 93-4344
  - filing of papers by county clerk, 93-4346
- Release of attachment of real property where no proceedings taken in action, 93-4331.1
- Sales under attachment validated despite defects, 93-5846
- Summons, attachment at time of issuance, 93-4301

### **ATTACK**

- Post-attack resource management, 77-1501 to 77-1508—See WAR, Resource Management
- Constitutional questions litigated, notice to and intervention by attorney general, M. R. Civ. P., Rule 24(c)
- Oath of office recorded by supreme court, M. R. App. Civ. P., Rule 19(a)
- Occupational disease act, duties under, 92-1343
- Optometry board, representation in supreme court, 66-1315
- Salary, 25-501
- Securities act enforcement, 15-2021
- Teletypewriter communications system for law enforcement, 82-3901 to 82-3906—See LAW ENFORCEMENT TELETYPEWRITER COMMUNICATIONS
- Tort actions against state, responsibility for litigation on behalf of state, 83-704
- Water resources board, duties as legal adviser, 89-103

### **ATTORNEY GENERAL**

- Commission of attorney general recorded by supreme court, M. R. App. Civ. P., Rule 19(a)
- Compromise and settlement of tort actions against state, power, 83-704
- Constitutional questions litigated, notice to and intervention by attorney general, M. R. Civ. P., Rule 24(c)
- Criminal investigator, 82-414 to 82-420—See CRIMINAL INVESTIGATOR
- Health department, legal advice to, 69-4111
- Oath of office recorded by supreme court, M. R. App. Civ. P., Rule 19(a)
- Occupational disease act, duties under, 92-1343
- Optometry board, representation in supreme court, 66-1315
- Salary, 25-501
- Securities act enforcement, 15-2021
- Teletypewriter communications system for law enforcement, 82-3901 to 82-3906—See LAW ENFORCEMENT TELETYPEWRITER COMMUNICATIONS
- Tort actions against state, responsibility for litigation on behalf of state, 83-704
- Water resources board, duties as legal adviser, 89-103

### **ATTORNEYS**

- Annual license tax, 93-2010
  - disposition of moneys collected, 93-2011
- Arrest, attorneys privileged from arrest, when, 95-616
- Attorney as justice of the peace, practice of law, limitation, 16-3605
- Corporations for practice of law, 15-2101 to 15-2116—See PROFESSIONAL SERVICE CORPORATIONS
- Criminal defendants, right to counsel, 95-1001 to 95-1006—See CRIMINAL PROCEDURE, Counsel, right to
- Disbarment proceedings, witness fees in, 93-2020
- Examination and admission to bar
  - fees for examination and admission, 93-2015
  - per diem of examining board members, 93-2014
- Investment advice exempt from securities act, 15-2004
- Judicial officers, restrictions on practice of law by, 93-902
- Pleadings, signature, effect, M. R. Civ. P., Rule 11
- Real estate brokers' act, exemption from, 66-1926
- Service of process on attorney required, M. R. Civ. P., Rule 5(b)

### **AUCTION SALES**

- Bond of auctioneer, terms, 66-204
- Bulk transfers at auction sale, procedure required for protection of creditors, 87A-6-108
- Completion of sale, 87A-2-328
- Memorandum of auctioneer binding bidder and seller, 66-202
  - provisions not modified by Uniform Commercial Code, 87A-10-103
- Nonresident auctioneers, reciprocal privileges, 66-203.1
- Real estate brokers' act, auctioneer's acts exempt from, 66-1926

### **AUTOPSIES**

- Cases in which authorized, procedure, 69-5103 to 69-5106
- Coroner, authority to require autopsy, when, 95-802
  - liability of mortuary or physician limited, 95-813
- Occupational Disease Act, autopsies under, 92-1318

## INDEX

References are to Title and Section numbers

### B

#### BAIL

- Amount of bail, how determined, 95-1110
  - reduction or increase in amount, application for, 95-1111
- Appeal
  - bail after conviction, 95-1109
  - judge may admit defendant to bail, 95-1102
  - reversal of judgment, bail exonerated or money refunded, 95-2430
- Arrest bond certificates, 95-1121 to 95-1123
- Arrests
  - defendant taken to nearest judge to fix bail, 95-1105
  - failure to comply with bail or recognizance, issuance of warrant, 95-1107
  - peace officer, acceptance of bail, procedure, 95-1103, 95-1104
  - sureties or surety company, arrest powers, 95-1115
- Attorney prohibited from furnishing bail, 95-1120
- Authority to admit to bail, persons authorized, 95-1102
  - persons prohibited from furnishing bail, 95-1120
- Bailable offenses, 95-1108
- Conditions of bail bond, 95-1118
- Deposits of cash, stocks or bonds for bail, 95-1112
- Discharge of bail upon performance of conditions, 95-1116
- Discharge of defendant upon allowance and acceptance, 95-1102
- Forfeiture of bail, procedure, judgment, 95-1116
  - disposition of judgment and execution, 95-1117
- Giving bail before another court or judge, duties of judge, 95-1105
- Guaranteed arrest bond certificates, 95-1121 to 95-1123
- Habeas corpus to obtain admission to, 95-2702
  - discharge of person detained, 95-2713
- Initial appearance of arrested person, duty to inform of right to bail, 95-902
- Judge may admit defendant to bail, 95-1102
- Minor offenses, setting and accepting bail, 95-1103
- New trial, provisions for bail, 95-1119
- Not guilty judgment, defendant discharged from obligation of bail, 95-2202
- Peace officer, acceptance of bail, procedure, 95-1103, 95-1104
- Purpose of bail, 95-1101
- Qualifications of bail, justification by sureties, challenge of bail or sufficiency of sureties, 95-1113, 95-1114
- Real estate as bail, amount required, 95-1112
- Recognizance, release authorized, duties of court, 95-1106
- Revocation of bail, 95-1111
- Substitution of bail, 95-1111
- Sureties or surety companies, how bail furnished, 95-1112
- Surrender of defendant, 95-1115
- Warrant of arrest, setting and accepting bail under, 95-1104

#### BAILORS AND BAILEES

- Selling property unlawfully, 94-35-114

#### BANKRUPTCY

- Bulk transfer sale chapter inapplicable to sale by trustee, 87A-6-103
- Discharge as affirmative defense, M. R. Civ. P., Rule 8(c)
- Real estate brokers' act inapplicable to trustees, 66-1926
- Uniform Commercial Code supplemented by general principles of law, 87A-1-103

#### BANKS AND BANKING

- Accounts excluded from chapter on secured transactions, 87A-9-104
- Branch banks prohibited, 5-1028
  - Uniform Commercial Code does not change law, 87A-10-103
- Capital stock required, amount and par value, 5-206
- Certification of check, effect, 87A-3-411
- Credit union provisions inapplicable to banks, 14-157
- Deposits and collections
  - agency of collecting bank for owner of item, 87A-4-201
  - agreements on applicable state law, restrictions on, 87A-1-105
  - agreements to vary terms of chapter, 87A-4-103
  - altered items
    - customer's duty to report to bank, 87A-4-406

## INDEX

References are to Title and Section numbers

### **BANKS AND BANKING (Continued)**

#### **Deposits and collections (Continued)**

##### altered items (Continued)

original amount, right to charge to depositor's account, 87A-4-401

waiver of defense against claim against prior parties, 87A-4-406

authenticity of third-party documents presumed, 87A-1-202

availability of deposits for withdrawal, time, 87A-4-213

blanks left in item, bank's right to charge as completed, 87A-4-401

branch office treated as separate bank, 87A-4-106

care required of collecting bank in collection and settlement, 87A-4-202

charge-back against provisional settlement for uncollected items, 87A-4-212

citation of Uniform Commercial Code chapter, 87A-4-101

clearinghouse rules, effect on rights and liabilities, 87A-4-103

commercial instrument payable through bank as authority to collect, 87A-3-120

Commercial Paper chapter subject to Bank Deposits and Collections chapter, 87A-3-103

conflict between chapters of Uniform Commercial Code, 87A-4-102

conflict of laws with respect to bank's liability, 87A-4-102

corresponding banks, collecting bank not liable for defaults of, 87A-4-202

course of dealing between parties, 87A-1-205

cut-off hour for handling of items and making of entries, 87A-4-107

damages for breach of warranty or engagement by collecting bank or customer, 87A-4-207

damages for failure to exercise ordinary care, measure, 87A-4-103

death of customer, effect on items in process of collection, 87A-4-405

deferred posting permitted to payor bank, 87A-4-301

definition of terms, 87A-4-104

"collecting bank," 87A-4-105

"depository bank," 87A-4-105

general definitions in Uniform Commercial Code, 87A-1-201

index of definitions, 87A-4-104

"intermediary bank," 87A-4-105

"payor bank," 87A-4-105

"presenting bank," 87A-4-105

"process of posting," 87A-4-109

"remitting bank," 87A-4-105

delay by payor bank in returning item, liability for, 87A-4-302

delay permitted collecting bank in effort to secure payment, 87A-4-108

destruction of item in transit, collecting bank not liable for, 87A-4-202

direct transmission to payor authorized, 87A-4-204

dishonor of item, bank's liability when wrongful, 87A-4-402

dishonor of paper tendered in remittance, collecting bank not liable, 87A-4-211

#### **documentary drafts**

dealing with goods by collecting bank following dishonor of draft, 87A-4-504

delivery of documents to drawee on acceptance or payment, 87A-4-503

dishonor of draft, duty of collecting bank to transferor, 87A-4-501, 87A-4-503

lien of collecting bank on goods following dishonor of draft, 87A-4-504

"on arrival" drafts, time for presentment, 87A-4-502

presentment of draft and documents by collecting bank, 87A-4-501

endorsement supplied by depository bank for customer, 87A-4-205

engagements of collecting bank and customer transferring item, 87A-4-207

excuses for delay by conditions beyond control of bank, 87A-4-108

extension of time permitted collecting bank in effort to secure payment, 87A-4-108

Federal Reserve regulations and operating letters, effect on rights and liabilities, 87A-4-103

#### **final settlement of item**

acts constituting final settlement, 87A-4-213

time of final settlement by remittance instrument or authorization to charge, 87A-4-211

foreign currency items, rate at which charged back on failure of collection, 87A-4-212

good faith required, 87A-1-203

identification of transferor bank, sufficiency of agreed method, 87A-4-206

incompetence of customer, effect on items in process of collection, 87A-4-405



## INDEX

References are to Title and Section numbers

### **BANKS AND BANKING (Continued)**

#### **Deposits and collections (Continued)**

- insolvency of collecting or payor bank, rights and preferences to item in process of collection, 87A-4-214
- insolvent banks, deposits accepted by, 5-803
- instructions from transferor of item, duty of collecting bank to follow, 87A-4-203
- loss of item in transit, collecting bank not liable for, 87A-4-202
- media of remittance acceptable by collecting bank, 87A-4-211
- order of posting of accepted or paid items, 87A-4-303
- overdraft, right of bank to charge to customer's account, 87A-4-401
- "pay any bank" endorsement, effect, 87A-4-201
- place of presentment of item to payor bank, 87A-4-204
- posting process, steps enumerated, 87A-4-109
- presentment of item by written notice to party to accept or pay, 87A-4-210
- promptness in sending item for collection, factors considered, 87A-4-204
- provisional nature of settlement given by collecting bank, 87A-4-201
- refund of provisional settlement for uncollected item, right of collecting bank to obtain, 87A-4-212
- reservation of rights by party while performing or accepting performance, 87A-1-207
- restrictive endorsement not binding on intermediary or payor bank, 87A-4-205
- return by payor bank of item provisionally settled, 87A-4-301
- security interest of bank in collection item, 87A-4-208
- separate office treated as separate bank, 87A-4-106
- short title of Uniform Commercial Code chapter, 87A-4-101
- stop payment order
  - duration of effectiveness of order, 87A-4-403
  - items in process of collection, effect against, 87A-4-303
  - loss from payment contrary to order, burden of proof, 87A-4-403
  - opportunity to bank prior to action with respect to item, 87A-4-403
  - subrogation of bank liable for loss to rights of other parties, 87A-4-407
- subrogation of bank liable on stop payment order to rights of other parties, 87A-4-407
- suspension of payments by collecting or payor bank, rights in item in process of collection, 87A-4-214
- time after which bank not obligated to pay check, 87A-4-404
- time allowed for required actions, 87A-1-204
  - collecting bank, time allowed to for action, 87A-4-202
  - return of provisionally settled item by payor bank, 87A-4-301
- unauthorized signatures, customer's duty to report to bank, 87A-4-406
- unpaid items, return to depository bank by intermediary or payor bank, 87A-4-212
- usage of banks, effect on rights and liabilities, 87A-1-205, 87A-4-103
- value given by bank supporting status as holder in due course, 87A-4-209
- warranties of collecting bank and customer, 87A-4-207
- withdrawal of deposits, when available, 87A-4-213

#### **Directors, increase in number, 5-217**

- articles of agreement to provide for increase, 5-201

#### **Dissolution of bank, when unclaimed distribution presumed abandoned, 67-2206—See also PROPERTY, Unclaimed property**

#### **Drafts, power to accept, 5-1001**

#### **Drive-in and walk-up facilities permitted, 5-1028**

#### **Examination of bank, trust company or investment company, fee for, 5-908**

#### **Holidays, when closing permitted, 19-107**

#### **Insolvent banks**

- priority of payment of debts, 5-1114
- restrictions on deposits accepted by, 5-803

#### **Investment advice, exemption from securities act, 15-2004**

#### **Letters of credit, power to issue, 5-1001—See also LETTERS OF CREDIT**

#### **Public funds, deposit by county, city and town treasurers, 16-2618**

#### **Real estate loans, limitations on, 5-506**

#### **Reserves, superintendent's power to raise and lower reserves on demand deposits, 5-532**

#### **Retail installment sales act**

- compliance with provisions other than licensing required, 74-603
- license not required under, 74-603

## INDEX

References are to Title and Section numbers

### **BANKS AND BANKING (Continued)**

Rules of civil procedure, application to special proceedings, M. R. Civ. P., Rule 81(a), Table A  
Securities exempt from securities act, 15-2013  
Special examination by state examiner, fee, 5-910  
Taxation  
    corporation license tax, state banks exempt until national banks taxable, 84-1501.4  
    offices in more than one county, assessment and apportionment of tax, 84-4606  
Unclaimed deposits and funds, when presumed abandoned, 67-2202—See PROPERTY,  
    Unclaimed property  
Unclaimed funds, disposition, 5-1117

### **BARBERS AND BARBER SHOPS**

Apprenticeship and apprentice examination, 66-403, 66-409, 66-411  
Compensation of examining board members, 66-408  
Moneys received by examining board, deposit, 66-407  
Officers of examining board, 66-407  
Report of examining board, 66-408

### **BASTARDY PROCEEDINGS**

Complaint to determine paternity, persons who may file, 93-2901-2  
Death of father, liability restricted to obligations accrued before, 93-2901-4  
Effective date of act, 93-2901-11  
Enforcement of financial obligations of father, 93-2901-2  
Judgment against father, form and persons to whom payable, 93-2901-7  
Jurisdiction of district court, 93-2901-5  
Limitation of actions for past obligations, 93-2901-3  
Married woman bearing child of another man, 93-2901-1  
Obligations of father defined, 93-2901-1  
Paternity determination on complaint, 93-2901-2  
Postponement of trial until after birth of child, 93-2901-6  
Reciprocal enforcement of support remedies, 93-2901-5  
Rules of civil procedure, application, M. R. Civ. P., Rule 81(a), Table A  
Security required of father for payment of judgment, 93-2901-8  
Uniformity of interpretation of act, 93-2901-10  
Venue of proceedings, 93-2901-9

### **BEDDING**

Shoddy control, 69-4701 to 69-4707—See SHODDY

### **BENEVOLENT ASSOCIATIONS**

See INSURANCE, Benevolent associations, 40-4901 to 40-4917

### **BILLS OF EXCHANGE**

See COMMERCIAL PAPER, 87A-3-101 to 87A-3-805

### **BILLS OF LADING**

Actions based on shipment, time and manner of institution regulated by terms of bill or tariff, 87A-7-309  
Altered bill enforceable according to original tenor, 87A-7-306  
Attachment of goods covered by bill, procedure required, 87A-7-602  
Authenticity of third-party documents presumed, 87A-1-202  
Care required of carrier, 87A-7-309  
Citation of Uniform Commercial Code chapter, 87A-7-101  
Claims based on shipment, time and manner of presentation regulated by terms of bill or tariff, 87A-7-309  
Commercial Paper chapter inapplicable to bills, 87A-3-103  
Conflicting claims to goods, carrier compelling interpleader, 87A-7-603  
Connecting carriers on through bills, liability, 87A-7-302  
Count of packages, duty of carrier, 87A-7-301  
Course of dealing between parties, application, 87A-1-205  
Damages for loss or injury to goods, limitation by terms of bill or tariff, 87A-7-309

## INDEX

References are to Title and Section numbers

### **BILLS OF LADING (Continued)**

- Date on bill erroneous, liability of issuer for, 87A-7-301
- Defenses defeated by negotiation of bill, 87A-7-502
- Definition of terms, 87A-7-102
  - general definitions in Uniform Commercial Code, 87A-1-201
- Delivery of goods by carrier
  - destroyed bill, 87A-7-601
  - good faith delivery exonerating carrier, 87A-7-404
  - lien lost for voluntary delivery, 87A-7-307
  - lien to be satisfied before delivery, 87A-7-403
  - lost bill, 87A-7-601
  - obligation of carrier to deliver, 87A-7-403
  - persons who may require delivery, 87A-7-403
  - stolen bill, 87A-7-601
  - surrender of document required before delivery, 87A-7-403
- Description of goods guaranteed to issuer by shipper, 87A-7-301
- Destination bills, issuance, 87A-7-305
- Destroyed bills, obtaining delivery of goods, 87A-7-601
- Diversion of goods on instructions of holder, 87A-7-303
  - consignee's interest defeated by diversion, 87A-7-504
- Duplicate bill, rights and liabilities of parties under, 87A-7-402
- Endorsement of bill
  - default by carrier or previous endorser, endorser not liable for, 87A-7-505
  - negotiation, when endorsement required for, 87A-7-501
  - nonnegotiable bill, effect of endorsement, 87A-7-501
  - transferee's right to require necessary endorsement, 87A-7-506
- Federal law controlling over Commercial Code chapter, 87A-7-103
- Forwarder of freight issuing bill, rights and obligations of parties, 87A-7-503
- Good faith required, 87A-1-203
- Interpleader of conflicting claims to goods, 87A-7-603
- Irregularities in issue of bill, obligations of issuer unaffected, 87A-7-401
- Judicial process against goods covered by bill, procedure required, 87A-7-602
- Letter of credit requirements, law governing adequacy, 87A-7-509
- Lien of carrier
  - charges covered by lien, 87A-7-307
  - delivery of goods causing loss of lien, 87A-7-307
  - delivery of goods, satisfaction of lien required for, 87A-7-403
  - enforcement of lien, procedure, 87A-7-308
  - persons against whom lien enforceable, 87A-7-307
  - refusal to deliver goods causing loss of lien, 87A-7-307
  - sale of goods to enforce lien, 87A-7-308
- Livestock injury, prior law not modified by Uniform Commercial Code, 87A-10-103
- Lost bills, obtaining delivery on, 87A-7-601
- Misdescription of goods, liability of issuer for, 87A-7-301
- Negotiability of bill, requirements for, 87A-7-104
  - notice of arrival of goods, effect on negotiability of term requiring, 87A-7-501
- Negotiation of bill
  - defenses defeated by negotiation, 87A-7-502
  - delivery required for negotiation, 87A-7-501
  - endorsement, when required for negotiation, 87A-7-501
    - right of holder to require necessary endorsement, 87A-7-506
  - formal requirements for negotiation, 87A-7-501
  - rights acquired by holder to whom negotiation made, 87A-7-502
  - sets of parts, negotiation of bill issued in, 87A-7-304
  - title required by holder to whom negotiation made, 87A-7-502
  - warranties of negotiator, 87A-7-507
    - intermediary delivering bill, 87A-7-508
- Nonreceipt of goods, liability of issuer for, 87A-7-301
- Overseas shipment of goods, form of bill required, 87A-2-323
  - bills issued in sets of parts, 87A-7-304
- Prior interest prevailing over interest represented by bill, 87A-7-503
- Reconsignment of goods on instructions of holder, 87A-7-303
  - consignee's interest defeated by reconsignment, 87A-7-504
- Regulatory laws unimpaired by Uniform Commercial Code, 87A-10-103
  - controlling over Commercial Code chapter, 87A-7-103



## INDEX

References are to Title and Section numbers

### **BILLS OF LADING (Continued)**

- Reservation of rights by party while performing or accepting performance, 87A-1-207
- Sale contract requirements, law governing adequacy, 87A-7-509
- Sale of goods to enforce carrier's lien, 87A-7-308
- Security interest in bill, means of perfection, 87A-9-304
  - possession taken by secured party, 87A-9-305
- Seller of goods reserving security interest in goods shipped, 87A-2-505
- Sets of parts, liability on bills issued in, 87A-7-304
- "Shipper's weight, load and count," meaning and protection accorded issuer, 87A-7-301
- Short title of Uniform Commercial Code chapter, 87A-7-101
- Stolen bills, obtaining delivery of goods, 87A-7-601
- Stoppage in transit by seller of goods
  - indemnification by seller for losses and expenses, 87A-7-504
  - surrender of bill required, 87A-2-705
- Substitute bill issued at another place, 87A-7-305
- Through bills, responsibility for acts of connecting carriers, 87A-7-302
- Time allowed for required actions, 87A-1-204
- Transfer of bill
  - endorsement necessary to title, right of transferee to require, 87A-7-506
  - notification to carrier of transfer, adverse interest perfected before, 87A-7-504
  - rights acquired by transferee, 87A-7-504
  - sets of parts, negotiation of bill issued in, 87A-7-304
  - title acquired by transferee, 87A-7-504
  - warranties of transferor, 87A-7-507
    - intermediary delivering bill, 87A-7-508
- Unaccepted delivery order, negotiation of bill defeating title based on, 87A-7-503
- Unauthorized issuance of bill, obligations of issuer unaffected, 87A-7-401
- Unknown goods, description on bill, 87A-7-301
- Usage of trade, application, 87A-1-205
- Warehouse receipt law, provisions included in but omitted from bills of lading law, 87A-7-105
- Warranties by transferor of bill, 87A-7-507
  - intermediary delivering bill, 87A-7-508
- Weighing of bulk freight, duty of carrier, 87A-7-301
- Wrongfully procured bill, when defeated by prior interest, 87A-7-503

### **BIRTH**

- Certificates of birth, 69-4413 to 69-4423—See VITAL STATISTICS, Birth certificates
- Judicial determination of date, application of rules of civil procedure to proceedings, M. R. Civ. P., Rule 81(a), Table A

### **BOARDING HOMES**

- County operation of home, 16-1037
  - services provided at county-operated home, 16-1038
- Fraud, obtaining accommodations with intent to defraud, penalty, evidence of intent, 94-1831
- Lease of county property for home, 16-1036

### **BOARDS OF HEALTH**

- Local boards of health, 69-4501 to 69-4509—See HEALTH, LOCAL BOARDS OF
- State board of health, 69-4103—See DEPARTMENT OF HEALTH, Board of health

### **BOILER INSPECTION**

- Advisory committee on boiler rules, 69-1501
- New boiler installations, 69-1503
- Special boiler inspectors employed by insurance companies, appointment, 69-1501

### **BOILERS**

- Engineer's license, fee, 69-1512
  - annual renewal, 69-1516
  - disposition of money, 69-1516
  - fee for renewal, 69-1516

### **BONDS AND UNDERTAKINGS**

- Bail in criminal proceedings, 95-1101 to 95-1123—See BAIL

## INDEX

References are to Title and Section numbers

### BONDS AND UNDERTAKINGS (Continued)

- Capitol improvement and repair bonds, 78-741 to 78-745—See STATE CAPITOL, Building improvement and repair
- City and town officers and employees
  - adequacy of bond, determination, 6-603
  - amount of bonds, 6-602
  - commission and commission-manager governments, 6-608
  - companies authorized to write bonds, 6-604
  - competitive bids to be sought, 6-602
  - conditions in bond, 6-606
  - form of bonds, approval, 6-605
  - premiums, payment out of budget, 6-607
  - purchase of bonds by council or commissioners, persons covered, 6-601
- County officers and employees, bonds covering
  - amount of bonds, determination, 6-204
  - adequacy supervised by state examiner, 6-205
  - commissioners to purchase bonds, 6-203
  - companies authorized to execute bonds, 6-206
  - competitive bids to be sought, 6-204
  - filing and recording, 6-208
  - form of bonds, approval, 6-208
  - group bonds permitted, 6-203
  - conditions and signature of bonds, 6-209
  - premiums, payment out of budget, 6-207
- County printing contract, bond of contractor, 16-1231
- Facsimile signatures of public officials—See PUBLIC OFFICERS AND EMPLOYEES, Facsimile signatures of public officials
- Fees of secretary of state for receiving and recording, 25-102
- Flood control bonds issued by counties and municipalities, 89-3312
- Industrial development bonds, 11-4103 to 11-4107—See INDUSTRIAL DEVELOPMENT, Bonds
- Issuance, transfer, and registration of investment securities, 87A-8-101 to 87A-8-406—See INVESTMENT SECURITIES
- Limitation on indebtedness of cities, towns, townships, school districts or high school districts, XIII, 6
- Long-range building program bonds, 79-2201 to 79-2205—See STATE CAPITOL, Long-range building program financing
- Restaurant, bar and tavern wage protection bond, 41-2002 to 41-2010—See WAGES, Restaurant, Bar and Tavern Wage Protection Act
- State officers and employees, bonds furnished by
  - amount of bonds, determination, 6-106
  - companies authorized to write bonds, 6-107
  - competitive bidding required, 6-106
  - controller to purchase bonds, 6-105
  - form of bonds, approval, 6-105
  - group bonds permitted, 6-105
  - judicial officers exempt from general provision, 6-105
  - legislative employees exempt from general provision, 6-105
  - premiums, proration and payment, 6-108
- Wheat research and marketing, official bonds of division chief, deputy or assistant, 3-2916—See AGRICULTURE

### BOULDER RIVER SCHOOL AND HOSPITAL

See also STATE INSTITUTIONS

- Admissions to school
  - application by parent or guardian, investigation and procedure, 80-2304
  - application other than by parent or guardian, investigation and procedure, 80-2305
  - availability of room, admission subject to, 80-2306
  - records to accompany person admitted, 80-2306
  - residence requirement, 80-2303
  - temporary admissions to school, 80-2307
  - transportation costs paid by county, 80-2306
- Cost of support, payment by resident or responsible person, 80-1601 to 80-1604
- Discharge of persons from school, 80-2309
- Division of mental retardation, school in, 80-2302

## INDEX

References are to Title and Section numbers

### **BOULDER RIVER SCHOOL AND HOSPITAL (Continued)**

- Fishing by inmates, license not required, 26-202.1
- Industrial activities permitted, 80-1501 to 80-1503
- Location of school, 80-2301
- Management and control of school, 80-1401 et seq.
- Mental retardation center at Glendive
  - capacity of center, 80-2311
  - services provided, 80-2310
  - supervision of center, 80-2312
- Purpose of school, 80-2301
- Residence required for eligibility for admittance, 80-2303
- Superintendent to manage school, 80-2302
- Temporary admissions to school, 80-2307
- Transfer of patients from other institutions
  - children's center, 80-2106
  - Glendive center, 80-2312
  - juvenile facilities under department of institutions, 80-2209
- Transfer of patients to Warm Springs state hospital or Galen state hospital, 80-2308

### **BOUNTIES**

- State bounty
  - employment of salaried hunters and trappers from bounty funds, 46-1912
  - expenditure of funds by livestock commission, 46-1903
  - fraudulent claims under bounty law, penalty, 46-1915
  - license money available for bounties, 46-1901
  - sale of furs, skins and specimens, disposition of proceeds, 46-1904
  - tax levy against livestock to provide moneys, 46-1914, 84-5214

### **BOXING, SPARRING AND WRESTLING**

- Report of ticket sales to athletic commission, 82-308
- State athletic commission, report to governor, 82-302
- Tax on gross receipts from exhibitions, payment and deposit, 82-308

### **BREACH OF PROMISE**

- Acts within state not to give rise to cause of action, 17-1203
- Cause of action abolished, 17-1202
- Litigation and threat of litigation prohibited, 17-1204
- Penalty for bringing action, 17-1206
- Settlements and compromises void, 17-1205

### **BROKERS**

- Securities brokers—See SECURITIES REGISTRATION, Broker-dealers

### **BUILDING AND LOAN ASSOCIATIONS**

- Accounts excluded from chapter on secured transactions, 87A-9-104
- Credit union provisions inapplicable to associations, 14-157
- Dissolution of association, when distribution presumed abandoned, 67-2206—See also PROPERTY, Unclaimed property
- Examination by state examiner, fee for, 5-909
- Real estate loans permitted, 7-113.1
- Securities exempt from securities act, 15-2013
- Special examination by state examiner, fee, 5-910
- Unclaimed deposits and funds, when presumed abandoned, 67-2202—See also PROPERTY, Unclaimed property

### **BUILDINGS**

- State-wide building construction standards, 69-2104 to 69-2120
  - applicable to public places outside municipalities, 69-2107
  - misdemeanor, 69-2119
  - municipalities, 69-2112, 69-2116, 69-2117
  - state building code council, 69-2106
    - adoption of rules, 69-2111
    - council's powers, 69-2114
    - injunctive powers, 69-2118
    - judicial review, 69-2115
  - state controller's administrative duties, 69-2108, 69-2109



## INDEX

References are to Title and Section numbers

### BULK TRANSFERS

- Agreements as to applicable state law, restrictions on, 87A-1-105
- Application of proceeds to debts of transferor, 87A-6-106
- Assignments for benefit of creditors not subject to chapter, 87A-6-103
- Assumption of debt by transferee exempting from Bulk Transfer chapter, 87A-6-103
- Auction sales, procedure required for protection of creditors, 87A-6-108
- Authenticity of third-party documents presumed, 87A-1-202
- Citation of Uniform Commercial Code chapter, 87A-6-101
- Commercial paper transferred in bulk transfer not held in due course, 87A-3-302
- Corporate reorganization proceeding not subject to chapter, 87A-6-103
- Course of dealing between parties, application, 87A-1-205
- Creditors entitled to protection under chapter, 87A-6-109
- Definition of terms, 87A-6-102
  - general definitions in Uniform Commercial Code, 87A-1-201
- Equipment transfers, when subject to chapter, 87A-6-102
- Exemption of transfers from chapter, 87A-6-103
- Good faith required, 87A-1-203
- Judicial sales, chapter inapplicable to, 87A-6-103
- Lien foreclosure not subject to chapter, 87A-6-103
- Limitation of actions and levies by creditors, 87A-6-111
- List of creditors, preparation and filing or holding for inspection, 87A-6-104
- Manufacturers subject to chapter, 87A-6-102
- Merchandise enterprises subject to chapter, 87A-6-102
- Notice to creditors of transfer
  - contents of notice, 87A-6-107
  - delivery to creditors, means permitted, 87A-6-107
  - persons to whom sent, 87A-6-107
  - required for transfer to be effective against creditors, 87A-6-105
- Payments in good faith to particular creditors, credit to transferee or auctioneer for, 87A-6-109
- Proceeds of sale, application to debts of transferor, 87A-6-106
- Schedule of property transferred, preparation and filing or holding for inspection, 87A-6-104
- Security interest, creation is not bulk transfer, 87A-9-111
- Security transactions not subject to chapter, 87A-6-103
- Short title of Uniform Commercial Code chapter, 87A-6-101
- Statute of frauds applicable to sale of personal property other than goods and securities, 87A-1-206
- Subsequent transfers by transferee with defective title, effect, 87A-6-110
- Time allowed for required actions, 87A-1-204
- Usage of trade, application, 87A-1-205

### BUREAU OF CRIMINAL IDENTIFICATION AND INVESTIGATION

- Assistance to local officers in establishing and maintaining local bureaus, 80-2006
- Co-operation with and assistance to law enforcement officers, 80-2002
- Co-operation with FBI and other states, 80-2005
- Criminal record of person arrested for felony, information to law enforcement officer, 80-2003
- Destruction of fingerprints and description on acquittal of person arrested, 80-2003
- Files of identification information, procurement and maintenance by bureau, 80-2002
- Fingerprints and other information to be furnished by law enforcement officers, 80-2003
  - failure to provide information, salary withheld, 80-2004
- Institutions to furnish identification material for files, 80-2002
- Supervisor of bureau, appointment, 80-2001
- Warden of state prison to supervise bureau, 80-2001

### BUSINESS CORPORATION ACT

- Actions by and against corporations
  - involuntary dissolution, commencement of action, 15-2289
  - survival of remedy after dissolution, 15-2298
- Administration by secretary of state, 15-22-127
- Annual report of domestic and foreign corporations required
  - contents of report, 15-22-118
  - existing corporations, filing report required, 15-22-136

## INDEX

References are to Title and Section numbers

### **BUSINESS CORPORATION ACT (Continued)**

Annual report of domestic and foreign corporations required (Continued)

failure to file, penalty, 15-22-125

filing of report, 15-22-119

fee, 15-22-121

Appeal from ruling or decision of secretary of state, 15-22-129

Application of act

existing corporations, 15-22-136

foreign and interstate commerce, 15-22-137

Articles of dissolution—See Dissolution, articles of dissolution, below

Articles of incorporation

amendments

certificate of amendment, issuance by secretary of state, 15-2256

disapproval by secretary of state, appeal to district court, 15-22-129

procedure to amend, 15-2253

reorganization, amendment of articles, purposes, procedure, 15-2259

right to amend, 15-2252

vote of shareholders required, 15-2253

class voting of amendments, 15-2254

articles of amendment

certificate of amendment issuance by secretary of state, 15-2256

effect of certificate of amendment, 15-2257

fee for issuance, 15-22-121

contents, 15-2255

execution by corporation, 15-2255

filing of articles with secretary of state, 15-2256

fee for filing, 15-22-121

certificate of amendment, issued by secretary of state, effect, 15-2256, 15-2257

contents, 15-2248

definition, 15-2202

disapproval by secretary of state, appeal to district court, 15-22-129

fee for filing, 15-22-121

filing with secretary of state, 15-2249

foreign corporations, amendment to articles, filing, 15-22-109

greater voting requirements, 15-22-132

restated articles of incorporation, filing, certificate of restatement, issuance and effect of, 15-2258

fees for filing, 15-22-121

waiver of required notice, 15-22-123

Assessment of shares, existing corporations, provisions for levying of assessment, 15-22-136

Books and records, examination by shareholders, 15-2246

Bylaws, adoption, amendment or repeal, 15-2225

Capital

amount of stated capital, determination of, 15-2219

cancellation of reacquired shares, reduction of stated capital, 15-2262

cancellation of redeemable shares, reduction of stated capital, 15-2261

fee for filing statement of reduction of stated capital, 15-22-121

reduction of stated capital, proposal, procedure, 15-2263

"stated capital" defined, 15-2202

surplus and reserves, 15-2264

Certificate of incorporation, issuance by secretary of state, 15-2249

effect of issuance, 15-2250

fee for issuing, 15-22-121

Consolidation—See Merger or consolidation below

Corporate laws, application to business trust, 15-2508

Definitions, 15-2202

Directors

classification of directors, 15-2235

compensation, 15-2233

consent to action taken without a meeting, 15-22-134

elected at annual meeting of shareholders, 15-2234

voting of shares, 15-2231

executive and other committees, designation by board, authority, 15-2238

liability of directors in certain cases, 15-2242

## INDEX

References are to Title and Section numbers

### BUSINESS CORPORATION ACT (Continued)

#### Directors (Continued)

##### meetings

- consent to action taken without a meeting, 15-22-134
- minutes of proceedings, 15-2246
- notice of meeting, waiver, 15-2239, 15-22-133
- organization meeting, 15-2251
- place of holding, 15-2239
- quorum of directors, 15-2237

number of directors, 15-2234

qualifications, 15-2233

quorum of directors, 15-2237

removal of directors, 15-2236

signing of false documents, penalty, 15-22-126

survival of remedy after dissolution, 15-2298

terms of office, 15-2234, 15-2235

vacancies occurring in board, how filled, 15-2236

#### Dissolution

appeal from disapproval by secretary of state, 15-22-129

##### articles of dissolution

contents, 15-2285

fee for filing, 15-22-121

filing of articles, 15-2286

tax clearance certificate, 15-2285

attorney general, notice from secretary of state as to corporations subject to involuntary dissolution, 15-2288

commencement of action and procedure, 15-2289

bulk transfer chapter of commercial code inapplicable to sales, 87A-6-103

continuation of corporate existence to wind up affairs after dissolution, 15-2279, 15-2298

##### involuntary dissolution

grounds, 15-2287

liquidation proceedings—See Liquidation below

notice to attorney general by secretary of state of corporations subject to dissolution, 15-2288

venue and process, 15-2289

license tax for final year, liability for, 84-1511

##### revocation of voluntary proceedings

act of corporation, 15-2282

consent of shareholders, 15-2281

effect of statement, 15-2284

execution of statement by officer of corporation, 15-2281, 15-2282

statement of revocation, filing, 15-2283

Small Business Tax Act option, agreement by shareholders to assume personal

liability required, 84-1501.3

##### statement of intent to dissolve

consent of shareholders, 15-2276

effect of statement, 15-2279

execution by officers of corporations, 15-2277

fee for filing, 15-22-121

filing with secretary of state, 15-2278

procedure after filing of statement, 15-2280

survival of remedy after dissolution, 15-2298

unclaimed distribution, when presumed abandoned, 67-2206

##### voluntary dissolution

act of corporation, 15-2277

consent of shareholders, 15-2276

incorporators, action to dissolve corporation which has not commenced business, 15-2275

revocation of proceedings, fee for filing statement, 15-22-121

statement of intent to dissolve, 15-2278 to 15-2280

tax clearance certificate, 15-2285

#### Distributions from capital surplus, 15-2241

liability of directors for unlawful distribution, 15-2242

#### Dividends

closing of transfer book and fixing record date, 15-2228



## INDEX

References are to Title and Section numbers

### **BUSINESS CORPORATION ACT (Continued)**

#### **Dividends (Continued)**

- corporations engaged in exploiting natural resources, payment out of depletion reserves, 15-2240
- cumulative dividends paid out of capital surplus, 15-2241
- declaration of by board of directors, 15-2240
- share dividends, 15-2240
- stock issued as share dividend, surplus transferred to stated capital as consideration, 15-2217
- unlawful declaration of dividends, liability of directors, 15-2242

#### **Evidence, certificates and certified copies issued by secretary of state to be received, 15-22-130**

#### **Exchange of property or assets by corporation**

- disposition of assets in other than regular course of business, 15-2272
- dissenting shareholders, right to dissent, 15-2273
- regular course of business, 15-2271

#### **Existence of corporation**

- continuation of corporate existence to wind up affairs after dissolution, 15-2279, 15-2298
- expiration of existence, notice by secretary of state, 15-22-128
- unauthorized assumption of corporate powers, liability, 15-22-135

#### **Existing corporations continued, 15-22-136**

- assessment of shares, provisions for levying of assessment, 15-22-136
- repeal of prior acts, effect, 15-22-139

#### **Expenses of organization, reorganization and financing, payment, 15-2220**

#### **Fees**

- authority of secretary of state to collect, 15-22-120
- filing documents and issuing certificates, enumeration of fees, 15-22-121
- license fees
  - authority of secretary of state to collect, 15-22-120
  - domestic corporations, fees payable by, 15-22-123
  - foreign corporations, fees payable by, 15-22-124
- miscellaneous charges of secretary of state, 15-22-122

#### **Foreign corporations**

- actions by and against corporation, effect of failure to obtain certificate of authority, 15-22-117
- admission of foreign corporation, 15-2299
- annual report required, contents, 15-22-118
  - filing of report, 15-22-119
- application of act to corporations heretofore authorized to do business in state, 15-22-116
- articles of incorporation, amendment, filing, 15-22-109
  - fee for filing copy of amendment, 15-22-121
- certificate of authority
  - amended certificate, requirements for securing, procedure, 15-22-111
    - application, fee for filing, 15-22-121
    - fee for issuing amended certificate, 15-22-121
  - application, contents, execution, 15-22-103
    - filing of application, 15-22-104
  - fee for filing application and issuance, 15-22-121
  - failure to obtain certificate, effect, 15-22-117
  - issuance of certificate, effect, 15-22-104, 15-22-105
  - limitations on issuance, 15-2299
  - required to transact business in state, 15-2299
  - revocation of certificate of authority
    - appeal from secretary of state, 15-22-120
    - grounds, 15-22-114
    - issuance of certificate of revocation, 15-22-115
- existing corporations, duty to file annual report, 15-22-136
- merger of foreign corporation authorized to do business in state, 15-22-110
  - fee for filing copy of articles of merger, 15-22-121
- merger or consolidation of domestic and foreign corporations, procedure, 15-2270
- name of corporation
  - change of name, 15-22-102
  - reservation of right to exclusive use, 15-2208
  - restrictions on contents of name, 15-22-101

## INDEX

References are to Title and Section numbers

### BUSINESS CORPORATION ACT (Continued)

#### Foreign corporations (Continued)

- powers of foreign corporation, 15-22-100
- registered agent required, 15-22-106
  - change of registered agent, 15-22-107
- registered office required, 15-22-106
  - change of registered office, 15-22-107
- service of process on foreign corporation, 15-22-108
- withdrawal of foreign corporation
  - application for withdrawal, contents, 15-22-112
    - filing of application, 15-22-113
  - certificate of withdrawal, requirements for issuance, 15-22-112, 15-22-113
  - fee for filing application and for certificate of withdrawal, 15-22-121

#### Incorporation

- articles of incorporation—See Articles of incorporation above
- expenses of organization, reorganization and financing, payment, 15-2220
- organization meeting of directors, 15-2251

#### Incorporators

- delivery of articles of incorporation to secretary of state, 15-2247
- dissolution of corporation that has not commenced business, 15-2275
- name and address to be included in articles of incorporation, 15-2248
- number, 15-2247
- organization meeting of directors, notice given by incorporators, 15-2251

#### Invalidity of part of act, effect of, 15-22-140

#### Leases of property of corporation

- disposition of assets in other than regular course of business, 15-2272
- regular course of business, 15-2271

#### Liability of persons assuming to act as a corporation without authority, 15-22-135

#### License fees, 15-22-123, 15-22-124

- authority of secretary of state to collect, 15-22-120

#### Liquidation

- assets due unknown creditor or shareholder, deposit with state treasurer, 15-2297
- creditors, grounds for action for liquidation, 15-2290
  - filing of claims and notice, 15-2293
- decree of dissolution
  - effect of decree, 15-2295
  - entry of decree by court, 15-2295
  - filing of decree, 15-2296
- discontinuance of proceedings, 15-2294
- grounds for liquidation of assets and business of corporation, 15-2290
- jurisdiction of district courts, 15-2290
- procedure
  - liquidation by court, 15-2291
  - voluntary dissolution, 15-2280
- receivers
  - appointment by court, 15-2291
  - authority of receivers, 15-2291
  - compensation, 15-2291
  - expenses, payment from assets or proceeds of sales, 15-2291
  - qualifications, 15-2292
- shareholders, grounds for action for liquidation, 15-2290

#### Merger or consolidation

- appeal from disapproval by secretary of state, 15-22-129
- articles of merger or consolidation, contents, filing, 15-2268
  - fee for filing, 15-22-121
- certificate of merger or consolidation
  - fee for issuing, 15-22-121
  - issuance by secretary of state, 15-2268
  - operation and effect, 15-2269
  - return to surviving or new corporation by secretary of state, 15-2268
- consolidation, procedure by board of directors, 15-2266
- dissenting shareholders, right to dissent, 15-2273
  - filing of objections, payment for shares, procedure, 15-2274
- domestic and foreign corporations merger or consolidation of, procedure, 15-2270
- effect of merger or consolidation, 15-2269

## INDEX

References are to Title and Section numbers

### **BUSINESS CORPORATION ACT (Continued)**

#### **Merger or consolidation (Continued)**

- foreign corporation authorized to do business in state, filing of articles of merger, 15-22-110
- merger, procedure by board of directors, 15-2265
- plan for merger or consolidation, 15-2265, 15-2266
  - abandonment of plan, 15-2267
  - approval by board of directors, 15-2265, 15-2266
  - approval by shareholders, 15-2267
  - subsidiary corporation, 15-2268
  - vote of shareholders required, 15-2267
- subsidiary corporation, merger by, plan, 15-2268

#### **Mortgages, power to give**

- disposition of assets in other than regular course of business, 15-2272
- regular course of business, sale or mortgage of assets, 15-2271

#### **Name of corporation**

- registration of name
  - fee for registration, 15-2209
  - procedure, 15-2209
  - renewal of registration, 15-2210
- reservation of right to exclusive use, who may make, procedure, transfer, 15-2208
- fee for filing application, 15-22-121
- notice of transfer of reserved name, fee for filing, 15-22-121
- restrictions on contents of name, 15-2207

#### **Officers**

- authority and duties prescribed by the bylaws, 15-2244
- election by board of directors, 15-2244
- removal of officers, 15-2245
- signing of false documents, penalty, 15-22-126

#### **Organization of corporation—See Incorporation above**

#### **Penalties**

- effect of repeal of prior acts, 15-22-139
- failure of corporation to file annual report, 15-22-125
- signing of false documents by corporate officers or directors, 15-22-126

#### **Pledges of assets by corporation**

- disposition of assets in other than regular course of business, 15-2272
- regular course of business, 15-2271

#### **Powers of corporation**

- acquisition and disposition of its own shares by corporation, 15-2205
- general powers enumerated, 15-2204
- ultra vires as a defense, 15-2206

#### **Pre-emptive rights of shareholders, 15-2224**

#### **Purposes for which organization is allowed, 15-2203**

#### **Receivers—See Liquidation, receivers above**

#### **Redemption of stock**

- cancellation of redeemable shares by redemption or purchase, 15-2261
  - statement of cancellation, contents, filing, 15-2261
- restriction on redemption or purchase of redeemable shares, 15-2260
- voting redeemed shares, when prohibited, 15-2231

#### **Registered agent required, 15-2211**

- change of registered agent, 15-2212
  - statement of change, fee for filing, 15-22-121
- resignation of agent, 15-2212

#### **Registered office required, 15-2211**

- change of registered office, 15-2212
  - statement of change, fee for filing, 15-22-121

#### **Reorganization**

- amendment of articles of incorporation, purposes, procedure, 15-2259
- bulk transfer chapter of commercial code inapplicable to sales, 87A-6-103
- expenses of reorganization, payment, 15-2220

#### **Repeal of prior acts, effect of, 15-22-139**

#### **Reports**

- annual report of domestic and foreign corporations required—See Annual report of domestic and foreign corporations required above
- forms to be prescribed by secretary of state, 15-22-131



## INDEX

References are to Title and Section numbers

### **BUSINESS CORPORATION ACT (Continued)**

Reservation of power to amend, repeal or modify, 15-22-138

Sale or mortgage of assets

disposition of assets in other than regular course of business, 15-2272

dissenting shareholders, right to dissent, 15-2273

filing of objections, payment for shares, procedure, 15-2274

regular course of business, 15-2271

Secretary of state

appeal from ruling or decision of secretary of state, 15-22-129

articles of incorporation, filing, 15-2249

articles of amendment, filing, 15-2256

cancellation of redeemable shares, filing statement, issuance of duplicate original, 15-2261

certificate of amendment of articles of incorporation, issuance, effect, 15-2256, 15-2257

certificate of incorporation, issuance, 15-2249

evidence, certificates and certified copies issued by secretary of state to be received, 15-22-130

fees and charges

authority to collect, 15-22-120

enumeration of fees for filing documents and issuing certificates, 15-22-121

license fees, 15-22-123, 15-22-124

miscellaneous charges, 15-22-122

foreign corporations

certificate of authority

amendment, procedure, 15-22-111

issuance, 15-22-104, 15-22-105

revocation, 15-22-114, 15-22-115

merger, filing of articles, 15-22-110

withdrawal, issuance of certificate, 15-22-112, 15-22-113

forms for reports to be prescribed by secretary of state, 15-22-131

involuntary dissolution, corporations, subject to notice to attorney general, 15-2288

merger or consolidation of corporations

issuance of certificate, 15-2268

operation and effect, 15-2269

subsidiary corporation, filing of articles, 15-2268

notice of expiration of corporate existence, 15-22-128

power to administer act, 15-22-127

reorganization, amendment of articles, filing, issuance of certificate, 15-2259

restated articles of incorporation, filing, certificate of restatement, 15-2258

voluntary dissolution of corporation

filing of articles of dissolution, 15-2286

revocation of voluntary proceedings, statement of revocation, filing, 15-2283, 15-2284

statement of intent to dissolve, filing with, 15-2278, 15-2279

Service of process on corporation, 15-2213

criminal offenses, service of summons, 95-615

foreign corporations, 15-22-108

Shareholders

action against corporation, defense of ultra vires, 15-2206

actions by shareholders, 15-2243

consent to action taken without a meeting, 15-22-134

definition, 15-2202

dissolution of corporation

act of corporation, vote of shareholders, 15-2277

revocation of voluntary proceedings

act of corporation, action by shareholders required, 15-2282

consent of shareholders, 15-2281

voluntary dissolution by consent of shareholders, 15-2276

examination of books and records of corporation, 15-2246

liability of subscribers and shareholders, 15-2223

liquidation of assets and business of corporation, grounds for action, 15-2290

meetings

annual meeting, 15-2226

closing of transfer books, 15-2228

## INDEX

References are to Title and Section numbers

### BUSINESS CORPORATION ACT (Continued)

#### Shareholders (Continued)

##### meetings (Continued)

- consent to action taken without a meeting, 15-22-134
- minutes of proceedings, 15-2246
- notice of meetings, 15-2227
  - waiver of notice, 15-22-133
- place of holding, 15-2226
- quorum, 15-2230
- record date, fixing of, 15-2228
- special meetings, 15-2226
- voting list, 15-2229
- merger or consolidation, rights of dissenting shareholders, 15-2273, 15-2274
- pre-emptive rights of shareholders, 15-2224
- sale or exchange of assets, rights of dissenting shareholders, 15-2273, 15-2274
- survival of remedy after dissolution, 15-2298
- voting list, 15-2229
- voting of shares—See Voting powers of shareholders below

#### Shares—See Stock below

#### Short title of act, 15-2201

#### Stock

- authorized shares, 15-2214
- cancellation of shares
  - fee for filing statement of, 15-22-121
  - reacquired shares, cancellation of, procedure, effect, 15-2262
  - redemption or purchase, cancellation of redeemable shares, procedure, effect, 15-2261
- certificates representing shares
  - form and contents, 15-2221
  - fractional shares, issuance of certificates for, 15-2222
  - scrip, issuance for fractional shares in lieu of certificate, 15-2222
- classes, division into classes authorized, 15-2214
  - series, issued of preferred or special classes in series, 15-2215
- consideration for shares, 15-2217
  - money, other property, labor or services, 15-2218
  - payment of the consideration, 15-2218
  - promissory notes and future services do not constitute payment, 15-2218
- convertibility of shares, limitation on provisions relating to, 15-2214
- corporation's right to acquire and dispose of its own shares, 15-2205
- fractional shares, issuance of certificates for, 15-2222
- payment for shares
  - calls for payment, 15-2216
  - consideration for shares, 15-2217
    - may be money, other property, labor or services, 15-2218
  - default in payment, procedure for collection of amount due, 15-2216
  - promissory notes and future services do not constitute payment, 15-2218
- preferred or special classes, authority of corporation to issue, provisions relating to, 15-2214
  - issuance in series, 15-2215
- reacquired shares, cancellation, procedure, effect, 15-2262
- redeemable shares—See Redemption of stock above
- scrip, issuance for fractional share in lieu of certificate, 15-2222
- series of shares
  - fee for filing statement of establishment of series, 15-22-121
  - issuance of preferred or special classes in series, 15-2215
- subscription for shares
  - calls for payment, 15-2216
  - default in payment, procedure for collection of amount due, 15-2216
  - liability of subscribers, 15-2223
- treasury shares
  - consideration, 15-2217
  - voting of prohibited, 15-2231
- voting of shares—See Voting powers of shareholders below

#### Stockholders—See Shareholders above

## INDEX

References are to Title and Section numbers

### **BUSINESS CORPORATION ACT (Continued)**

- Stock rights and options, 15-2218
- Subsidiary corporations, merger, 15-2268
- Surplus and reserves, 15-2264
- Transfer books
  - closing of transfer books and fixing record date, 15-2228
  - voting list, preparation by officer having charge of books, damages for failure to prepare list, 15-2229
- Treasury shares, voting of prohibited, 15-2231
- Ultra vires as a defense, 15-2206
- Unauthorized assumption of corporate powers, 15-22-135
- Voting powers of shareholders
  - amendments to articles of incorporation
    - class voting on amendments, when holders entitled to vote as a class, 15-2254
    - vote by shareholders, 15-2253
  - authorized vote of each outstanding share, 15-2231
  - corporation-owned shares, voting prohibited, 15-2231
  - cumulative voting authorized, 15-2231
  - fiduciaries, voting of shares, 15-2231
  - greater voting requirements in articles of incorporation to control, 15-22-132
  - merger or consolidation, vote of shareholders required, 15-2267
  - pledged shares, voting powers of shareholder or pledgee, 15-2231
  - proxies, 15-2231
  - quorum at meetings, 15-2230
  - receivers, voting of shares standing in name of, 15-2231
  - redeemable shares, when not entitled to vote, 15-2231
  - trust, creation of voting trust authorized, 15-2232
  - voting list, 15-2229
- Waiver of notice requirements, 15-22-133

### **BUSINESS TRUSTS**

- Classifications of business trusts, 15-2502
- Commencement of business, when authorized, 15-2504
- Corporate laws, application to business trust, 15-2508
- Definition, 15-2501
- Domestic business trust
  - certificate of organization, 15-2504
  - definition, 15-2502
  - required filings with the secretary of state, 15-2504
  - trust agreement, filing with secretary of state, 15-2504
    - amendments to trust instrument, 15-2505
    - construction of instrument, 15-2506
    - terms and conditions of instrument, binding effect, 15-2506
- Foreign business trusts
  - definition, 15-2502
  - license to do business in state, when issued, 15-2504
  - required filings with the secretary of state, 15-2504
  - trust agreement, filing with secretary of state, 15-2504
    - amendments to trust instrument, 15-2505
    - binding effect of terms and conditions of instrument, 15-2506
    - construction of instrument, 15-2506
- Form of association authorized, 15-2503
- Powers and authority of business trusts, 15-2506
- Secretary of state
  - certificate of organization, issuance to domestic business trust, 15-2504
  - copies of trust agreements, filing with secretary of state, 15-2504
    - amendments to trust instrument, 15-2505
  - license to foreign business trust to do business in state, when issued, 15-2504
- Taxation of business trust, 15-2507

### **BUTCHERS AND MEAT PEDDLERS**

- Inspection and marking of hides of slaughtered cattle
  - emergency or custom slaughter without live inspection, 46-503
  - livestock sanitary board inspection in lieu of sheriff's inspection, 46-503



## INDEX

References are to Title and Section numbers

### **BUTCHERS AND MEAT PEDDLERS (Continued)**

Meat markets, 27-611 to 27-625—See **FOOD AND DRUGS**, Food service establishments  
Persons exempted from procuring license for having meat inspected or stamped, 46-504

## **C**

### **CAMPGROUNDS**

See **TOURIST CAMPS**, 69-5601 to 69-5607

### **CAPITAL PUNISHMENT**

Appeals, stay of execution, 95-2406  
Execution of death sentence, procedure, 95-2303  
Mental fitness of defendant, determination of, proceedings, 95-2304, 95-2305  
Pregnant female, proceedings, 95-2306, 95-2307

### **CAREY LAND ACT BOARD**

Fund abolished, 79-416  
Money and appropriations transferred to water conservation board, 89-103.6  
Powers transferred to water conservation board, 89-103.4  
Records and property transferred to water conservation board, 89-103.5

### **CARRIERS**

Common carrier contract modifying carrier's rights and duties, effect, 8-709  
Motor carriers  
    interchange of equipment, 8-103.2  
    lease of power equipment, 8-103.1  
    lease of railroad commission certificate, 8-103.3  
Pipeline carriers, 8-201 to 8-207, 8-209, 8-210—See **PIPELINES**

### **CEMETERIES**

Rules of civil procedure, application to special proceedings, M. R. Civ. P., Rule 81(a)  
Table A

### **CENTER FOR THE AGED**

Convalescent release of patients, 80-2503  
Cost of support, payment by resident or responsible person, 80-1601 to 80-1604—See **STATE INSTITUTIONS**, Cost of support of residents  
Discharge of patients, 80-2503  
Industrial activities permitted, 80-1501 to 80-1503—See **STATE INSTITUTIONS**, Industrial activities permitted  
Location of center, 80-2501  
Management and control of center, 80-1401 to 80-1409—See **STATE INSTITUTIONS**, Department of institutions  
Purpose of center, 80-2501  
Transfer of patients to and from other institutions, 80-2502  
    Galen state hospital, 80-1703

### **CENTRAL PAYROLL SYSTEM**

See **SALARIES**, Central payroll system, 25-507.1 to 25-507.10

### **CERTIORARI**

Real estate commission, writ of district court for appeal from, 66-1939  
Rules of civil procedure, application to proceedings, M. R. Civ. P., Rule 81(a), Table A  
Supreme court proceedings, M. R. App. Civ. P.—See **SUPREME COURT**, Original proceedings in supreme court

### **CESSPOOLS**

Cleaning of cesspools, 69-5401 to 69-5408—See **SANITARY LICENSEES**

### **CHANGE OF NAMES**

Rules of civil procedure, application to proceedings, M. R. Civ. P., Rule 81(a), Table A

## INDEX

References are to Title and Section numbers

### CHANGE OF VENUE

Procedure for change in civil cases, M. R. Civ. P., Rule 12(b)  
Procedure for change in criminal cases, 95-401, 95-1710  
justices' and police courts, 95-2003

### CHECKS

See COMMERCIAL PAPER, 87A-3-101 to 87A-3-805

### CHILDREN AND MINORS

Abandonment of child as felony, 94-304  
Abuse of children, reports required of physicians and others, 10-902  
evidentiary use of report not subject to privilege, 10-905  
immunity from liability of person making report, 10-904  
investigation and prosecution by county officials, 10-903  
policy declaration, 10-901  
Apprehending children and holding them in custody, 10-608.1  
Assistance payments, payment to interested person other than original recipient, 71-509  
Borrowing of money for educational expense, capacity of minors, 64-106.1  
Causing, contributing to or permitting law violations by children, penalty, 10-617  
Consent by minors to medical or surgical care  
minor who is, or professes to be, married, pregnant or afflicted with venereal disease, consent valid, 69-6101  
divulgence of information by physician, 69-6102  
immunity of hospital, public clinic or physician, 69-6105  
surgery not directly connected with pregnancy not included, 69-6104  
Correctional facilities, establishment, control and management by department of institutions, 80-1410 to 80-1412—See STATE INSTITUTIONS, Juvenile facilities  
Day care facilities, licensing and regulation, 10-801 to 10-811—See DAY CARE FACILITIES  
school districts for child care institutions, 75-5501 to 75-5508—See SCHOOLS, School districts, child care institution  
Delinquent children  
commitment to state institution, form of order, 10-612  
definition, 10-602  
jury trial rights, 10-604.1  
petitions, 10-605.1  
preliminary inquiry, 10-605.1  
reception and evaluation center, authority to commit to, 10-611.1  
Dependent and neglected children  
commitment or other disposition of child, 10-509  
cost of care and maintenance  
hearing and order requiring parent to pay, 10-507  
investigation of ability of parents to pay, 10-506  
state and county payments of cost, 10-524  
suspension of sentence on giving of bond by responsible person, 10-512  
hearing on disposition of child, 10-504  
Firearms, permitting use by minors prohibited, 94-3579  
Galen state hospital, juvenile reception and evaluation center, 80-1704  
Health information given to state department or medical association, privilege, 69-4115  
Illegitimate children, support obligations of father, 93-2901-1 to 93-2901-11—See BASTARDY PROCEEDINGS  
Interstate compact on juveniles  
additional procedure for return of runaway juveniles, 10-1006  
administrator, 10-1002  
financial obligations, discharge, 10-1004  
ratification, text, 10-1001  
responsibilities of state departments, agencies and officers, 10-1005  
supplementary agreements by compact administrator, 10-1003  
Lewd and lascivious acts upon children, penalty, 94-4106  
Neglect of child, report required, 10-901 to 10-905—See Abuse of children above  
Nonsupport as felony, 94-304  
Nutrition program in schools, 75-4801 to 75-4809—See SCHOOLS, School lunches  
Phenylketonuria test required at birth, 69-4116  
Representation in actions by and against, M. R. Civ. P., Rule 17(c)  
Service of process on minors, M. R. Civ. P., Rule 4D(2)

## INDEX

References are to Title and Section numbers

### CHILDREN AND MINORS (Continued)

- Unlawful operation of motor vehicle by child under 18
  - court learning of unlawful operation, action which may be taken after hearing or investigation, 32-21-165
  - exclusive jurisdiction of district court, 32-21-163
  - impounding of vehicle, when, 32-21-163
  - penalty, 32-21-163
  - summoning of child, 32-21-164

### CHILDREN'S CENTER

- Commitment of child to center, records to accompany child, 80-2103
- Cost of support, payment by resident or responsible person, 80-1601 to 80-1604—See STATE INSTITUTIONS, Cost of support of residents
- Discharge of child from center, 80-2104
- Fishing by inmates, license not required, 26-202.1
- High school students attending Twin Bridges, state payments for, 75-4230
- Incorrigible child, commitment to vocational school or industrial school, 80-2105
- Industrial activities permitted, 80-1501 to 80-1503—See STATE INSTITUTIONS Industrial activities permitted
- Location of center, 80-2101
- Management and control of center, 80-1401 to 80-1409—See STATE INSTITUTIONS, Department of institutions
- Medical examination before commitment of child to center, 80-2103
- Mentally ill or retarded child, transfer to state hospital or state training school and hospital, 80-2106
- Purpose of center, 80-2101
- Superintendent to manage center, 80-2102
- Transfer of children to other institutions
  - Boulder river school and hospital, 80-2106
  - juvenile facilities of department of institutions, 80-2105
  - Warm Springs state hospital, 80-2106
- Truants, commitment to center, 75-3002
- University aid to children resident at center, 80-2107

### CHIROPODISTS

- Compensation of board members, 66-608
- Corporations for practice of chiropody, 15-2101 to 15-2116—See PROFESSIONAL SERVICE CORPORATIONS
- Disability insurance, freedom of choosing physician under disability insurance, 40-4108
  - scope of practice not enlarged, 40-4109
- Examination of applicants for license, 66-603
- Expenses of board of examiners, payments, 66-608
- Moneys collected by board, disposition, 66-607
- Reciprocal license without examination, fee, 66-603

### CHIROPRACTORS

- Corporations for practice of chiropractic, 15-2101 to 15-2116—See PROFESSIONAL SERVICE CORPORATIONS
- Disability insurance, freedom of choosing physician under disability insurance, 40-4108
  - scope of practice not enlarged, 40-4109
- License applicants, examination, 66-506
- Moneys received by board of examiners, disposition and use, 66-513
- Per diem of members of board of examiners, 66-513
- Report of board of examiners, 66-513

### CHURCHES

- Religious corporation sole, 15-2401 to 15-2413—See RELIGIOUS CORPORATION SOLE ACT
- Sanitary inspections and correction of conditions by boards of health, 69-4118

### CIGARETTE SALES

- Actions for enforcement of act, 51-313
- Competitive pricing in good faith permitted, 51-308
- Contracts in violation of law void, 51-309
- Damage actions for violation of act, 51-313



## INDEX

References are to Title and Section numbers

### **CIGARETTE SALES** (Continued)

- Definition of terms, 51-303
- Enforcement powers of board of equalization, 51-314
- Hearings by board on violations of act, 51-314
- Injunction to prevent violations of act, 51-313
- Judicial review of board actions, 51-314
- Legislative findings, 51-301
- Licenses and permits, revocation or suspension for violations of act, 51-314
- Penalty for violations, 51-304
- Policy of state, 51-301
- Price-cutting as evidence of intent to injure competitor, 51-304
- Rules and regulations for enforcement of act, 51-314
- Sales below cost prohibited, 51-304
  - clearance sales exempt, 51-307
  - combination sales, determination of cost in, 51-306
  - competitive pricing exempt, 51-308
  - concealment of true cost as bearing on good faith, 51-310
  - customary trade practices as evidence of cost, 51-310
  - damaged merchandise, sale exempt, 51-307
  - definitions of cost, 51-303
  - fiduciary sales exempt, 51-307
  - isolated transactions exempt, 51-307
  - judicial sales exempt, 51-307
  - liquidation sales exempt, 51-307
  - promotional merchandise not considered in cost, 51-310
  - purchases outside ordinary trade channels not considered in determining cost, 51-311
  - survey evidence, use in determining cost, 51-312
  - wholesalers, definition of cost in sales between, 51-305
- Short title of act, 51-302
- Surveys to determine lowest cost, 51-312
  - competitive prices, use of survey in determining, 51-308
- Unlawful practices enumerated, 51-304

### **CITIES AND TOWNS**

- Airports, establishment, 1-801 to 1-803—See AERONAUTICS, City and county establishment of airports
- Aldermen
  - residence requirements for eligibility, 11-714
  - salaries, 11-725
- All-purpose exclusive tax levy, 84-4701.1 to 84-4701.6—See TAXATION, Levy of taxes, all-purpose exclusive levy
- Ambulance service
  - establishment authorized, 69-3601
  - joint service authorized, 69-3601
  - methods of operation, 69-3602
  - previously existing service unaffected, 69-3603
- Annexation of contiguous platted tracts or other parcels of land, procedure, 11-403
- Bonds, official
  - adequacy of bond, determination, 6-603
  - amount of bonds, 6-602
  - commission and commission-manager governments, 6-608
  - companies authorized to write bonds, 6-604
  - competitive bids to be sought, 6-602
  - conditions in bond, 6-606
  - form of bonds, approval, 6-605
  - premiums, payment out of budget, 6-607
  - purchase by council or commissioners, persons covered, 6-601
- Bridges within municipalities, construction and maintenance, 32-2902
  - police regulation, 32-2905
- City attorney, salary, 11-729
- City-county building, acquisition or construction authorized, 11-4201
  - bonding authority undiminished, 11-4203
  - contracts between city and county, 11-4202

## INDEX

References are to Title and Section numbers

### **CITIES AND TOWNS (Continued)**

Clerk, salary, 11-731

Commission-manager plan of government

compensation of commissioners and mayor, 11-3248

primary election for commissioners, 11-3215

#### **Contracts**

advertising, letting of, 11-1202

awarding, 11-1202

emergency contracts, when authorized, 11-1202

exemptions from act, 11-1202

installment payments, 11-1202

preference to Montana bidders

federal aid projects exempt, 82-1926

percentage differential, 82-1924

provision in contracts for preference to Montana materials and labor, 82-1926

residence, definition, determination of, 82-1925, 82-1925.1

submission to electors at election, when required, 11-1202

County road machinery, use permitted, 32-2807

Deposit of public funds by treasurer, 16-2618

Disaster emergency tax, city-county

council meeting, 11-4303

definitions, 11-4301

determination of disaster, resolution of disaster committee, 11-4302

levy of tax to cover expenses, 11-4305

resolution stating emergency, 11-4304

surplus held in separate fund, 11-4306

Ditches, municipal regulation, 11-4001 to 11-4006

declaration of nuisance, 11-4002

investigative powers of governing body, 11-4003

irrigation ditches exempt, 11-4006

notice to close and fill ditch, 11-4004

protective devices, owner providing, 11-4005

purpose of act, 11-4001

#### **Elections**

registration of electors, 11-715

residence requirements for electors, 11-716

Employees, hours of work of salaried personnel, 59-510(2)

Examination by state examiner, fees, 5-905

Examination of accounts by state examiner, 82-1008

Fire codes, adoption authorized, 11-1102

#### **Fire departments**

fire department relief associations

investment of surplus funds, 11-1914

pensions payable

disability pension, 11-1926

service pension, 11-1925

widows' and orphans' pensions, 11-1927

premium tax collected from insurers

amount of tax, 11-1919

estimates of payments into treasury fund, 11-1920

payment by state treasurer, 11-1921

risk covered by taxable premiums, 11-1919

tax levy for disability and pension funds, 11-1912

mutual aid agreements authorized, 11-1901

wages of firemen, longevity pay requirement based on statutory minimum,  
11-1932.1

#### **Fire protection in unincorporated towns**

disability and insurance benefits of firemen

administration of act by industrial accident board, 11-2026

allowance and payment of claim by industrial accident board, 11-2025

benefits allowable, 11-2023

claims for compensation, filing and procedure, 11-2024

earnings of money in earmarked revenue fund, 11-2028

payment of claims, 11-2025

premium tax paid into earmarked revenue fund, 11-2030

## INDEX

References are to Title and Section numbers

### **CITIES AND TOWNS (Continued)**

- Fire protection in unincorporated towns (Continued)
  - disability and insurance benefits of firemen (Continued)
    - qualification for benefits, 11-2023
    - reports to governor by retirement system, 11-2029
  - fire districts
    - change of boundaries, 11-2008
    - contracts with cities and towns and private services for fire protection, 11-2008
    - creation, 11-2008
    - dissolution, 11-2008
    - trustees, 11-2010
      - powers, 11-2010
  - fire insurance premium tax deposited into volunteer fireman's compensation fund, amount, 11-2030
  - mutual aid agreements, 11-2010
  - premium tax paid into earmarked revenue fund, 11-2030
  - training program conducted by chief, 11-2007
- Flood control, 89-3301 to 89-3313—See FLOOD CONTROL AND WATER CONSERVATION
- Group insurance for officers and employees, 11-1024
- Health, board of, 69-4501 to 69-4509—See HEALTH, LOCAL BOARDS OF
- Highways bypassing municipality, consent of governing body required, 32-1628
- Highways through municipality, cost of construction and maintenance, 32-1627
- Indebtedness
  - electors at elections concerning
    - persons entitled to vote, 11-2310
    - registration, 11-2310
  - extraordinary levies to pay bonded indebtedness, 84-4701.6
  - form and execution of bonds, 11-2316
  - limitation on incurring, XIII, 6
  - power to incur, 11-966
  - purposes for which indebtedness may be incurred, 11-966
- Industrial development projects, 11-4101 to 11-4110—See INDUSTRIAL DEVELOPMENT
- Interlocal co-operation, 11-4401 to 11-4416; 16-4901 to 16-4904—See INTERLOCAL CO-OPERATION
- Investment of surplus bonds in warrants, government securities and bank deposits, 11-1310
- Limitation on indebtedness, XIII, 6
- Mayor
  - qualifications for office, 11-710
  - salary, 11-725
- Mental health facilities, establishment by division of mental hygiene, 80-2406
- Motor vehicle yards, power to regulate, 11-918
- Officers, residence requirements, 11-713
- Off-street parking facilities
  - acquisition and construction, power of municipality, 11-986
  - funding or refunding bonds, 11-3721
  - indenture for security of bonds, 11-3714
- Open meetings of public agencies
  - legislative intent, 82-3401
  - meetings to be open, exceptions, 82-3402
  - minutes to be available for public inspection, 82-3403
- Open-space land, 62-601 to 62-609—See PARKS
- Ordinances, technical codes, adoption by reference, 11-1102
- Parks, donation of county land for, 16-1131
- Planning and zoning—See PLANNING AND ZONING
- Plats and surveys, vacation of recorded plat, 11-616
- Police department
  - appointment of commission in third class cities, when required, 11-1804.1
  - appointment of persons to do police duty who are not members of police department, authority of mayor, 11-1806
  - discharge of policemen in third class city when police commission established, 11-1804.1



## INDEX

References are to Title and Section numbers

### **CITIES AND TOWNS (Continued)**

#### **Police department (Continued)**

- fingerprints taken on felony arrest, 80-2003
- salary of officer withheld on failure to furnish information, 80-2004
- fund for payment of officers on reserve list, 11-1823**
  - tax levy, 11-1823**
- identification bureaus, assistance by state bureau in establishing, 80-2006
- law enforcement teletypewriter communications committee, membership of chiefs of police, 82-3902
- qualifications, enumeration of qualifications of policemen, 11-1814**
- state payments to municipalities with police departments
  - amount of annual payment, 11-1834
  - insurance premium tax as source of payments, 11-1835
  - retirement reserve fund, credit of payments to, 11-1836
  - use of funds in municipalities not subject to retirement law, 11-1837
- suspension of policemen by mayor or chief of police**
  - appeal, 11-1806**
  - authority, 11-1806**
  - limitation on length of suspension, 11-1806**
- wages of members, longevity pay requirement based on statutory minimum, 11-1832.1

#### **Police judge, salary, 11-726**

Post-enemy-attack, continuity in government, V, 46; 82-3801 to 82-3809—See WAR, Continuity in government

Property transactions with county or political subdivision, 11-964.1, 11-964.2

counties authorized to transact, 16-1007.1, 16-1009.1

Records of fiscal transactions, destruction after period of years, 59-516

Retirement act applicable on application by employee, 68-301

#### **Revenue bonds**

- advertisement of bond issue, 11-2404
- authorization of bond issue, 11-2404
- definition of terms, 11-2402
- election to authorize bond issue, 11-2404
- negotiability of bonds, 11-2404
- refunding revenue bonds, terms, issue, and disposition of proceeds, 11-2414
- terms of bonds, 11-2404

#### **Road fund, sources, disposition and use, 53-122**

flood control project, use for, 89-3308

Rules of civil procedure, application to special statutory proceedings, M. R. Civ. P., Rule 81(a), Table A

Service of process on cities and towns, M. R. Civ. P., Rule 4D(2)

Sidewalks, curbs and gutters, construction without improvement district, 11-2226

#### **Soil and water conservation districts**

- appointment of supervisors, 76-107
- definition of municipality as "land occupier," 76-103

**Special examination by state examiner, fee, 5-910**

#### **Special improvement districts**

##### **bonds and warrants**

- form, 11-2231**
- provisions, 11-2231**
- redemption, 11-2231**
- refunding of revenue bonds, 11-2218
- revenue bonds for water and sewer systems, 11-2218
- signing, 11-2231**

investment of interest and sinking fund moneys, 11-2288

**notice of resolution of intention, contents, persons to whom given, 11-2204**

off-street parking and pedestrian malls

assessments and bonds, 11-2214.2

authority to create improvement districts, 11-2201

bonds, authority to issue, 11-2214.1

leasing of real property, 11-2214.4

payment of assessments, 11-2214.3

resolution of intention, publication and adoption, 11-2214.5

purposes for which authorized, 11-2202

**warrants and bonds, form, 11-2231**

## INDEX

References are to Title and Section numbers

### CITIES AND TOWNS (Continued)

Taxation, all-purpose exclusive levies authorized, 84-4701.1 to 84-4701.6

Tax levy to pay flood control indebtedness, 89-3312

Third class cities, appointment of police commission upon request of policemen, 11-1804.1

Treasurer, salary, 11-728

Urban renewal law

“agency” defined, 11-3901

annual report of urban renewal agency, 11-3916

bidding upon disposition of real property, 11-3909

“blighted area” defined, 11-3901

blighted areas, finding of public interest in, 11-3902

bonds

bonds issued do not constitute an indebtedness within meaning of constitutional or statutory debt limitations, 11-3910

definition, 11-3901

general credit of municipality not to be pledged, 11-3910.

payment, 11-3910

power to issue, 11-3910

resolution authorized, 11-3910

sale, terms, 11-3910

bonds as legal investments, 11-3911

borrowing power, 11-3907

clearance and redevelopment of blighted areas, inclusion in program, 11-3904

“clerk” defined, 11-3901

contract powers of municipality, 11-3907

cooperation by other public bodies, 11-3913

definitions, 11-3901

disclosure of interest in property within area, duty of public officers, 11-3918

discrimination because of race, creed, color or national origin prohibited, 11-3917

election, submission to electors for approval of plan, 11-3906

eminent domain

compensation, 11-3908

power of municipality, 11-3908

exercise of powers by municipality itself or by agency or department or other officers, 11-3915

fair value in sales or leases by municipality, 11-3909

“federal government” defined, 11-3901

findings required before exercise of powers, 11-3905

interest, direct or indirect in project or property by public officials, commissioners or employees prohibited, 11-3918

investment of project funds, 11-3907

legislative finding and declaration of necessity for act, 11-3902

“local governing body” defined, 11-3901

“mayor” defined, 11-3901

“municipality” defined, 11-3901

“obligee” defined, 11-3901

operation and maintenance of real property, power of municipality, 11-3909

“person” defined, 11-3901

plans, powers concerning, 11-3907

powers additional and supplemental to other powers conferred by law, 11-3919

powers of municipality, enumeration, 11-3907

prevention of spread of blight into areas, inclusion in program, 11-3904

private enterprise, encouragement of, 11-3903

program for, 11-3904

property exempt from taxes, termination of exemption upon sale, lease or disposition, 11-3912

property, power of municipality to sell, lease or transfer, 11-3909

“public body” defined, 11-3901

“public officer” defined, 11-3901

purchasers or lessees of property, obligation to comply with uses specified in urban renewal plan, 11-3909

“real property” defined, 11-3901

“redevelopment” defined, 11-3901

“rehabilitation” defined, 11-3901

## INDEX

References are to Title and Section numbers

### CITIES AND TOWNS (Continued)

#### Urban renewal law (Continued)

- rehabilitation of blighted areas, inclusion in program, 11-3904
- resolution of required findings, 11-3905
- restrictions in instruments of conveyance to private purchaser or lessee, authority, 11-3909
- short title of act, 11-3920
- surveys and appraisals, power to enter buildings and property for, 11-3907
- tax exemption of property, termination of exemption upon sale, lease or other disposition, 11-3912
- title of purchaser, 11-3914
- urban renewal agency
  - annual report, 11-3916
  - commissioners
    - appointment, 11-3915
    - expenses, 11-3916
    - meetings, 11-3916
    - removal, 11-3916
    - term of office, 11-3916
  - definition, 11-3901
  - determination that agency shall exercise powers, 11-3915
  - employees, 11-3916
  - powers, 11-3915

"urban renewal area" defined, 11-3901

#### urban renewal plan

- definition, 11-3901
- hearing on, 11-3906
- notice of hearing on, 11-3906
- preparation, who may prepare, 11-3906
- submission to electors at election, 11-3906
- submission to planning commission of municipality, 11-3906

#### urban renewal project

- approval by local governing body, 11-3906
- definition, 11-3901
- determinations required, 11-3906
- modification, 11-3906

workable program, 11-3904

Warrants, investment of municipal funds in, 11-1310

Water conservation, 89-3301 to 89-3313—See FLOOD CONTROL AND WATER CONSERVATION

Water, furnishing to industries and persons outside city, 11-1001

Winter work programs, 41-1901 to 41-1907—See WINTER WORK PROGRAMS

### CITY AND COUNTY CONSOLIDATION

Fire districts preserved, 11-3523

Firemen's disability and pension funds, rights preserved, 11-3524

Firemen, tenure, 11-3524

Police officers, tenure, 11-3518

Police reserve fund, vested rights preserved, 11-3518

Voluntary fire departments preserved, 11-3523

### CIVIL DEFENSE

Post-attack resource management, 77-1501 to 77-1508—See WAR, Resource management

Post-enemy-attack continuity in government, V, 46; 82-3801 to 82-3809—See WAR, Continuity in government

### CIVIL PROCEDURE

Federal rules, adoption, M. R. Civ. P., Rules 1 to 86

administrative bodies, act not to affect powers concerning rules governing practice, 93-228

adoption by legislature before rules effective, 93-229

amendment of rules, procedure, M. R. Civ. P., Rule 86(a)

appendix of forms, M. R. Civ. P., Appendix of Forms

changes, amendments and additional rules, procedure for accomplishing, 93-230



## INDEX

References are to Title and Section numbers

### **CIVIL PROCEDURE (Continued)**

#### **Federal rules, adoption (Continued)**

citation of rules, M. R. Civ. P., Rule 85

#### **commission**

appointment, 93-222

duties, 93-222

expenses of members, 93-232

number of members, 93-222

organization, 93-233

records, 93-233

secretary-stenographer, appointment, 93-231

selection of members, 93-223

services of research agency, power to employ, 93-231

forms applicable under rules, M. R. Civ. P., Rule 84, Appendix of Forms

local rules of practice, authority for courts to adopt so long as not in conflict with promulgated rules, 93-227

#### **proposed rules**

distribution to bench and bar for consideration and suggestions, 93-224

preparation, 93-224

purpose of act, 93-221, M. R. Civ. P., Rule 1

scope of rules, M. R. Civ. P., Rule 1

statutory proceedings, applicability of rules to, M. R. Civ. P., Rule 81(a), Table A

#### **tentative final draft**

hearing on, 93-226

submission to supreme court, 93-225

Local rules of practice, authority to adopt, 93-227, 93-2801-4, M. R. Civ. P., Rule 83

Rules of Appellate Civil Procedure, Title 93, Chapter 3001

Rules of Civil Procedure, Title 93, Chapter 2701

Supreme court power to prescribe rules, 93-2801-1

administrative practice rules unaffected, 93-2801-5

advisory committee, appointment, 93-2801-2

continuation of existing rules until modified, 93-2801-6

effective date of rule changes, 93-2801-7

legislative power reserved, 93-2801-8

petitions of professional associations concerning rules, 93-2801-3

proposed rules, distribution to bench and bar, 93-2801-3

scope of rules within power of court, 93-2801-1

substantive rights of litigants not to be affected, 93-2801-1

Tort actions against state, 83-701 to 83-707—See STATE OF MONTANA, Tort actions against

### **CIVIL RIGHTS**

County parks, discrimination in employment prohibited, 16-4806

Freedom from discrimination as civil right, 64-301

definition of terms, 64-302

discriminatory practices as misdemeanor, 64-303

Hospitals and facilities constructed with public funds, discrimination prohibited, 69-5313

Mental health programs, discrimination in providing services prohibited, 80-2409

### **CLAIMS**

Assignment of claims against state, 83-901 to 83-904

### **CLERK OF DISTRICT COURT**

Arrest, clerk privileged from arrest, when, 95-616

Authorized actions by clerk, M. R. Civ. P., Rule 77(c)

Fees enumerated, 25-232

naturalization fees paid to county treasurer for credit to general fund of county, 25-210

probate proceedings, 25-233

Membership in clerks' association, payment from county funds, 16-3006

Practice of law by clerk, restrictions on, 93-902

### **CLERK OF SUPREME COURT**

Arrest, clerk privileged from arrest, when, 95-616

Fees chargeable by clerk, 82-503

## INDEX

References are to Title and Section numbers

### CLERK OF SUPREME COURT (Continued)

Practice of law by clerk, restrictions on, 93-902  
Salary, 25-501

### CLOSE PURSUIT

Power of arrest by officers of another state, 95-619

### COAL

License tax for strip coal mines, 84-1302 to 84-1304  
    credit for reclamation of strip mining land, 50-1004  
Native coal preferred for public buildings, 82-1904.1  
    use of other fuels not prohibited, 82-1904.2  
Reclamation of lands, 50-1001 to 50-1004—See MINES AND MINING, Strip coal mining

### CODES AND LAWS

Criminal Procedure, 95-101 et seq.—See CRIMINAL PROCEDURE  
Replacement Volumes 1 and 9 to Revised Codes of Montana, 1947  
    adoption, 12-337  
    omissions or inaccuracies, effect, 12-338  
Replacement Volumes 1, part 2, and 2, parts 1 and 2 to Revised Codes of Montana, 1947  
    adoption, 12-345  
    omissions or inaccuracies, effect, 12-346  
Replacement Volumes 3 and 4 to Revised Codes of Montana, 1947  
    adoption, 12-339  
    omissions or inaccuracies, effect, 12-340  
Replacement Volume 5 to Revised Codes of Montana, 1947  
    adoption, 12-343  
    omissions or inaccuracies, effect, 12-344  
Replacement Volumes 6 and 7 to Revised Codes of Montana, 1947  
    adoption, 12-341  
    omissions or inaccuracies, effect, 12-342  
Session laws index, assistance in preparation, 44-412  
Supplements and replacement volumes, control by supreme court, 12-332.1

### COERCION

Uniform Commercial Code supplemented by general principles of law, 87A-1-103

### COLLEGES AND UNIVERSITIES

Children's center residents, university aid to, 80-2107

#### Community colleges

    accreditation by state board of education, 75-4414  
    annexation of school districts to college district, election on, 75-4430  
    borrowing federal funds, 75-4426  
    boundaries of district to coincide with school district boundaries, 75-4415  
    budgeting laws applicable, 75-4425  
    buildings, construction, repair and acquisition authorized, 75-4426  
    contracts for building, maintenance and supplies, when advertising and bids required, 75-4422  
    corporate powers of district, 75-4413  
    courses of instruction, determination, 75-4423  
    donations, acceptance authorized, 75-4427  
        federal and state aid, 75-4426  
    election on organization of district, 75-4416  
        conduct of election, 75-4418  
        notice of election, publication, 75-4418  
        trustees elected at same time, 75-4417  
    employment of teachers and personnel, 75-4424  
    equalization aid, participation in, 75-4425  
    federal and state aid, acceptance authorized, 75-4426  
    foundation program, participation in, 75-4425  
    junior college district, conversion to community college district, 75-4429  
    name of district, 75-4413

## INDEX

References are to Title and Section numbers

### COLLEGES AND UNIVERSITIES (Continued)

#### Community colleges (Continued)

- officers of district, selection, 75-4419
- petition for organization of district, filing, 75-4416
- population required for formation of district, 75-4413
- property valuation required for formation of district, 75-4413
- retirement system for teachers and trustees, 75-4424
- school district law not applicable, 75-4413
- school district, when considered as, 75-4425
- state aid, 75-4425
- state board of education to supervise districts, 75-4414
- studies and surveys by state board of education, 75-4414
- surplus property of school districts, use by college district, 75-4428
- tax levy authorized, 75-4425, 75-4426
- trustees of district, districts represented and terms of office, 75-4417
  - election of trustees, 75-4420
  - first trustees, election, 75-4416
  - interest in contracts prohibited to trustees, 75-4422
  - meetings of board, 75-4421
  - mileage allowance for trustees, 75-4421
  - oath of office of trustees, 75-4419
  - organization and officers of board, 75-4419
  - quorum for transaction of business, 75-4419
  - seal of board, 75-4419
  - vacancies on board, filling, 75-4419
- tuition charges, determination and approval, 75-4423
- Control and supervision vested in state board of education, 75-107, 75-301
  - community colleges, 75-4414
- Entomologist, appointment and qualifications, 82-804.1
- Executive boards of institutions, composition and duties, 75-302
  - officers of boards, 75-303
- Executive secretary of university of Montana, 75-107
- Expenditures of institution, control by state board, 75-310
- Experimental station at Bozeman, federal funds and income received by, 75-706
- Experimental station at Corvallis
  - authority to accept donations of land, 75-710.3
  - change of name, 75-710.1
  - donations of money, implements, livestock, authority to receive, 75-710.4
  - function, 75-710.2
- Faculty and president of state institutions, employment by state board of education, 75-107
- Grain inspection laboratory
  - expenditures of laboratory, report, 75-811
  - fees charged for testing, 75-807
  - disposition of fees, 75-811
- Institutional programs, use of university facilities and personnel in, 80-1405
- Junior colleges subject to supervision by state board, 75-4414, 75-4429
  - conversion to community college district, 75-4429
- Juvenile facilities of department of institutions, university aid to, 80-2213
- Law enforcement academy
  - advisory board
    - composition, 75-5205
    - duties and powers, 75-5206
    - term of members, 75-5205
  - establishment, 75-5203
  - expenditure of funds for attendance of officers, lawful, 75-5208
  - officers in attendance at academy not to suffer loss of salary, vacation, seniority or other rights, 75-5207
  - persons eligible for admission, 75-5204
  - purpose of establishing, 75-5202
  - short title, 75-5201
- Montana university system, units constituting, 75-401
  - building construction, authority of regents and governor, 82-3316
  - construction to be supervised by controller, 82-3317
  - names of units, 75-402
  - retired teachers, employment, 75-2707



## INDEX

References are to Title and Section numbers

### COLLEGES AND UNIVERSITIES (Continued)

- Research and development programs, university system participation, 75-313
  - powers of educational units in conducting programs, 75-314
- Residence of students, determination for tuition and fee purposes
  - appeal from adverse decision on residency, 75-506.7
  - armed forces, requirements for acquisition of domicile, 75-506.4
  - definition of terms, 75-506.3
  - income tax payment as evidence of intent to change domicile, 75-506.5
  - intent of act, 75-506.2
  - intent required to change domicile, 75-506.5
  - married woman's domicile, 75-506.4
  - minor's domicile follows that of parents, 75-506.4
    - change of domicile by parents required for change by minor, 75-506.6
  - period of residence required to establish change in classification, 75-506.6
  - written evidence of intent filed with university, 75-506.5
- Revenue-producing facilities at university of Montana
  - borrowing powers of regents, 75-218
    - state not to be charged with obligations, 75-219
  - construction to be supervised by controller, 82-3317
  - powers of regents in general, 75-216
  - previous contracts unimpaired, 75-222, 75-223
  - previously authorized bonds unaffected by repeal, 75-223
  - state funds not to be obligated or used, 75-221
  - title to real estate and improvements, 75-217
  - units of university as units for financing, 75-220
- University of Montana redesignated as university system, 75-401—See Montana university system, above
- Wool laboratory, moneys received by, 75-723

### COLUMBIA INTERSTATE COMPACT

- Commissioners representing Montana, appointment and terms, 89-3202
  - compensation and reimbursement of commissioners, 89-3204
- Cooperation by state officers, 89-3205
- Information furnished by state officers, 89-3205
- Liberal construction of compact, 89-3206
- Notice to president and other governors of ratification, 89-3207
- Powers granted to commission, 89-3203
- Ratification, 89-3201
- Supplemental nature of powers, 89-3206
- Text of compact, 89-3201

### COMMERCIAL PAPER

- Acceleration of performance, good faith required in exercising option, 87A-1-208
- Acceptance of instrument
  - banks' power to accept, 5-1001
  - certification of check as acceptance, 87A-3-411
  - date of acceptance of sight draft, 87A-3-410
  - definition, 87A-3-410
  - drawee's liability dependent on acceptance, 87A-3-409
  - engagements of acceptor with respect to payment of instrument, 87A-3-413
  - finality of acceptance, 87A-3-418
  - form of acceptance, 87A-3-410
  - time allowed for acceptance following presentment, 87A-3-506
  - variation of draft in acceptance, rights of holder, 87A-3-412
- Accommodation party, rights and liabilities, 87A-3-415
- Accrual of causes of action on commercial paper, 87A-3-122
- Agent, effect of instrument payable to, 87A-3-117
- Alteration of instrument
  - discharge of parties by alteration, 87A-3-407
  - material alteration defined, 87A-3-407
  - negligence contributing to alteration, unavailability of defense, 87A-3-406
  - unauthorized completion treated as material alteration, 87A-3-115
- Alternative payees, effect of instruments, 87A-3-116
- Ambiguous terms in instrument, construction, 87A-3-118

## INDEX

References are to Title and Section numbers

### COMMERCIAL PAPER (Continued)

- Assignment of funds not made by check or draft, 87A-3-409
- Bank collections and deposits, extent to which subject to chapter, 87A-4-102
- Bank, effect of instrument payable at, 87A-3-121
- Bank, effect of instrument payable through, 87A-3-120
- Banks' power to accept drafts, 5-1001
- Bearer instruments defined, 87A-3-111
- Burden of proof as to signature, defenses and due course, 87A-3-307
- Certification of check, effect, 87A-3-411
- Citation of Uniform Commercial Code chapter, 87A-3-101
- Consideration, want or failure as defense, 87A-3-408
- Conversion of instrument by refusal to pay, accept or return, 87A-3-419
- Course of dealing between parties, application, 87A-1-205
- Dates on instrument presumed correct, 87A-3-114
- Definition of terms, 87A-3-102
  - "bill of exchange," 87A-3-104
  - "certificate of deposit," 87A-3-104
  - "check," 87A-3-104
  - "draft," 87A-3-104
  - general definitions in Uniform Commercial Code, 87A-1-201
  - index of definitions, 87A-3-102
  - negotiable instrument, 87A-3-104
  - "note," 87A-3-104
- Demand instruments, instruments included, 87A-3-108
- Description of payee in instrument, effect, 87A-3-117
- Destroyed instrument, action on, 87A-3-804
- Discharge of instrument
  - holder's right to discharge, 87A-3-301
  - sets of drafts, discharge by payment of any part, 87A-3-801
- Discharge of parties, 87A-3-601
  - acceptance varying terms of draft, discharge by holder assenting to, 87A-3-412
  - agreement with another party effecting discharge, 87A-3-601
  - alteration of instrument discharging parties, 87A-3-407
  - cancellation of endorsement as discharge, 87A-3-605
  - delay in presentment, notice of dishonor or protest discharging parties, 87A-3-502
  - impairment of collateral effecting discharge, 87A-3-606
  - impairment of recourse effecting discharge, 87A-3-606
  - mutilation of signature effecting discharge, 87A-3-605
  - notice of discharge required against holder in due course, 87A-3-602
  - payment to holder effecting discharge, 87A-3-603
  - reacquisition by prior party discharging, 87A-3-601
  - readiness to pay as tender effecting discharge, 87A-3-604
  - release of party as discharge of intervening party, 87A-3-606
  - renunciation of rights by holder effecting discharge, 87A-3-605
  - satisfaction to holder effecting discharge, 87A-3-603
  - surrender of instrument effecting discharge, 87A-3-605
  - suspension of enforcement rights effecting discharge, 87A-3-606
  - tender of payment, extent of discharge by, 87A-3-604
  - underlying obligation discharged by discharge of instrument, 87A-3-802
- Dishonor of instrument
  - action permitted on instrument or underlying obligation, 87A-3-802
  - acts constituting dishonor, 87A-3-507
  - bank making presentment by notice, dishonor following, 87A-4-210
  - evidence of dishonor, 87A-3-510
  - notice of dishonor required to charge parties on instrument, 87A-3-501
    - delay in notice, effect on liabilities of parties, 87A-3-502
    - evidence of notice, 87A-3-510
    - excuses for delay or failure to give notice, 87A-3-511
    - manner of giving notice, 87A-3-508
    - parties benefiting from notice, 87A-3-508
    - persons to whom notice given, 87A-3-508
    - time allowed for notice, 87A-3-508
    - waiver of notice, 87A-3-511
  - protest of dishonor
    - contents of protest, 87A-3-509

## INDEX

References are to Title and Section numbers

### COMMERCIAL PAPER (Continued)

#### Dishonor of instrument (Continued)

##### protest of dishonor (Continued)

- delay in protest, effect on liabilities of parties, 87A-3-502
- excuses for delay or failure to make protest, 87A-3-511
- notice of protest, construction, 93-401-22
- permitted on dishonor of any instrument, 87A-3-501
- required to charge parties on certain instruments, 87A-3-501
- time allowed for protest, 87A-3-509
- waiver of protest, 87A-3-511

##### rights of holder on dishonor, 87A-3-507

##### wrongful dishonor, bank liable for damages to customer, 87A-4-402

#### Drawer's engagements with respect to payment of instrument, 87A-3-413

#### Endorsement of instrument

##### ambiguous signature construed as endorsement, 87A-3-402

##### blank endorsement, effect, 87A-3-204

##### cancellation of endorsement by prior party reacquiring instrument, 87A-3-208

##### depository bank supplying endorsement on behalf of customer, 87A-4-205

##### engagements of endorser enumerated, 87A-3-414

##### forged signature, when effective, 87A-3-405

##### name of payee misspelled or wrong, form of endorsement required, 87A-3-203

##### negotiation, endorsement required for, 87A-3-202

##### order of liability of endorser, 87A-3-414

##### paper on which endorsement written, 87A-3-202

##### partial assignment, endorsement operating as, 87A-3-202

##### "pay any bank" endorsement, effect, 87A-4-201

##### restrictive endorsement

###### effect of restrictions, 87A-3-206

###### intermediary bank not bound by restrictions, 87A-4-205

###### payor bank not bound by restrictions, 87A-4-205

###### terms creating restriction, 87A-3-205

##### special endorsement, effect, 87A-3-204

##### transferee's right to require endorsement, 87A-3-201

#### Exemptions from execution, waiver in unsecured note not enforceable, 93-5813.1

#### Extension terms in instrument, construction, 87A-3-118

#### Fiduciary, effect of instrument payable to, 87A-3-117

#### Foreign currency as medium of payment, 87A-3-107

#### Good faith required, 87A-1-203

#### Guarantor of payment, rights and liabilities, 87A-3-416

#### Holder of instrument

##### bulk transaction preventing holding in due course, 87A-3-302

##### burden of proof as to holding in due course, 87A-3-307

##### claims available against holder, 87A-3-305

##### consideration, want or failure as defense against holder, 87A-3-408

##### defenses available against holder in due course, 87A-3-305

##### defenses available against holder not in due course, 87A-3-306

##### discharge ineffective without notice against holder in due course, 87A-3-602

##### discharge of instrument, holder's right, 87A-3-301

##### due course holder, requirements, 87A-3-302

##### enforcement of payment, holder's right, 87A-3-301

##### judicial sale preventing holding in due course, 87A-3-302

##### knowledge preventing holding in due course, 87A-3-304

##### legal process to obtain instrument preventing holding in due course, 87A-3-302

##### negotiation of instrument, holder's right, 87A-3-301

##### nonnegotiable instrument not subject to holding in due course, 87A-3-805

##### notice preventing holding in due course, 87A-3-304

##### sets of drafts, taker of any part as holder in due course, 87A-3-801

##### transfer, holder's power to, 87A-3-301

##### value given by holder to support holding in due course, 87A-3-303

###### bank with security interest as holder in due course, 87A-4-209

#### Incomplete instrument unenforceable, 87A-3-115

#### Interest on obligation

##### rate payable in absence of specific rate, 87A-3-118

##### time of commencement of interest in absence of provision, 87A-3-122

#### International sight draft, action permitted drawee bank, 87A-3-701



## INDEX

References are to Title and Section numbers

### COMMERCIAL PAPER (Continued)

- Investment Securities chapter governing where applicable, 87A-8-102
- Joint liability of parties on ambiguous terms in instrument, 87A-3-118
- Joint payees, effect of instrument, 87A-3-116
- Knowledge of purchaser preventing holding in due course, 87A-3-304
- Letter of advice of international sight draft, actions permitted drawee bank, 87A-3-701
- Limitation of actions, time of accrual of action, 87A-3-122
- Litigation on instrument, notice to third party liable, 87A-3-803
- Lost instrument, action on, 87A-3-804
- Maker's engagements with respect to payment of instrument, 87A-3-413
- Negligence contributing to alteration or unauthorized signature, unavailability of defense, 87A-3-406
- Negotiability, requirements for, 87A-3-104
  - bearer instruments, 87A-3-111
  - collateral statements not affecting negotiability, 87A-3-112
  - date on instrument, effect on negotiability, 87A-3-114
  - definite time of payment, terms consistent with, 87A-3-109
  - money as medium of payment, 87A-3-107
  - mortgage securing note, effect on negotiability, 93-6010
  - order of designated person, instruments payable to, 87A-3-110
  - seal not affecting negotiability, 87A-3-113
  - separate agreement, effect on negotiability, 87A-3-119
  - sum certain, terms consistent with, 87A-3-106
  - unconditional promise or order, permissible terms, 87A-3-105
- Negotiation of instrument
  - bearer instrument negotiated by delivery, 87A-3-202
  - breach of duty in negotiation, effect, 87A-3-207
  - corporation exceeding powers, effect of negotiation by, 87A-3-207
  - duress, effect of negotiation obtained by, 87A-3-207
  - endorsement, when required for negotiation, 87A-3-202
  - fraud, effect of negotiation obtained by, 87A-3-207
  - holder's right to negotiate, 87A-3-301
  - illegal transaction, effect of negotiation in, 87A-3-207
  - infant, effect of negotiation by, 87A-3-207
  - mistake, effect of negotiation obtained by, 87A-3-207
  - reacquisition by prior party, right to cancel intervening endorsements, 87A-3-208
  - rescindable negotiation, effect, 87A-3-207
  - warranties of negotiator, 87A-3-417
    - bank, items negotiated through, 87A-4-207
- Nonnegotiable instruments, application of chapter to, 87A-3-104, 87A-3-805
- Notice to purchaser preventing holding in due course, 87A-3-304
- Payment of instrument
  - finality of payment, 87A-3-418
  - holder's right to enforce payment, 87A-3-301
  - readiness to pay as tender of payment, 87A-3-604
  - tender of payment, discharge effected by, 87A-3-604
  - time allowed for payment following presentment, 87A-3-506
- Presentment for payment or acceptance required to charge parties to instrument, 87A-3-501
  - bank, instrument accepted or payable at, 87A-3-504
  - bank making presentment by notice to party to accept or pay, 87A-4-210
  - conversion by refusal to pay, accept or return instrument, 87A-3-419
  - delay in presentment, effect on liabilities of parties, 87A-3-502
  - excuses for delay for failure to make presentment, 87A-3-511
  - exhibition of instrument required, 87A-3-505
  - identification and evidence of authority of person making presentment required, 87A-3-505
  - manner of making presentment, 87A-3-504
  - person to whom presentment made, 87A-3-504
  - place of making presentment, 87A-3-504, 87A-3-505
  - receipt for payment required, 87A-3-505
  - re-presentment after dishonor, terms permitting, 87A-3-507
  - surrender required on full payment, 87A-3-505
  - time allowed for presentment, 87A-3-503
  - waiver of presentment, 87A-3-511

## INDEX

References are to Title and Section numbers

### COMMERCIAL PAPER (Continued)

- Presentment for payment or acceptance required (Continued)
  - warranties of person presenting, 87A-3-417
  - bank, items presented through, 87A-4-207
- Protest of dishonor—See Dishonor of instrument, above
- Reservation of rights by party while performing or accepting performance, 87A-1-207
- Sale of goods, payment by check as conditional payment, 87A-2-511
- Scope of Uniform Commercial Code chapter, 87A-3-103
- Security interest in instrument, means of perfection, 87A-9-304
  - possession taken by secured party, 87A-9-305
  - transfer of security interest, rights vested, 87A-3-201
- Separate agreements affecting terms of instrument, 87A-3-119
- Sets of drafts, rights and liabilities of parties on, 87A-3-801
- Several liability of parties on ambiguous terms in instrument, 87A-3-118
- Short title of Uniform Commercial Code chapter, 87A-3-101
- Signature of instrument
  - agent's signature, 87A-3-403
  - ambiguous signature, endorsement presumed, 87A-3-402
  - assumed name as signature, 87A-3-401
  - burden of proof as to signature, 87A-3-307
  - forged signature, when effective, 87A-3-405
  - fraudulently procured issuance of instrument, signature to, 87A-3-405
  - mark in lieu of written signature, 87A-3-401
  - negligence contributing to unauthorized signature, unavailability of defense, 87A-3-406
  - pleadings as to signatures, 87A-3-307
  - representative's signature, 87A-3-403
  - required for liability on instrument, 87A-3-401
  - trade name as signature, 87A-3-401
  - unauthorized signature, effect, 87A-3-404
- State of frauds applicable to sale of personal property other than goods and securities, 87A-1-206
- Stolen instrument, action on, 87A-3-804
- Subordination of chapter to other chapters of Uniform Commercial Code, 87A-3-103
- Third party liable on instrument, notice of litigation, 87A-3-803
- Time allowed for required actions, 87A-1-204
- Transfer of instrument
  - endorsement, transferee's right to enforce, 87A-3-201
  - holder's right to transfer, 87A-3-301
  - nonnegotiable instrument, application of chapter to, 87A-3-805
  - reacquisition by prior party, right to cancel intervening endorsements, 87A-3-208
  - rights vested by transfer, 87A-3-201
  - security interest transferred, rights vested in transferee, 87A-3-201
  - warranties of transferor, 87A-3-417
    - bank, items transferred through, 87A-4-207
- Underlying obligation, discharge or suspension by taking of instrument in payment, 87A-3-802
- Usage of trade, application, 87A-1-205
- Waiver of statutory exemption in unsecured note not enforceable, 93-5813.1

### COMMISSION ON PROBLEMS OF AGING

- Appointive members, qualifications, appointment and terms, 82-3502
- Creation of commission, 82-3501
- Functions of commission, 82-3504
- Gifts and grants, acceptance and use, 82-3505
- Meetings of commission, quorum, 82-3503
- Members of commission, 82-3502
- Officers of commission, 82-3503

### COMMUNICABLE DISEASES

- Definition, 69-4102
- Emergency action by executive officer of state department, 69-4113
- Food service establishments, diseased person may not work in or handle food, 27-619
- Jail prisoners, removal to hospital, 69-4516
- Quarantine by state department, penalty for violation, 69-4112
  - local regulation, violation, 69-4517

## INDEX

References are to Title and Section numbers

### COMMUNICABLE DISEASES (Continued)

Reports by physicians of cases treated, 69-4514  
Smallpox vaccination required for school attendance, 69-4515  
Tuberculosis control, 69-4301 to 69-4317—See TUBERCULOSIS  
Venereal disease, 69-4601 to 69-4617—See VENEREAL DISEASE

### COMMUNICATIONS SYSTEM FOR LAW ENFORCEMENT

See LAW ENFORCEMENT TELETYPEWRITER COMMUNICATIONS,  
82-3901 to 82-3906

### COMPLAINT

Commencement of action by filing of complaint, M. R. Civ. P., Rule 3  
Criminal cases, charging offense, 95-1501 to 95-1506—See CRIMINAL PRO-  
CEDURE, Complaint  
Forms suggested by rules, M. R. Civ. P., Appendix of Forms, Forms 2 to 14  
Joinder of claims and remedies, M. R. Civ. P., Rule 18  
Justices' courts, permissible pleadings, 93-6802.1  
Service with summons, M. R. Civ. P., Rule 4D(2)

### CONDITIONAL SALES

See SECURED TRANSACTIONS, 87A-9-101 to 87A-9-507

Definition of term, 19-103

### CONFESSIONS

Criminal cases, motions to produce or suppress confession or admission, 95-1804,  
95-1805

### CONFLICT OF LAWS

Foreign law, reasonable written notice of intention to raise issue concerning law of  
foreign country necessary, M. R. Civ. P., Rule 44.1

### CONGRESS

Residence required for election or appointment to Congress, 23-4404

### CONSIDERATION

Failure as affirmative defense, M. R. Civ. P., Rule 8(c)

### CONSTABLES

Fees enumerated, 25-309  
Fish and game laws, enforcement by constables, 26-114

### CONSTITUTIONAL AMENDMENTS

Apportionment of legislative assembly, VI, 2 and 3  
Attorney general's summary of proposed amendments for placement on ballot, 37-104.1  
County attorney, extension of term of office, VIII, 19  
Limitation on indebtedness of city, town, township, school district or high school  
district, XIII, 6  
War emergency, continuity of state and local governments, powers of legislature, V, 46

### CONSUMER LOAN ACT

Advertising, limitations on, 47-219  
Annual examination of licensee, 47-216  
Annual report  
    contents, 47-218  
    date required, 47-218  
Appeals from order of commissioner, 47-225  
Change of place of business, 47-206  
"Commissioner" defined, 47-202  
Confessions of judgment prohibited, 47-213  
Consumer loan commissioner  
    access to records, power, 47-226  
    annual examination of licensee, 47-216  
    appeals from, 47-225  
    bank examiner designated, 47-203



## INDEX

References are to Title and Section numbers

### CONSUMER LOAN ACT (Continued)

- Consumer loan commissioner (Continued)
  - cease and desist orders, 47-227
  - investigative powers, 47-215
  - office created, 47-203
  - powers and duties vested in, 47-203
- "Consumer type loan business" defined, 47-202
- Contents of annual report required of licensee, 47-218
- Contract or statement of contents
  - copy to be furnished borrower, 47-212
  - required contents, 47-212
- Contracts of loan violating act, effect, 47-204
- Definitions, 47-202
- Exemptions from act, 47-204
- Fee for annual examination of licensee, 47-216
- First installment payment, date for, 47-211
- Injunctions, power, 47-227
- Installment payments, time period for, 47-211
- Instruments containing blanks prohibited, exception, 47-213
- Insurance required of borrower, restrictions and limitations on, 47-214
- Interest charged, maximum, 47-204
- Investigations, 47-215
- License
  - definition, 47-202
  - denial, 47-207
  - fee, 47-206
  - fee for annual examination of licensee, 47-216
  - fee for renewal, 47-209
  - issuance, 47-207
  - liability of licensee not affected by surrender of license, 47-221
  - license year, 47-206
  - notifying applicant of denial of license, 47-207
  - operating without, penalty, 47-228
  - pre-existing lawful contracts not affected by surrender, revocation or expiration of license, 47-222
  - reinstatement, 47-224
  - renewal, 47-209
  - required, 47-206
  - surrender of license by licensee, 47-221
  - suspension or revocation
    - hearing, 47-223
    - notice, 47-223
    - reinstatement, when, 47-224
- "Licensee" defined, 47-202
- Loans in excess of \$1,000 by licensee prohibited, 47-205
- Penalties for violations of act, 47-228
- Period of time licensee required to preserve records, 47-217
- "Person" defined, 47-202
- Place of business
  - change, effect on license, 47-206
  - conduct of other business in same office, 47-208
  - license required for, 47-206
- Rates and charges
  - additional charge, default or extension agreement, 47-210
  - excess charges, effect, 47-210
  - maximum rate of charge, 47-210
  - penalty for violation, 47-228
  - permissible rates, 47-210
  - recording fees, 47-210
  - refunds, 47-210
- Receipt, licensee required to give, 47-212
- Receivers, appointment for licensees, 47-227
- Records, access of commissioner to, 47-226
- Records required of licensee, 47-217
- Repayment of loan in full, duty of licensee upon, 47-212
- Rules and regulations, 47-203

## INDEX

References are to Title and Section numbers

### CONSUMER LOAN ACT (Continued)

- Scope of act, 47-204
- Secured transactions, application of chapter to, 87A-9-203
- Short title, 47-201
- Time period for repayment, limitations on, 47-211
- Wage assignments, 47-220

### CONTAGIOUS DISEASES

See COMMUNICABLE DISEASES

### CONTEMPT OF COURT

- Habeas corpus, refusal to obey writ, 95-2706
- Judgment or order, disobedience, M. R. Civ. P., Rule 70
- Subpoena, failure to obey, M. R. Civ. P., Rule 45(f)

### CONTINUITY OF GOVERNMENT

- Post-attack resource management, 77-1501 to 77-1508—See WAR, Resource management
- Post-enemy-attack continuity in government, V, 46; 82-3801 to 82-3809—See WAR, Continuity in government

### CONTRACTS

- Actions against state, law not modified by Uniform Commercial Code, 87A-10-103
- Assignment of contract rights, 87A-9-101 to 87A-9-507—See SECURED TRANSACTIONS
- Capacity to contract
  - education, minors' capacity to borrow for, 64-106.1
  - Uniform Commercial Code supplemented by general principles, 87A-1-103
- Statute of frauds, 13-606—See STATUTE OF FRAUDS

### CONTRIBUTORY NEGLIGENCE

- Affirmative defense, M. R. Civ. P., Rule 8(c)

### COOPERATIVE ASSOCIATIONS

- Amendment of articles, 14-204
- Articles of incorporation, filing, 14-201
- Certificate of incorporation, issuance, 14-204
- Rules of civil procedure, application to special proceedings, M. R. Civ. P., Rule 81(a), Table A
- Unclaimed distributions, when presumed abandoned, 67-2205—See also PROPERTY, Unclaimed property

### COOPERATIVE MARKETING ASSOCIATIONS

- Fees for filing of articles and issuance of certificate, 14-422

### CO-ORDINATE SYSTEM

- Adoption of Coast and Geodetic Survey system, 67-2011
- Documents, maps and reports, use of co-ordinates in, 67-2017
- Interzonal tracts, description, 67-2014
- Proximity to triangulation or traverse station required for recording of description, 67-2016
- Public land surveys prevail over co-ordinate system, 67-2018
- Purchasers and mortgagees not required to rely on co-ordinate system, 67-2019
- Technical description of system and zones, 67-2015
- Triangulation and traverse stations, incorporation into system, 67-2015
- X- and y-co-ordinates, description and use, 67-2013
- Zones, division of state into, 67-2011
  - designation of zonal systems, 67-2012
  - technical description of zones, 67-2015

### CORAM NOBIS

- Post-conviction hearing, 95-2601 to 95-2608—See CRIMINAL PROCEDURE, Post-conviction hearing

## INDEX

References are to Title and Section numbers

### CORONER

See COUNTY CORONER, 95-801 to 95-814

### CORPORATIONS

Business Corporation Act, 15-2201 to 15-22-140—See BUSINESS CORPORATION ACT

Criminal procedure, offenses committed by corporations, issuance of summons, 95-615

Development Credit Corporation Act, 15-2601 to 15-2618—See DEVELOPMENT CREDIT CORPORATION ACT

Fees payable to secretary of state for filing and issuance of papers, 25-102

Insurance holding companies act, 40-5501 to 40-5508—See INSURANCE, Holding companies act

License tax—See TAXATION, Corporation license tax

Nonprofit corporations, 15-2301 to 15-2397—See NONPROFIT CORPORATION ACT

Professional corporations, 15-2101 to 15-2116—See PROFESSIONAL SERVICE CORPORATIONS

Religious Corporation Sole Act, 15-2401 to 15-2402—See RELIGIOUS CORPORATION SOLE ACT

Rules of civil procedure, application to special proceedings, M. R. Civ. P., Rule 81(a), Table A

Securities registration, 15-2001 to 15-2025—See SECURITIES REGISTRATION

Service of process on corporation, M. R. Civ. P., Rule 4D(2)

Shareholders' derivative actions, allegations required, M. R. Civ. P., Rule 23(b)

Stock, issuance, transfer, and registration, 87A-8-101 to 87A-8-406—See INVESTMENT SECURITIES

fiduciary transfers, 15-652 to 15-662—See INVESTMENT SECURITIES, Fiduciary transfers

Unclaimed stock or distributions, when presumed abandoned, 67-2205—See also PROPERTY, Unclaimed property

### COSMETICS

See FOOD AND DRUGS, Food, Drug and Cosmetic Act, 27-701 to 27-723

### COSMETOLOGY

Compensation of examining board members, 66-809

Fees payable by licensees and applicants, 66-815

Injunctions, 66-817

Licenses to teach, renewal requirements, 66-816

Moneys received by examining board, deposit and use, 66-809

### COSTS

Judgment to provide for costs, M. R. Civ. P., Rule 54(d)

Offer of judgment before trial, effect on costs, M. R. Civ. P., Rule 68

Remencement of previously dismissed action, M. R. Civ. P., Rule 41(d)

### COUNTERCLAIM

Addition of parties, M. R. Civ. P., Rule 13(h)

Assignee bringing action, claims available against, 93-3403

Compulsory counterclaim, M. R. Civ. P., Rule 13(a)

Dismissal of counterclaim, M. R. Civ. P., Rule 41(c)

Exceeding opposing claim permitted, M. R. Civ. P., Rule 13(c)

Joinder of claims and remedies, M. R. Civ. P., Rule 18

Justices' courts, permissible pleadings, 93-6802.1

Omitted counterclaim, pleading by amendment, M. R. Civ. P., Rule 13(f)

Permissive counterclaims, M. R. Civ. P., Rule 13(b)

Separate trial and judgment permitted, M. R. Civ. P., Rule 13(i)

State and public agencies, right to counterclaim against not enlarged, M. R. Civ. P., Rule 13(d)

Supplemental pleading of claim arising or acquired after original pleading, M. R. Civ. P., Rule 13(e)

Third party brought in by plaintiff, M. R. Civ. P., Rule 14(b)

Trustee bringing action, claims available against, 93-3403



## INDEX

References are to Title and Section numbers

### COUNTIES

- Airports, establishment, 1-801 to 1-803—See AERONAUTICS, City and county establishment of airports
- Ambulance service
  - establishment authorized, 69-3601
  - joint service authorized, 69-3601
  - methods of operation, 69-3602
  - previously existing service unaffected, 69-3603
- Boarding homes for aged persons
  - lease of county property for home, 16-1036
  - operation of home by county, 16-1037
  - services provided at county-operated home, 16-1038
- Bond issues
  - earnings of sinking funds investments, disposition, 16-2001
  - elections on issuance, 16-2026, 16-2028
  - flood control costs, bonds issued to pay, 89-3312
  - investment of sinking funds, 16-2001, 16-2044
  - limitation on amount of bond issues, 16-2010
  - purposes for which issues authorized, 16-2008
  - repurchase of bonds from sinking fund moneys, 16-2044
  - rescission of authority for issue, 16-2028
  - resolution for issuance, 16-2028
  - road and bridge bonds, 32-3801 to 32-3806—See HIGHWAYS, BRIDGES AND FERRIES, County bonds
  - types of bonds permitted, 16-2012
- Bonds of officers, 6-203 to 6-209—See BONDS AND UNDERTAKINGS
- Budgets
  - adoption of budget, 16-1904
  - emergency expenditures, provision for, 16-1907
  - tax levy, fixing, 16-1904
- City and county consolidation—See CITY AND COUNTY CONSOLIDATION
- City-county building, acquisition or construction authorized, 11-4201
  - bonding authority undiminished, 11-4203
  - contracts between city and county, 11-4202
- Commission for management of civic centers, youth centers, museums, parks, hospitals, etc., 16-1008A
- County buildings and improvements, erection and management, 16-1008A
- County hospital, 16-1008A
  - joint hospitals authorized, 16-1040
  - definition of terms, 16-1039
  - terms of agreement, 16-1041
- County water districts
  - collection of water tax, 16-4528
  - corporation voting at election, 16-4508
  - laws governing elections, 16-4508
  - levy of water tax, 16-4528
  - notice of tax assessment, 16-4527
  - persons owning real property within district but residing outside, authority for voting, 16-4508
  - protest against tax assessment, 16-4527
  - publication of notice of election, 16-4520
  - qualified electors, 16-4520
  - revenues as inadequate to pay bonded debt, assessment of taxes, 16-4527
  - water taxes, 16-4527
- Curfews for minors, 16-1182 to 16-1184
- Deposit of funds by treasurer, 16-2618
- Disaster emergency tax, city-county
  - board of commissioners meeting, 11-4303
  - definitions, 11-4301
  - determination of disaster, resolution of disaster committee, 11-4302
  - levy of tax to cover expenses, 11-4305
  - resolutions stating emergency, 11-4304
  - surplus held in separate fund, 11-4306
- Employees, hours of work of salaried personnel, 59-510(2)
- Examination by state examiner, fee, 5-904

## INDEX

References are to Title and Section numbers

### COUNTIES (Continued)

- Federal funds received under flood control act, use, 79-2101, 79-2102
- Flood control, 89-3301 to 89-3313—See FLOOD CONTROL AND WATER CONSERVATION
- Group insurance for officers and employees, 11-1024
- Health, board of, 69-4501 to 69-4509—See HEALTH, LOCAL BOARDS OF
- Hospitals constructed by joint action of two or more counties, 69-5312
- Improvement districts for road construction, 32-3101 to 32-3131—See HIGHWAYS, BRIDGES AND FERRIES, Local improvement districts
- Indemnity insurance premiums, payment from county funds, 16-1001
- Industrial development projects, 11-4101 to 11-4110—See INDUSTRIAL DEVELOPMENT
- Interlocal co-operation, 11-4401 to 11-4416; 16-4901 to 16-4904—See INTERLOCAL CO-OPERATION
- Joint county youth guidance centers, 16-1008B
- Leases of county property, 16-1030
- License proceeds, disposition, 84-2708
- Mineral reservations in conveyance of property, validation, 16-1122.1
- Motor vehicle license fund, sources, disposition and use, 53-122
- Nursing home for aged persons
  - joint institutions authorized, 16-1040
  - definition of terms, 16-1039
  - terms of contract between counties, 16-1041
  - lease of county property for home, 16-1036
  - operation of home by county, 16-1037
  - services provided at county-operated home, 16-1038
- Open meetings of public agencies
  - legislative intent, 82-3401
  - meetings to be open, exceptions, 82-3402
  - minutes to be available for public inspection, 82-3403
- Photostatic or mechanical processes for records—See RECORDING
- Planning and zoning—See PLANNING AND ZONING
- Printing, County Printing Commission Act. 16-1225 to 16-1233
  - contract for county printing, duty of county commissioners, 16-1230
  - competitive bids may be allowed, 16-1232
  - contractor's bond, 16-1231
  - letting of contracts at less than maximum prices, 16-1232
  - subletting contract, 16-1231
  - county fairs and expositions, exemption from act, 16-1233
  - county printing commission, establishment of, 16-1227
    - annual meeting, 16-1227
    - compensation of members, 16-1228
    - members appointed by governor, terms of office, 16-1227
    - powers and duties of commission, 16-1226, 16-1229
  - purpose of act, 16-1226
  - rates, power and duty of county printing commission to set maximum prices, 16-1226
  - short title, 16-1225
- Property, prior dispositions validated, 16-1510 to 16-1512
- Property transactions with cities or towns, 16-1007.1, 16-1009.1
  - cities or towns authorized to transact, 11-964.1, 11-964.2
- Public camping and recreational park, appropriations for, 62-102
- Public defender's office, authority to establish, 95-1006
- Purchases and contracts
  - advertising for bids, when required, 16-1803
  - preference to Montana bidders, 82-1924
  - federal aid projects exempt, 82-1926
  - provisions in contract for preference to Montana materials and labor, 82-1926
  - residence, definition, determination of, 82-1925, 82-1925.1
- Records, destruction after period of years, 59-516
- Road fund, allotment from state land equalization payments, 81-1120
- Road fund, use for flood control projects, 89-3308
- Royalty reservations in conveyance of property, validation, 16-1122.1
- Rural improvement districts
  - assessment for lighting systems, 16-1629
  - cancellation of record of extinguished liability account, 16-1638

## INDEX

References are to Title and Section numbers

### COUNTIES (Continued)

#### Rural improvement districts (Continued)

- districts including more than one county
- areas includable in district, 16-1605.1
- trustees to administer district
  - number of trustees, 16-1605.2
  - powers of trustee, 16-1605.4
  - terms of office of trustee, 16-1605.3
  - vacancies in office, 16-1605.3
- ditch protection devices, 16-1601(1)
- form of warrants and bonds, 16-1620
- "improvements" defined, 16-1626
- lighting systems
  - apportionment of costs, 16-1629
  - maintenance, 16-1629
- purchase contracts entered by county commissioners, 16-1607
- purchase of property authorized, 16-1601(2)
- sale of bonds and warrants, 16-1620
- "work" defined, 16-1626

#### Salaries of county officers, 25-605

establishment before election, 25-609

Service of process on counties, M. R. Civ. P., Rule 4D(2)

Special examination by state examiner, fee, 5-910

State land equalization payments, 81-1115 to 81-1121—See STATE LANDS, Equalization payments to counties

Surplus funds of county or school district, investment, 16-2050

Tax levy for county purposes, 16-1015

flood control indebtedness, levy to pay, 89-3312

Water conservation, 89-3301 to 89-3313—See FLOOD CONTROL AND WATER CONSERVATION

Weed control districts, creation of, 16-1709.1

Weed control embargo, proclamation by governor, 16-1708

finances and inspection fees, disposition, 16-1708.3

rules and regulations for enforcement prescribed by commissioner, 16-1708.1

violations of embargo, penalty, 16-1708.2

Zoning districts, 16-4701 to 16-4710—See PLANNING AND ZONING, County zoning districts

### COUNTY ASSESSOR

Salary, establishment before election, 25-609

Schools and meetings of county assessors and appraisers conducted by state board, 84-708

State land equalization payments to counties, duties, 81-1115 to 81-1121

### COUNTY ATTORNEY

Coroner's inquest, duties, 95-803

Election, qualifications, term of office, and salary, VIII, 19

Fire districts, representation, 16-3101

Health laws, enforcement by attorney, 69-4111

Labeling of paint and paint products, violations, duties, 3-1515

Salary, establishment before election, 25-609

Securities act, enforcement duties, 15-2021

### COUNTY AUDITOR

Counties in which office exists, 16-3201

Oath of office, 16-3204

### COUNTY CLERKS

Associations and organizations of clerks

memberships, payment for, 16-2926

travel expense to attend meetings, 25-508

Fees, enumeration, 25-231

Indexes to be maintained by clerks, 16-2905

Practice of law by clerk, restrictions on, 93-902

Salaries, establishment before election, 25-609

Seed lien records, filing and retention, 16-2922

destruction of records, when allowed, 16-2923



## INDEX

References are to Title and Section numbers

### COUNTY CLERKS (Continued)

Threshers' lien records, filing and retention, 16-2922  
destruction of records, when allowed, 16-2923

### COUNTY COMMISSIONERS

Cancellation of record of extinguished liability accounts, 16-1638  
Dog licensing, 16-4601 to 16-4615—See DOGS  
Erection and management of county buildings, 16-1008A  
Extra sessions, 16-910  
Fire protection in unincorporated areas  
    fire districts  
        annexation, 11-2008  
        contracts with cities, towns and private companies for service, 11-2008  
        creation, 11-2008  
        dissolution, 11-2008  
        division, 11-2008  
        tax levy for, 11-2008  
        trustees, 11-2010  
    fire insurance premium tax deposited into volunteer fireman's compensation fund, amount, 11-2030  
Garbage and ash collection  
    contractors rendering service, approval of rates by commissioners, 16-1031  
    districts, establishment by commissioners, 16-1031  
Indemnity insurance premiums, payment from county funds, 16-1001  
Leases of county property, 16-1030  
Meetings, 16-910  
Parks, donation of land to state, municipality or federal government for park, 16-1131  
Post-enemy-attack, continuity in government, V, 46; 82-3801 to 82-3809—See WAR,  
    Continuity in government  
Salaries of county officials, establishment before election, 25-609  
Tax levy for construction, maintenance and repair of public ferries, 32-1518  
Tax levy for county purposes, 16-1015

### COUNTY CORONER

Autopsies, when authorized, 95-802  
    liability of mortuary or physician limited, 95-813  
Death or stillbirth by other than natural causes, duty to make investigation, 95-801  
Deputy coroners, appointment authorized, 95-814  
Inquests  
    county attorney to request and give aid and assistance, 95-803  
    definition, 95-803  
    jurors, number summoned, jurors to be sworn, 95-803, 95-804  
    public proceedings required, 95-809  
    recording and transcribing proceedings, payment of expenses, 95-808  
    testimony of witnesses, writing required, filing, 95-508  
    verdict of jury, writing required, contents, 95-807  
    when coroner to hold inquest, 95-803  
    witnesses, subpoena of, examination, 95-805  
        compelling attendance of witness, 95-806  
        writing and filing of testimony, 95-808  
Jurisdiction of coroner, 95-812  
Laboratory facilities, provision and payment for, 95-814  
Notice to law enforcement agencies by coroner, when required, 95-801  
Property found on body, disposition of, 95-810  
Register required, contents, 95-811  
Reports to coroner, when required, 95-801  
Technical and clerical assistance, provision and payment for, 95-814

### COUNTY SURVEYOR

Plat books showing roads to be prepared by surveyor, 32-2803

### COUNTY TREASURER

Deposits of public funds, 16-2618  
Investment of public funds in government securities, 16-2618  
Salary, establishment before election, 25-609

## INDEX

References are to Title and Section numbers

### COUNTY WATER AND SEWER DISTRICTS

Consolidation of districts, petition and procedure, 16-4531  
Sewer service charges, payment of operating expenses, 16-4526  
Water and sewer rates, 16-4525

### COURTS

Arrest, officers privileged from arrest, 95-616  
Criminal procedure, definition, 95-205  
Judges' retirement system, 93-1107 to 93-1132—See JUDGES, Retirement system  
Jurisdiction of persons, M. R. Civ. P., Rules 4A, 4B

### CREDIT CARDS

Violations involving credit cards, 94-1823 to 94-1830—See CRIMINAL OFFENSES,  
Credit device violations

### CREDIT UNIONS

Accounts excluded from chapter on secured transactions, 87A-9-104

#### Articles of incorporation

approval by supervisor of credit unions required, 14-133  
certified copy as prima facie evidence of facts stated, 14-134  
contents of articles, 14-133  
fees for filing and recording, 14-155  
filing with secretary of state, 14-133  
form prepared by supervisor of credit unions, 14-136

Banks exempt from provisions of chapter, 14-157

#### Board of directors

compensation of directors prohibited, 14-141  
composition of board, 14-141  
election and terms of directors, 14-141  
powers and duties, 14-143

Bonds required of officers, 14-152

Borrowing power, 14-147

Building and loan associations exempt from provisions of act, 14-157

Bylaws, form, approval, and amendment, 14-136

Certificate of incorporation, issuance, 14-133

evidence of corporate character and capacity, 14-135  
fees for issuance, 14-155

Change in place of business, 14-154

Citation of act, 14-130

Conversion to or from federal credit union, 14-156

#### Credit committee

compensation of members prohibited, 14-141  
composition of committee, 14-141  
election and terms of members, 14-141  
powers and duties, 14-144

Definition of terms, 14-131

Destruction of records of liquidated credit union, 14-152

Dissolution of credit unions, 14-152

fee for filing certificate, 14-155

Dividends on earnings, 14-150

Evidence of corporate character and capacity, 14-135

#### Examination of books

state examiner's examination, fee, 5-910  
supervisor of credit unions, examination by, 14-132  
supervisory committee examination, 14-145

Expulsion of member, procedure, 14-151

Federal credit union, conversion to or from, 14-156

Fees assessed for examinations, 14-132

disposition of fees, 14-155  
state examiner's fee, 5-910

Fiscal year, 14-140

Incorporation of credit union, procedure, 14-133

Interest chargeable on loans, 14-146

Joint tenancy in shares, 14-139

Legislative power to amend or appeal reserved, 14-153

Liquidation by state supervisor, 14-152

## INDEX

References are to Title and Section numbers

### **CREDIT UNIONS (Continued)**

#### Loans to members

- application for loan, form, 14-144
- approval by credit committee required, 14-144
- directors and committee members, restrictions on loans to, 14-148
- interest rate chargeable, 14-146
- purposes for which authorized, 14-148
- repayment privileges of borrower, 14-148
- security required, 14-144

#### Meetings of members, 14-140

#### Membership, qualifications and restrictions, 14-139

- approval by board of directors, 14-143
- expulsion of member, 14-141
- withdrawal of member, 14-141

#### Merger of credit unions, 14-152

- fees for certificate, 14-155

#### Name of credit union, 14-133

#### Officers, appointment and duties, 14-142

- bond required by state supervisor, 14-152

#### Perpetual succession during corporate existence, 14-138

#### Powers of credit union, 14-138

#### Prior rights and duties unaffected by act, 14-158

#### Reports to supervisor of credit unions, 14-132

#### Reserves against losses, maintenance required, 14-149

#### Rules and regulations prescribed by supervisor, 14-152

#### Securities exempt from securities act, 15-2013

#### Separability of provisions of act, 14-153

#### Short title of act, 14-130

#### State supervisor's powers, 14-152

#### Supervisory committee

- audit of books, 14-145
- compensation of members prohibited, 14-141
- composition of committee, 14-141
- election and terms of members, 14-141
- powers and duties, 14-145
- suspension of members of committee, 14-145

#### Term not to be used by other persons or firms, 14-137

#### Voting by members, 14-140

#### Withdrawal of member, procedure, 14-151

### **CRIMINAL INVESTIGATOR**

#### Appointment and qualifications, 82-414

#### Creation of position within office of attorney general, 82-414

#### Definition of "investigator," 82-415

#### Files of criminal investigator, access to limited, 82-417

#### Location of office, 82-420

#### Powers and duties, 82-416

#### Retirement system, investigator and assisting personnel covered, 82-418

#### State agencies to co-operate with investigator, 82-419

### **CRIMINAL LAW STUDY**

#### Application for service on commission, 94-1001-3

#### Appointment of commission by supreme court, 94-1001-2

#### Composition of commission, 94-1001-3

#### Employment of secretary and research services by commission, 94-1001-9

#### Expenses of commission members, reimbursement, 94-1001-10

#### Officers of commission, selection, 94-1001-11

#### Procedural rules, adoption by commission, 94-1001-11

#### Proposals for changes in law

- distribution to bench and bar by commission, 94-1001-4
- hearings by supreme court on commission proposals, 94-1001-6
- legislative approval required, 94-1001-7
- submission to supreme court for approval, 94-1001-5
- supreme court, suggestions by, 94-1001-8

#### Purpose of act, 94-1001-1

#### Records of commission proceedings, 94-1001-11



## INDEX

References are to Title and Section numbers

### CRIMINAL LAW STUDY (Continued)

Removal of members from commission, 94-1001-3  
Research agencies, employment by commission, 94-1001-9  
Scope of study by commission, 94-1001-2  
Terms of office of commission members, 94-1001-3  
Vacancies on commission, filling, 94-1001-3

### CRIMINAL OFFENSES

Alcoholic beverage bottle clubs, 4-172, 4-173  
Alienation of affections, bringing or threatening litigation, 17-1206  
Bids for contracts, unlawful agreements for refunds or returns, penalty, 94-1104  
Bigamy, venue of prosecution, 95-410  
Big-game hunting violation as misdemeanor, 26-303.4  
Bounty law, fraudulent claims under, 46-1915  
Breach of promise, bringing or threatening litigation, 17-1206  
Children, offenses involving  
    abandonment or nonsupport, 94-304  
    firearms, permitting use, 94-3579  
    lewd and lascivious acts against children, 94-4106  
    violations by children, causing, permitting, or contributing to, 10-617  
Coloration of wheat, oats, rye or barley  
    required when products treated with injurious or toxic substances, 94-35-271.1  
    sale or offering for sale in violation of act, 94-35-271.2  
    violation of act requiring coloration, misdemeanor, 94-35-271.3  
Commercial tow cars improperly equipped, 32-21-161, 32-21-162  
Consumer loan act, violations, 27-228  
Corporations  
    annual report, failure to file, 15-22-125  
    signing of false documents by corporate officers or directors, 15-22-126  
County zoning regulations, violation, 16-4707  
Credit device violations  
    felony, violations deemed, 94-1829  
    knowledge of falsity or revocation implied from presentation or use, 94-1828  
    misdemeanor, violations deemed, 94-1829  
    notice of revocation of device, manner in which given, 94-1827  
    possession of false or stolen device unlawful, 94-1826  
    retention of device without authority unlawful, 94-1825  
    telephone or telegraph communications originating or terminating in state, application to, 94-1830  
    theft of credit device unlawful, 94-1825  
    unauthorized use of credit device unlawful, 94-1823  
    use of false, expired or revoked credit device unlawful, 94-1823  
Credit union, misuse of name, 14-137  
Dentistry, practice without certificate, 66-919  
Discrimination because of race, creed, color or national origin, 64-303  
Dog licensing act violations, misdemeanor, 16-4613  
Driving while license suspended or revoked, 31-155  
Electric lines, tampering with or tapping, 94-3203  
Escape from custody on interstate detainer, 94-1101-4  
Firearms, permitting use by minors, 94-3579  
Fireworks regulatory act, penalty for violation, 69-2706  
Fish illegally taken, possession or removal from state, 26-701  
Fishing violations under reciprocal privileges, 26-228  
Food, Drug and Cosmetic Act, violations of, 27-705  
Food service establishments, offenses relating to, 27-625  
    obtaining food with intent to defraud, penalty, evidence of intent, 94-1831  
Funeral directors and insurers, prohibited relations, 40-3521  
Game animals, contests based on size, 26-811  
Game illegally taken, possession or removal from state, 26-701  
Game wardens' retirement system, false claims under, 68-1423  
Grain warehousemen  
    operation without license, 3-228  
    reports, falsification or failure to file, 3-227

## INDEX

References are to Title and Section numbers

### CRIMINAL OFFENSES (Continued)

- Homicide, state criminal jurisdiction, 95-304
  - death and cause of death in different counties, venue, 95-406
- Horse racing violations, 62-508
- Hotels, obtaining accommodations with intent to defraud, penalty, evidence of intent, 94-1831
- Identification cards, false procurement, penalty, 94-2014
- Inducing engagement as advertising agency for sale of real property by misrepresentation of services, penalty, 94-1822
- Industrial insurance account in agency fund, conversion of profits from, 92-1123
- Industrial school resident, aiding in leaving school, 80-2212
- Insurance agent, misappropriation of funds by as larceny, 40-3324
- Insurance code violations, 40-2617
  - false representation in applications and claims, 40-3522
- Kidnaping, venue of prosecution, 95-411
- Labeling requirements on paint and paint products, penalty for violation, 3-1511
- Larceny, robbery, false pretenses or embezzlement, venue of offenses, 95-408
- Livestock running at large in road construction area, 32-321
- Lobbyist licensing and regulatory act, violations, 43-808
- Marriage, declaration of marriage without solemnization, violation of act concerning, 48-130.2
- Mortician's and funeral director's act, violation, 66-2717
- Motels, obtaining accommodations with intent to defraud, penalty, evidence of intent, 94-1831
- Motorboat and vessel regulatory act, penalty for violations, 69-3518
- Obscene conduct, harassment by telephone, penalty, 94-35-221.5, 94-35-221.6
- Obtaining money for property or services by false pretenses, penalty, 94-1805
- Occupational disease act, violation, penalty, 92-1340
- Optometry, practice without license, 66-1314
- Petroleum products, violations with respect to, 60-233
- Political contributions by insurers, 40-3518
- Post-attack resource management, violation of rules and regulations, 77-1508
- Poultry improvement law, violation, 3-2212
- Printing for state, obtaining from noncomplying contractor, 82-1138
- Private conversation, recording without knowledge of parties as misdemeanor, 94-35-274
  - exemptions from general prohibition, 94-35-275
- Real estate license act violations, 66-1940
- Recording of conversation without knowledge of parties as misdemeanor, 94-35-274
  - exemptions from general prohibition, 94-35-275
- Refuse disposal areas, violations with respect to, 69-4009
- Retail installment sales act, penalty for violation, 74-611
- Roadblocks established by peace officers, failure to stop, penalty, 95-618
- Schools, failure of parent, guardian or person having custody to require children to attend, penalty, 75-2901
- Sheep, removal from county without permit, 46-810
- Subdivided lands, improper sale or leasing outside state, 67-2116
- Telephone and telegraph facilities, offenses involving
  - abuse, harassment or extortion by telephone, 94-35-221.5, 94-35-221.6
  - false or unauthorized use of credit card or telephone number, 94-1823
  - felony, credit device violations deemed, 94-1829
  - fraudulent device to obtain service without intention to pay, 94-1824
  - injury to or removal of coin box or wires, 94-3211
  - interstate communication, application of credit act to, 94-1830
  - knowledge presumed from unauthorized use of credit card or telephone number, 94-1828
  - misdemeanor, credit device violations deemed, 94-1829
  - notice of revocation of credit card, manner of giving, 94-1827
  - tampering with or tapping lines, 94-3203
- Television, operation of VHF booster or VHF translator system, penalty for violations of act, 70-407

## INDEX

References are to Title and Section numbers

### CRIMINAL OFFENSES (Continued)

- Trucks, failure to display owner's name on, 53-803
- Unauthorized insurer, representing or aiding, 40-3401
- Unclaimed property, failure to report or pay over to state treasurer, 67-2225
- Uniform facsimile signatures of public officials act, violation with intent to defraud, felony, 59-1304
- Union interference with operation of sole proprietor or two man partnership retail or amusement establishment, 41-1805
- Vocational school for girls resident, aiding in leaving school, 80-2212
- Warehouse receipts, crimes involving
  - delivery of goods without obtaining possession of receipt, 88-154
  - duplicate negotiable receipt, issuance, 88-152
- Wife, abandonment or nonsupport, 94-301
- Wild turkey, taking in violation of act, misdemeanor, 26-512

### CRIMINAL PROCEDURE

- Admission, motion to produce or suppress, 95-1804, 95-1805

#### Appeals

- amicus curiae, brief of, 95-2417
- application of chapter, 95-2401
- authority of court, determination of appeal, 95-2426
- briefs
  - amicus curiae, brief of, 95-2417
  - appellant's brief, contents and arrangement, 95-2416
  - appendix, 95-2418
  - filing and service of, 95-2419
  - form, printing and binding, 95-2420
  - submission of case on briefs, court may direct argument, 95-2421
- calendar, placing causes upon calendar, setting for argument, 95-2424
- death sentence, stay of execution, 95-2406
- defendant, appeal from conviction and certain orders after judgment, scope of review, 95-2404
- determination on appeal, authority of reviewing court, 95-2426
- dismissal for failure to cause timely transmission or to docket appeal, 95-2410
- dismissal of appeal, effect of, 95-2411
- docket
  - docketing appeal, 95-2410
  - entry and notice of orders and judgments, 95-2422
- errors on appeal
  - jurisdictional or constitutional rights noticed, 95-2425
  - matters not affecting substantial rights disregarded, 95-2425
  - reversal for error by trial court against appellant, error must be prejudicial, 95-2412
- filing of papers, 95-2413
  - briefs, time for filing, number of copies, consequences of failure to file, 95-2419
  - petitions for rehearing, 95-2423
  - time, computation and extension of, 95-2414
- fine, stay of execution, 95-2406
- form of briefs, motions, and other papers, 95-2420
- habeas corpus, appeal from order discharging petitioner, 95-2714
- hearings, oral arguments, requirements, 95-2421
  - petition for rehearing, 95-2423
- imprisonment, defendant admitted to bail, stay of execution, 95-2406
- indigent appeals, procedure, 95-2428
- justices' courts, procedure for trial in district court, 95-2009
- mailing of copy of judgment or order and mailing of notice of date of entry, duties of clerk, 95-2422
- motions, writing required, contents, time for answer, 95-2415
  - filing with judge, 95-2413
  - form, printing and binding, 95-2420
- notice of appeal
  - contents, service, 95-2405
  - exclusive method of review, 95-2401



## INDEX

References are to Title and Section numbers

### CRIMINAL PROCEDURE (Continued)

#### Appeals (Continued)

- opinion of court, issuance of mandate, return of record and termination of jurisdiction, 95-2427
- oral argument, requirements, 95-2421
  - calendar, withdrawal of records, 95-2424
  - petitions for rehearing, 95-2423
- orders, rulings, or proceedings of trial court against respondent, review on appeal, 95-2412
- parties, appellant and respondent, 95-2405
- police courts, procedure for trial in district courts, 95-2009
  - finest for city ordinance violations, disposition of, 95-2008.1
- post-conviction hearing, 95-2601 to 95-2608—See Post-conviction hearing, below
  - appeal from order, 95-2608
- probation, effect of appeal, 95-2406
- record on appeal
  - agreed statement as record, 95-2408
  - composition of record, 95-2408
  - correction or modification of record, 95-2408
  - filing of record, 95-2410
  - indigent appeals, procedure, 95-2428
  - permission to take from clerk's office, 95-2424
  - statement of evidence or proceedings, 95-2408
  - transcript of proceedings, duties of parties, costs, 95-2408
  - transmission of record, time for, duty of appellant, duty of clerk, extension of time, 95-2409
- relief pending appeal, 95-2406
- remand of cause to trial court, return of record and termination of jurisdiction, 95-2427
- reversal of judgment, defendant discharged, 95-2430
- scope of appeal
  - defendant, appeal from conviction and certain orders after judgment, scope of review, 95-2404
  - state, appeals from certain court orders or judgments, 95-2403
- sentence, review of sentence, 95-2211, 95-2501 to 95-2504—See Sentence and judgment, review of sentence, below
- service of papers, 95-2413
  - briefs, time for, number of copies, 95-2419
  - time, computation and extension of, 95-2414
- several defendants, appeal by one authorized, 95-2429
- state, appeals from certain orders or judgments authorized, 95-2403
  - effect of appeal by state, 95-2407
- stay of execution, 95-2406
- substantive rights of parties, consideration on appeal, 95-2412
- suspension of statutory requirements authorized, 95-2402
- time, computation and extension of, 95-2414
- time for appeal, 60 days after rendition of judgment, 95-2405
- title of case not changed, 95-2405

Appearance of arrested person, duties of person who made arrest and of court, 95-901, 95-902

#### Arraignment

- answer, time allowed, 95-1607
- definition, 95-1601
- irregularity of arraignment, effect, 95-1608
- joint defendants, 95-1605
- place of arraignment, 95-1602
- presence of defendant, 95-1603, 95-1604
- procedure on arraignment, 95-1606

Arrest, 95-601 to 95-619—See ARRESTS

Bail, 95-1101 to 95-1123—See BAIL

Change of judge, 95-1709

Change of venue, 95-401, 95-1710

justices' and police courts, 95-2003

## INDEX

References are to Title and Section numbers

### CRIMINAL PROCEDURE (Continued)

Charging offense, methods of prosecution, 95-1501, 95-1502

“charge” defined, 95-203

justice and police courts, 95-2001

Close Pursuit Act, 95-619

Competency of accused

death sentence, determination of mental fitness, 95-2304, 95-2305

defense of mental disease or defect excluding responsibility

affirmative defense, notice, form of verdict and judgment on finding of  
irresponsibility, 95-503

determination of irresponsibility on basis of psychiatrist's report, judgment,  
95-507

legal effect of acquittal, commitment of defendant, release or discharge, 95-508  
requirements, 95-501

definition of “mental disease or defect,” 95-501

evidence of mental disease or defect, when admissible, 95-502

evidence, statements for purposes of examination or treatment inadmissible except  
on issue of mental condition, 95-509

examination of defendant, rights of defendant or state, form of expert testimony,  
95-505, 95-507

fitness to proceed, mental disease or defect excluding

effect of finding of unfitness, proceedings if fitness regained, 95-506  
requirements, 95-504

privilege, statements for purposes of examination or treatment inadmissible except  
on issue of mental condition, 95-509

psychiatric examination of defendant, rights of defendant or state, form of expert  
testimony, 95-505, 95-507

test for mental disease or defect excluding responsibility, 95-501

Complaint

amending charge, 95-1505

appearance of person arrested without warrant, filing complaint, 95-901

form of charge, 95-1503

joinder of offenses and of defendants, 95-1504

prior conviction, charge of, notice and procedure, 95-1506

prosecution of offense by complaint, 95-1501, 95-1502

justice and police courts, 95-2001

Confession, motion to produce or suppress, 95-1804, 95-1805

Construction of Code of Criminal Procedure, 95-102

Continuance, pretrial motion, requirements, 95-1708

Conviction—See Sentence and judgment, below

definition, 95-204

Coroner's office, 95-801 to 95-814—See COUNTY CORONER

Counsel, right to

appearance of arrested person, duty of court to inform defendant of rights, 95-902

duration of appointment of counsel, 95-1003

duty of court to inform defendant, 95-902, 95-1001

felony charge, furnishing counsel required, when, 95-1001

misdemeanor charge, furnishing counsel, when, 95-1001

payment of appointed counsel, 95-1005

post-conviction criminal action or proceeding, appointment of counsel authorized,  
95-1004

public defender's office, authority of counties to establish, 95-1006

waiver of counsel, 95-1002

Courts, definition, 95-205

Death sentence

appeals, stay of execution, 95-2406

execution of sentence, procedure, 95-2303

mental fitness of defendant, determination of, proceedings, 95-2304, 95-2305

pregnant female, proceedings, 95-2306, 95-2307

Defenses and objections raised before trial, 95-1701, 95-1702

Definitions

arraignment, 95-1601

## INDEX

References are to Title and Section numbers

### CRIMINAL PROCEDURE (Continued)

#### Definitions (Continued)

- arrest, 95-601
- charge, 95-203
- conviction, 95-204
- coroner's inquest, 95-803
- court, 95-205
- gender, masculine gender includes feminine, 95-202
- guaranteed arrest bond certificate, 95-1121
- judge, 95-206
- judgment, 95-207
- magistrate, 95-208
- meanings of words and phrases, 95-201
- mental disease or defect, 95-501
- new trial, 95-2101
- notice to appear, 95-601
- offense, 95-209
- peace officer, 95-210
- search warrant, 95-703
- sentence, 95-211
- singular term includes plural, 95-202
- summons, 95-601
- warrant of arrest, 95-601

#### Depositions, 95-1802

#### Discharge of defendant

- granting of motion to dismiss, 95-1706
- not guilty judgment, 95-2202
- reversal of judgment on appeal, 95-2430

#### Discovery, applicable rules, 95-1803

#### Dismissal of action, complaint, information, or indictment

- motion of court or application of attorney prosecuting, 95-1703
- pretrial motion, effect of determination, 95-1706

#### Disqualification of judge, requirements and procedure, 95-1709

#### Evidence

- books, documents and objects, subpoena authorized, inspection or copying by defendant, 95-1801, 95-1803
- confession or admission, motion to produce or suppress, 95-1804, 95-1805
- depositions, 95-1802
- illegally seized evidence, motion to suppress, 95-1806

#### Examination of defendant, preliminary examination, 95-1201 to 95-1204—See Preliminary examination, below

#### Examination to determine competency of accused, 95-505, 95-507

#### Execution of sentence, 95-2301 to 95-2312—See Sentence and judgment, execution of sentence, below

#### Grand jury, 95-1401 to 95-1410—See GRAND JURY

#### Guilty plea, conditions for acceptance, withdrawal

- district court, 95-1902
- justices' and police courts, 95-2004

#### Habeas corpus, 95-2701 to 95-2716—See HABEAS CORPUS

#### Indictment, 95-1401 to 95-1410—See GRAND JURY

#### Information

- amending charge, 95-1505
- application for leave to file information, requirements, 95-1301
- commencement of prosecution by information, 95-1501, 95-1502
- district court judge, information against, procedure, 95-1301
- failure of county attorney to file, duty of court, 95-1303
- form of charge, 95-1503
- joinder of offenses and of defendants, 95-1504
- prior conviction, charge of, notice and procedure, 95-1506
- time for filing by county attorney, effect of failure, 95-1302

#### Initial appearance of arrested person, duties of person who made arrest and of court, 95-901, 95-902

#### Insanity, 95-501 to 95-509—See Competency of accused, above

#### Interstate agreement on detainers, text and enactment, 94-1101-1

- cooperation of public agencies in enforcement, 94-1101-3
- coordinator of agreement, appointment and duties, 94-1101-6



## INDEX

References are to Title and Section numbers

### CRIMINAL PROCEDURE (Continued)

#### Interstate agreement on detainees (Continued)

- delivery of prisoner by institution on detainer, 94-1101-5
- district courts to function under agreement, 94-1101-2
- escape from custody on detainer, penalty, 94-1101-4

#### Joinder of offenses and of defendants in making charge, 95-1504

- appeal by one defendant authorized, 95-2429

#### Judges

- definition, 95-206
- disqualification, substitution of judge, requirements and procedure, 95-1709

#### Judgments, 95-2201 to 95-2216—See Sentence and judgment, below

- definitions, 95-207, 95-211

#### Juries and jurors

- coroner's inquest, number of jurors, jurors to be sworn, 95-803, 95-804
- district court

- admonition upon adjournment of court, 95-1913
- alternate jurors, 95-1909
- challenges, 95-1909
- examination of jurors, 95-1909
- formation of trial jury, number of drawn, 95-1905
- instructions to jury, 95-1910
- list of prospective jurors furnished, 95-1909
- number of jurors, 95-1901
- objection to jury panel, motion to discharge, 95-1908
- qualifications and exemptions, 95-1909
- retirement of jury, 95-1913
- right to jury trial, 95-1901
- separation during trial, 95-1913
- verdicts—See Verdicts, below
- view of place of offense or property, 95-1912

#### grand jury, 95-1401 to 95-1410—See GRAND JURY

- justices' courts, 95-2004 to 95-2006—See Justices' courts, below
- police courts, 95-2004 to 95-2006—See Police courts, below

#### Jurisdiction

- appeals, remand of cause and termination of jurisdiction, 95-2427
- coroner, jurisdiction of, 95-812
- district courts, 95-301
- justice of the peace courts, 95-302
- municipal courts, 95-303
- police courts, 95-303
- state criminal jurisdiction, 95-304

#### Justices' courts

- change of place of trial, 95-2003
- disqualification of judge, 95-1709
- docket required, contents, 95-2002
- guilty plea, conditions for acceptance, 95-2004
- juries and jurors
  - discharge of jury, 95-2006
  - examination of jurors, challenges, 95-2005
  - formation of trial jury, 95-2005
  - number of jurors, 95-2005
  - right to trial by jury, waiver, 95-2004
  - verdict, 95-2006
- jurisdiction of criminal cases, 95-302
  - dangerous drug act cases, no jurisdiction in, 95-302
- preliminary examination, 95-1201 to 95-1204
- prosecutions commenced by complaint, 95-2001
- sentence and judgment, execution of judgment, 95-2007, 95-2008
- trials
  - guilty plea, conditions for acceptance, 95-2004
  - issue, designation for trial, 95-2004
  - preparation for trial, time for, 95-2004
  - presence of defendant, requirements, 95-2004
  - right to jury trial, waiver, 95-2004
- verdicts
  - number of jurors required to concur, 95-2006

## INDEX

References are to Title and Section numbers

### CRIMINAL PROCEDURE (Continued)

#### Justices' courts (Continued)

##### verdicts (Continued)

poll of jury, 95-2006

return, requirements, 95-2006

several defendants, requirements, 95-2006

#### Magistrate, definition of, 95-208

Mental disease or defect of accused, 95-501 to 95-509—See Competency of accused, above

#### Motions

appeals, requirements, 95-2415

filing with judge, 95-2413

new trial, 95-2101

post-conviction hearing, time for motion, 95-2604

pretrial motions, 95-1701 to 95-1710—See Pretrial motions, below

#### New trial, definition and effect, motion for, 95-2101

appeal, authority to order new trial, 95-2426

bail, provisions for, 95-1119

Notice to appear, issuance, form, failure to appear, 95-614

#### Peace officers

arrests, 95-608—See ARRESTS, Peace officer

bail, acceptance, procedure, 95-1103, 95-1104

definition, 95-2010

#### Police courts

appeals, procedure for trial in district court, 95-2009

finances for city ordinance violations, disposition of, 95-2008.1

change of place of trial, 95-2003

docket required, contents, 95-2002

##### juries and jurors

discharge of jury, 95-2006

examination of jurors, challenges, 95-2005

formation of trial jury, 95-2005

number of jurors, 95-2005

right to trial by jury, waiver, 95-2004

verdict, 95-2006

jurisdiction of criminal cases, 95-303

prosecutions commenced by complaint, 95-2001

sentence and judgment, execution of judgment, 95-2007, 95-2008

finances for city ordinance violations tried on appeal, disposition of, 95-2008.1

##### trials

guilty plea, conditions for acceptance, 95-2004

issue, designation for trial, 95-2004

preparation for trial, time for, 95-2004

presence of defendant, requirements, 95-2004

right to jury trial, waiver, 95-2004

##### verdicts

number of jurors required to concur, 95-2006

poll of jury, 95-2006

return, requirements, 95-2006

several defendants, requirements, 95-2006

#### Post-conviction hearing

appeal from order entered on motion, 95-2608

commencement of proceedings by petition, 95-2602

contents of petition, 95-2603

grounds for petition, 95-2601

proceedings on petition, notice, proof, order, 95-2605

record required, 95-2606

successive petitions prohibited, 95-2607

time for motion, any time after conviction, 95-2604

#### Prejudice

change of place of trial, requirements and procedure, 95-1710

justice and police courts, 95-2003

substitution of judge, requirements and procedure, 95-1709

#### Preliminary examination

definition, 95-1201

## INDEX

References are to Title and Section numbers

### CRIMINAL PROCEDURE (Continued)

#### Preliminary examination (Continued)

- deposition of witness after examination, requirements, 95-1204
- exclusion and separation of witnesses, 95-1203
- proceedings at examination, 95-1202
- recognizance by witness after examination, requirements, 95-1204
- waiver of preliminary examination, defendant held to answer, 95-1202

Presentence investigations, contents, availability of report, 95-2203 to 95-2205

#### Pretrial motions

- arraignment, motions allowed in answer, 95-1607
- books, documents and objects, subpoena authorized, inspection or copying by defendant, 95-1801, 95-1803
- confession or admission, motions to produce or suppress, 95-1804, 95-1805
- continuance, requirements for motion, 95-1708
- defenses and objections raised before trial, 95-1701, 95-1702
- denial of motion, procedure, 95-1706
- depositions, 95-1802
- discovery, applicable rules, 95-1803
- dismissal of action on motion of court or application of attorney prosecuting, 95-1703
- disqualification of judge, requirements and procedure, 95-1709
- evidence illegally seized, motion to suppress, 95-1806
- granting of motion to dismiss, procedure, 95-1706
- hearing on motion, 95-1705
- jury panel, objection to, motion to discharge, 95-1908
- substitution of judge, requirements and procedure, 95-1709
- time of making motion, 95-1704
- transfer of trial, motion based on lack of jurisdiction or improper place, 95-1707

Prior conviction, charge of, notice and procedure, 95-1506

Prisoner furlough program—See PRISONS AND PRISONERS, Prisoner furlough program

Prosecution, methods of charging offense, 95-1501, 95-1502

justice and police courts, 95-2001

Public defender's office, 95-1006

Purpose of Code of Criminal Procedure, 95-102

#### Recognizance

- preliminary examination of criminal defendant, recognizance by witness after examination, 95-1204
- release authorized, duties of court, 95-1106

#### Review division of supreme court

- appointment of district court judges, 95-2501
- decisions, procedure and disposition of, 95-2503
- meetings, where held, 95-2501
- number of judges, number required for decision, 95-2501
- procedure for review, 95-2502
- scope of act, 95-2504

#### Rights of defendant

- change of place of trial, 95-1710, 95-2003
- counsel, right to, 95-1001 to 95-1006
- initial appearance of arrested person, duties of person who made arrest and of court, 95-901, 95-902
- jury trial, 95-1901, 95-2004
- substitution of judge, 95-1709

Roadblocks, arrests at, 95-618

Rules of supreme court, 95-2801 to 95-2806—See Supreme court rules, below

Scope of Code of Criminal Procedure, 95-101

Search and seizure, 95-701 to 95-708—See SEARCH AND SEIZURE

Second offense, charge of prior conviction, notice and procedure, 95-1506

#### Sentence and judgment

- board of pardons, statistical data transmitted to, 95-2210
- combination of sentences authorized, 95-2206
- commutation of prison sentence to commitment to juvenile facilities, 80-2210
- construction of chapter, liberal construction, 95-2201
- credit for incarceration prior to conviction, 95-2215
- credit for time served, 95-2214
- death sentence, execution of, 95-2303—See Death sentence, above



## INDEX

References are to Title and Section numbers

### CRIMINAL PROCEDURE (Continued)

#### Sentence and judgment (Continued)

- deferment of imposition of sentence, 95-2206
  - withdrawal of plea allowed, effect, 95-2207
- definitions, 95-207, 95-211
- entry of judgment and judgment roll, 95-2209
- execution of sentence
  - commitment of defendant, 95-2206, 95-2301
  - death sentence, 95-2303—See Death sentence, above
  - fine, execution of, 95-2302
  - justices' courts, 95-2008
  - police courts, 95-2008
  - sheriff, commitment of defendant to custody of, 95-2301
- finest for offense, imposition of, 95-2206
  - appeal, stay of execution, 95-2406
  - execution of, 95-2302
  - lien of judgment to pay fine, 95-2208
- guilty verdict, sentence and judgment within reasonable time, 95-2202
- imposition of sentence, exclusive duty of judge, 95-2212
- investigations, contents of presentence investigation, availability of report, 95-2203 to 95-2205
- justices' courts, 95-2007, 95-2008
- mental disease or defect excluding responsibility, form of verdict and judgment on finding of irresponsibility, 95-503
- merger of sentences, 95-2213
- not guilty judgment, discharge of defendant, 95-2202
- open court, judgment rendered in, 95-2202
- police courts, 95-2007, 95-2008
- post-conviction hearing, 95-2601 to 95-2608—See Post-conviction hearing, above
- presentence investigations, contents, availability of report, 95-2203 to 95-2205
- probation authorized, 95-2206
- review division of supreme court, 95-2501 to 95-2504—See Review division of supreme court, above
- review of sentence, 95-2211
- sentences enumerated, 95-2206
- separate sentences, merger of sentences, 95-2213
- stay of execution of sentence authorized, 95-2206
- Western Interstate Corrections Compact, 95-2308 to 95-2312
- work release program for prisoners, 95-2216

#### Subpoenas

- coroner's inquest, subpoena of witnesses, compelling attendance, 95-805, 95-806
- discovery, subpoena as discovery device, 95-1803
- issuance, requirements and form, 95-1801

#### Substitution of judge, requirements and procedure, 95-1709

#### Summons, definition, issuance, form and service, failure to appear, 95-601, 95-612, 95-613

#### Supreme court rules

- adoption of rules of pleading, practice and procedure, authority of court, 95-2801
- advisory committee, appointment, members, duties, 95-2801
- effective date of rules, 95-2805
- expiration date of rule-making power, 95-2805
- legislature's right to adopt rules not abridged, 95-2806
- present laws and rules, in force until modified or superseded, 95-2804
- promulgation of rules of pleading, practice and procedure, authority of court, 95-2801
- proposed rules, distribution of and hearings before adoption, 95-2803
- rights of state or a defendant, not abridged, enlarged or modified, 95-2801

#### Transfer of trial

- justice and police courts, 95-2003
- lack of jurisdiction or proper venue, 95-1707
- prejudice existing in county, 95-1710

#### Trials

- district court
  - adjournment of court, 95-1914
  - admonition to jury, 95-1913

## INDEX

References are to Title and Section numbers

### CRIMINAL PROCEDURE (Continued)

#### Trials (Continued)

##### district court (Continued)

- county attorney, failure to attend, appointment of substitute, 95-1903
- degree of offense, jury to find, 95-1915
- discharge of defendant, when, 95-1916
- guilty plea, conditions for acceptance, withdrawal, 95-1902
- instructions to jury, 95-1910
- issues, designation for jury trial, 95-1901
- jury panel, objection, motion to discharge, 95-1908
- jury trial, 95-1901—See Juries and jurors, district court, above
- lesser offense, conviction of authorized, 95-1915
- not guilty plea, issues, 95-1901
- order of prosecutions, 95-1906
- order of trial, 95-1910
  - departure from, authority for, 95-1911
- preparation for trial, reasonable time allowed, 95-1907
- presence of defendant, mistrial for absence, 95-1904
- retirement of jury, 95-1913
- right to jury trial, number of jurors, 95-1901
- separation of jurors during trial, 95-1913
- several defendants, verdicts, 95-1915
- view of place of offense or property, 95-1912
- justices' courts, method of trial, 95-2004—See Justices' courts, above
- mental disease or defect excluding fitness to proceed
  - requirements, procedure, 95-504 to 95-506
- new trial, definition and effect, motion for, 95-2101
  - appeal, authority to order new trial, 95-2426
  - bail, provisions for, 95-1119
- police courts, method of trial, 95-2004—See Police courts, above
- several defendants, verdicts, 95-1915
  - appeal by one defendant authorized, 95-2429
- verdicts—See Verdicts, below

#### Venue

- aiding, abetting, or procuring commission of offense in another county, 95-404
- bigamy, trial where marriage or cohabitation occurred, 95-410
- boundary, offense committed on or near, 95-403
- change of venue, 95-401, 95-1710
  - justice and police courts, 95-2003
- commencement of offense outside state, trial where offense consummated, 95-407
- death and cause of death in different counties, 95-406
- escape from prison, trial in any county, 95-409
- kidnaping, trial where victim has traveled or been confined, 95-411
- objections to place of trial, waiver, hearing, 95-401, 95-1710
  - justice and police courts, 95-2003
- stolen property, trial in county where control exerted, 95-408
- telephone misuse, venue of offenses, 94-35-221.5
- transit, offenses committed while in, 95-405
- treason, trial in any county, 95-412
- trial in county where offense committed, 95-401
- two or more acts occurring in different counties, 95-402

#### Verdicts

- coroner's inquest, writing required, contents, 95-807
- district court
  - degree of offense, jury to find, 95-1915
  - directed verdict, 95-1909
  - general verdict to each offense, 95-1909
  - lesser offense, conviction of authorized, 95-1915
  - number required to concur, 95-1915
  - poll of jury, 95-1915
  - return of verdict, form, 95-1915
  - several defendants, 95-1915
- justices' courts, 95-2006
- police courts, 95-2006

Warrant for search and seizure, definition, issuance, procedure, 95-703 to 95-711

Warrant of arrest, definition, issuance, procedure, 95-601, 95-603 to 95-605

Western Interstate Corrections Compact, 95-2308 to 95-2312

## INDEX

References are to Title and Section numbers

### CRIMINAL PROCEDURE (Continued)

#### Witnesses

- coroner's inquest, subpoena of witness, compelling attendance, writing and filing of testimony, 95-805, 95-806, 95-808
- expenses of witnesses, 95-1801
- indigent defendants, procedure for obtaining subpoenas, 95-1801
- preliminary examination, exclusion and separation, recognizance by or deposition after examination, 95-1203, 95-1204
- subpoena, requirements and form, 95-1801

## D

### DAIRIES AND DAIRY PRODUCTS

Ice cream, definition and standards, 3-2476

#### Milk control board

- assessment upon producer-distributors and distributors, 27-409
- bonds required of distributors, 27-426
- declaration of policy regulating milk, 27-401
- definitions, 27-403
- distributors and producer-distributors, records required to be kept by, 27-416
- entry and inspection, powers of, 27-415
- fair trade practices, rules and regulations governing, 27-414
- fines assessed for violations, deposit and use, 27-417
- general powers, 27-405
- judicial review of orders, 27-428
- licenses
  - application for, 27-410
  - issuing, 27-409
  - persons required to obtain, 27-409
- local advisory board, duties, 27-427
- meetings, 27-404
- members, 27-404
- minimum prices
  - fixing, 27-407
  - hearing on, 27-407
  - notice of hearing on, 27-407
  - order for, 27-407
- natural marketing areas, designation, 27-406
- organization, 27-404
- per diem expenses, 27-404
- police powers of state invoked, 27-402
- protection and promotion of public welfare, 27-402
- service of process upon, 27-429
- term of members, 27-404

Samples held for inspection by commissioner or agent, 3-2407

### DAMAGES AND RELIEF

Measurement of damages, principles applicable under Uniform Commercial Code, 87A-1-106

Tort actions against state, 83-701 to 83-707—See STATE OF MONTANA, Tort actions against

### DAMS AND RESERVOIRS

Fish and game affected, clearance required, 26-1501 to 26-1507—See FISH AND GAME, Construction projects affecting fish and game

Taxability of facilities, 84-206

### DANGEROUS DRUG ACT

See NARCOTIC DRUGS

### DAY CARE FACILITIES

Assistance by board in meeting standards, 10-809

Definition of terms, 10-801

Enforcement powers of board of public welfare, 10-811

Exemption of facilities from regulatory act, 10-801



## INDEX

References are to Title and Section numbers

### **DAY CARE FACILITIES** (Continued)

- Fire safety standards prescribed by fire marshal, 10-804
  - waiver of fire marshal approval prohibited, 10-807
- Health protection standards prescribed by board of health, 10-805
  - waiver of board of health approval prohibited, 10-807
- Inspection of facilities by board of public welfare, 10-809
- License required for operation, 10-802
  - denial, suspension or revocation of license, grounds, procedure and appeal, 10-810
  - fire safety compliance required for license, 10-804
  - health standards compliance required for license, 10-805
  - investigation of applications for license, 10-806
  - issuance of licenses, 10-806
  - provisional license, issuance, 10-807
  - renewal of license, 10-808
  - standards for license, 10-806
- Records and reports required of facilities, 10-809
- Rules and regulations for conduct of facilities, 10-806
- School districts for child care institutions, 75-5501 to 75-5508—See SCHOOLS, School districts, child care institution
- Standards prescribed by board of public welfare, 10-803
- Violations of act, investigation and prosecution, 10-811

### **DEAD ANIMALS**

- Unlawful disposition, penalty, 69-4518, 69-4519

### **DEAD BODIES**

- Anatomical gifts, 69-2315 to 69-2323
- Autopsy or dissection, cases in which authorized, 69-5103
  - mortician authorized to perform acts necessary for burial, 69-5105
  - penalty for unauthorized autopsy or examination, 69-5106
  - physician to perform autopsy, 69-5104
  - report of findings by physician, 69-5104
- Burial permit required for disposition or removal, 69-4428
  - delay in determination of death, issuance of permit pending, 69-4427
  - importation of body into state, endorsement of permit, 69-4429
- Certificate of death, 69-4424 to 69-4428—See VITAL STATISTICS, Death certificate
- Coroner, powers and duties, 95-801 to 95-814—See COUNTY CORONER
- Medical use of cadavers authorized, 69-5101
  - procedure for obtaining cadavers, 69-5102
- Occupational Disease Act, autopsies under, 92-1318

### **DEATH SENTENCE**

- Appeal, stay of execution, 95-2406
- Execution of sentence, procedure, 95-2303
- Mental fitness of defendant, determination of, proceedings, 95-2304, 95-2305
- Pregnant female, proceedings, 95-2306, 95-2307

### **DEBTOR AND CREDITOR**

- Debt adjusters
  - definitions, 18-401
  - exemptions, 18-403
  - prohibition and penalty, 18-402

### **DECLARATORY JUDGMENT**

- Action for declaratory judgment, M. R. Civ. P., Rule 57

### **DEEDS AND CONVEYANCES**

- Joint tenancy in real property created by direct conveyance, 67-1602.1
- Recording as notice as to property acquired after conveyance, 73-201
- Unit ownership property, contents of deed, 67-2322
- Validation of defectively executed instruments, 73-207 to 73-211
- Validation of fiduciary sales, 91-4324, 91-4325
- Validation of unacknowledged instruments, 39-135 to 39-137

### **DEFAULT JUDGMENT**

- See JUDGMENTS, Default judgment, M. R. Civ. P., Rule 55

## INDEX

References are to Title and Section numbers

### DEMURRER

Abolition in civil cases, M. R. Civ. P., Rule 7(c)  
Abolition in justices' courts, 93-6802.2

### DENTISTRY

Alcoholic beverage, administration by dentist, 4-137  
Annual renewal of license, fee, 66-906  
Board of examiners  
    compensation of members, 66-909  
    meetings of board, 66-904  
    moneys received by board, deposit and use, 66-904  
    report to governor, 66-904  
    rules as to auxiliary personnel, 66-923.1  
    secretary-treasurer of board, duties and accounts, 66-904  
Certificate to practice, filing with county recorder, 66-906  
Citation of regulatory act, 66-925  
Corporations for practice of dentistry, 15-2101 to 15-2116—See PROFESSIONAL SERVICE CORPORATIONS  
Injunction to prevent unauthorized practice, 66-911  
Laboratories and technicians  
    advertising to general public prohibited, 66-910  
    work authorization to be given by dentist, 66-910  
National board of examiners certificate, recognition, 66-905  
Penalties for practice without certificate, 66-919  
Prosecution of violations, employment of special counsel for, 66-909

### DEPARTMENT OF ADMINISTRATION

Abolition of previous agencies, 82-3322  
Allocation of controller's duties among divisions, 82-3304  
Building programs  
    architects and consulting engineers, appointment, 82-3319  
        restrictions on architectural work by state, 82-3320  
    buildings subject to control, 82-3314  
    definition of terms, 82-3314  
    emergency repairs and operations authorized by governor, 82-3316  
    legislative consent, when required for construction, 82-3316  
    pecuniary interest prohibited to public officers and employees, 82-3321  
    powers of controller in supervision of construction, 82-3318  
    submission of programs to controller, governor and legislative assembly, 82-3315  
    supervision of construction by department, 82-3317  
    university buildings, authority of regents and governor, 82-3316  
Capitol buildings and grounds, oversight and supervision by controller, 82-3309, 82-3310  
Citation of act, 82-3301  
Controller as chief executive officer, 82-3302  
Creation of department, 82-3302  
Data processing, computer, duplicating, copying, and automatic typing facilities, maintenance for state agencies, 82-3306  
Divisions within departments, enumeration and appointment of division heads, 82-3303  
    allocation of duties among division, 82-3304  
Mailing facilities, maintenance for state agencies, 82-3306  
Office space, assignment to state agencies, 82-3308  
Purpose of act, 82-3301  
Records management program, 82-3311  
    definition of "records," 82-3312  
    destruction of records, procedure for authorization, 82-3313  
    library and museum material excluded from program, 82-3312  
Regulations for administration of department, 82-3305  
Reports of controller, 82-3305  
Short title of act, 82-3301  
Telephone switchboard, maintenance for state agencies, 82-3307

### DEPARTMENT OF HEALTH

Board of health, composition and appointment of members, 69-4103  
    administering state matching funds for water pollution control facilities, 69-4808.1  
    biennial report to governor, 69-4106

## INDEX

References are to Title and Section numbers

### DEPARTMENT OF HEALTH (Continued)

- Board of health (Continued)
  - chairman of board, 69-4104
  - compensation of members, 69-4104
  - duties of board, 69-4106
  - legal adviser to board, 69-4111
  - meetings of board, 69-4104
  - powers of board, 69-4106
  - secretary of board, 69-4104
- Clean Air Act, administration, 69-3904 to 69-3923—See AIR POLLUTION CONTROL
- Commission on alcohol and drug dependency, 69-6201 to 69-6207
  - co-operation among agencies, 69-6204, 69-6206
  - department to administer act, 69-6205
  - financial assistance, 69-6204
- Comprehensive state health planning powers, 69-4110.1
- Consultants, employment by executive officer, 69-4109
- Definition of terms, 69-4102
- Duties of department, 69-4110
- Establishment of department, 69-4101
- Executive officer of department, qualifications, appointment and salary, 69-4107
  - powers and duties, 69-4109
  - removal from office, procedure, 69-4108
- Food, Drug and Cosmetic Act, enforcement, 27-701 to 27-723—See FOOD AND DRUGS, Food, Drug and Cosmetic Act
- Food service establishments, licensing and regulation, 27-611 to 27-625—See FOOD AND DRUGS, Food service establishments
- Hospital survey and construction, department as principal agency, 69-5302
  - powers and duties of department, 69-5303
- Industrial hygiene and occupational disease, investigations and reports by department, 69-4203
- Information furnished to department on request, 69-4114
- Inspection and correction of conditions in public buildings, 69-4118
- Laws administered by department, 69-4105
- Legal adviser to department, 69-4111
- Local boards, general supervision by state board, 69-4502
- Mental health regions, establishment by division of mental hygiene, conformity to state plan, 80-2407
- Powers of department, 69-4110
- Venereal disease, departmental functions with respect to, 69-4602
- Vital statistics, departmental functions with respect to, 69-4403
- Water supply, protection by state board, 69-4808, 69-4809
  - domestic water supply, 69-4903

### DEPARTMENT OF INSTITUTIONS

See STATE INSTITUTIONS, Department of institutions, 80-1401 to 80-1412

### DEPOSIT

Storage deposits, applicability of Uniform Commercial Code to, 20-314

### DEPOSITIONS

- Criminal procedure, 95-1802
- Depositions to be taken in other jurisdictions for use in Montana, subpoena authorized, M. R. Civ. P., Rule 32(e)
- Errors in depositions, effect, M. R. Civ. P., Rule 32
- Irregularities in depositions, effect, M. R. Civ. P., Rule 32
- Justices' courts, 93-7712
- Oral examination, manner of taking deposition, M. R. Civ. P., Rule 30
- Pending action, scope and procedure for depositions, M. R. Civ. P., Rule 26
- Pending appeal, procedure for perpetuation of testimony, M. R. Civ. P., Rule 27(b)
- Perpetuation of testimony before action, M. R. Civ. P., Rule 27(a)
- Persons authorized to take depositions, M. R. Civ. P., Rule 28
- Stipulations to govern taking of depositions, M. R. Civ. P., Rule 29
- Subpoena for taking of depositions, M. R. Civ. P., Rule 45(d)
- Written interrogatories, manner of taking depositions, M. R. Civ. P., Rule 31



## INDEX

References are to Title and Section numbers

### DEPOSITS IN COURT

Statutes govern deposits, M. R. Civ. P., Rule 67

Unclaimed deposit presumed abandoned, 67-2208—See **PROPERTY, Unclaimed property**

### DEVELOPMENT CREDIT CORPORATION ACT

Annual statement, 15-2614

Articles of incorporation, 15-2603  
amendment, 15-2605

Board of directors, 15-2606

Capital stock, 15-2603

Certificate of incorporation, 15-2604

Corporation law, applicability of, 15-2618

Credit of state not pledged, 15-2617

Definitions, 15-2602

Deposit of funds, 15-2613

Deposits, receipt of, prohibited, 15-2613

Duration of corporation to be perpetual, 15-2615

Earnings, setting apart of portion as earned surplus, 15-2612

First meeting of corporation, 15-2608

Liability of directors and officers for losses, 15-2606

Member financial institutions

application for membership, 15-2610

loans to corporation, 15-2610

stock ownership, 15-2609

withdrawal from membership, 15-2611

Powers and privileges, 15-2603

Purpose, 15-2601

Reports to and by superintendent of banks, 15-2614

Stockholders' and members' powers, 15-2607

Stock ownership and limitations, 15-2609

Superintendent of banks, supervisory power of, 15-2614

Surplus, setting aside of portion of, 15-2612

Termination for failure to begin business, 15-2616

Votes of stockholders, 15-2607

### DISCOVERY

Admission of facts and genuineness of documents, request for, M. R. Civ. P., Rule 36  
form suggested by rules, M. R. Civ. P., Appendix of Forms, Form 21

Criminal procedure, rules for discovery, inspection, and notice, 95-1803

Documents and papers, discovery and production, M. R. Civ. P., Rule 34

Interrogatories to parties, M. R. Civ. P., Rule 33

Physical and mental examination of persons, M. R. Civ. P., Rule 35

Probate proceedings, application of procedures to, M. R. Civ. P., Rule 1

Refusal to make discovery, effect, M. R. Civ. P., Rule 37

Tangible objects, discovery and production, M. R. Civ. P., Rule 34

### DISCRIMINATION

See **CIVIL RIGHTS**

### DISEASE

See **COMMUNICABLE DISEASES**

### DISTRICT COURTS

Adjournments, 93-316

Calling of juries for trial of causes, 93-315

Chambers, acts and proceedings done in, M. R. Civ. P., Rule 77(b)

Conciliation court, sitting as, 36-203

powers of conciliation court, 36-205

Criminal jurisdiction, 95-301

Departments, division of district into, 93-321

Disqualification of judge

civil cases, 93-901

criminal cases, 95-1709

## INDEX

References are to Title and Section numbers

### DISTRICT COURTS (Continued)

District comprised of two or more counties, holding of court continuously and simultaneously in each or any county, power, 93-316

Fixing of terms where district comprises two or more counties, 93-315

Grand juries, summoning, discretion of district judge, 95-1401

Interstate agreement on detainees, district courts to function under, 94-1101-2

Judges  
assignment of judges to departments, 93-321  
criminal law study commission, service on, 94-1001-3  
expenses outside county of residence, certification and filing, 93-314  
expenses outside district, certification and filing, 93-306  
indictment against, filing, 95-1410  
information against, procedure for permission to file, 95-1301  
number, 93-302  
practice of law, restrictions on, 93-902  
retired judge, call for duty, 93-1130  
retirement system, 93-1107 to 93-1132—See JUDGES, Retirement system  
salary, 93-303

### Jurisdiction

criminal offenses, 95-301  
rules of civil procedure do not extend or limit jurisdiction, M. R. Civ. P., Rule 82  
tort actions against state, 83-701

Open at all times, M. R. Civ. P., Rule 77(a)

Pre-trial calendar, M. R. Civ. P., Rule 16

Removal of action to federal district court, transmittal of file, M. R. Civ. P., Rule 77(e)

### Reporters

appointment by judges, 93-1901  
attendance to duty in person required, 93-1907  
copies of proceedings furnished to parties, fees, 93-1904  
fees payable by parties before trial, 93-1905  
notes of testimony and proceedings, filing with clerk, 93-1902  
oath of office, filing, 93-1901  
objections and exceptions, writing out and filing with clerk, 93-1903  
prima facie correctness of reports, 93-1908  
pro tempore reporter in absence of regular reporter, 93-1907  
reimbursement of expense outside county of residence, 93-1906  
salary of reporter, 93-1906  
transcript of evidence, admissibility, M. R. Civ. P., Rule 80

Review division of supreme court for review of criminal sentences, 95-2501 to 95-2504

Rules of practice adopted by district courts, 93-2801-4, M. R. Civ. P., Rule 83

Term of court, 93-315

### DITCHES

#### Municipal regulation of open ditches

declaration of nuisance, 11-4002  
investigative powers of governing body, 11-4003  
irrigation ditches exempt, 11-4006  
notice to close and fill ditch, 11-4004  
protective devices provided by owner, 11-4005  
purpose of act, 11-4001  
special improvement districts, 11-4006

Rural improvement districts authorized to build protection devices, 16-1601(1)

Taxability of ditches, 84-206

### DIVORCE

Foreign divorce of parties domiciled in state, when not recognized, 21-150

Registrar of vital statistics, report to, 69-4433

judicial information included in report, 69-4434

Stay of proceedings to attempt reconciliation, 21-135.1

conciliation petition filed, 36-204

Waiting period before decree granted, 21-135.1

## INDEX

References are to Title and Section numbers

### DOGS

Damages to livestock or poultry, liability of owner of dog, 16-4614

"Kennel" defined, 16-4602

#### Licenses

application, 16-4602

collar and license tag required, 16-4601

county commissioners may provide for, 16-4602

disposition of fees, 16-4612

fee, 16-4603

kennel license

application, 16-4602

fee, 16-4603

license year, 16-4602

municipal license tag in compliance with act, 16-4604

removal of tag when dog under immediate control of owner, 16-4601

required, 16-4601

"Owner" defined, 16-4615

Public inspection of applications on file, 16-4603

#### Seizure and impounding

contract with humane societies and other associations, authority for, 16-4607

contract with municipal corporations for use of impounding facilities, authority, 16-4607

county commissioners, duties, 16-4606

county pound master, appointment, 16-4607

disposition of impounded dogs, 16-4608

dogs running at large without tags, 16-4605

dogs suspected of rabies or known to have bitten human or animal, retaining, 16-4608

fee for impoundment and keep, 16-4609

fees and charges as charged against county, 16-4610

fees, payment by owner claiming dog, 16-4610

failure to pay pound fee, abandonment, 16-4611

finer, disposition, 16-4612

Violation of act constitutes misdemeanor, 16-4613

### DOUBLE JEOPARDY

Defense of former prosecution, when allowed, exceptions, 94-6808.3 to 94-6808.5

Definition of "same transaction" and "included offense," 94-6808.1

More than one offense in same transaction, prosecution for, 94-6808.2

### DRAINAGE DISTRICTS

#### Bonds

resolution for issuance of bonds or notes, 89-2501

signatures on, 89-2501

Rules of civil procedure, application to special proceedings, M. R. Civ. P., Rule 81(a), Table A

### DRIVER EDUCATION

See SCHOOLS, Driver education program, 75-5304, 75-5305

### DRIVER LICENSE COMPACT

See OPERATORS' AND CHAUFFEURS' LICENSES, Interstate compact, 31-163 to 31-169

### DRUGS

See DEPARTMENT OF HEALTH, Commission on alcohol and drug dependency, 69-6201 to 69-6207; FOOD AND DRUGS, Food, Drug and Cosmetic Act, 27-701 to 27-723; NARCOTIC DRUGS, Dangerous Drug Act, 54-129 to 54-138

### DURESS

Affirmative defense, M. R. Civ. P., Rule 8(c)

Uniform Commercial Code supplemented by general principles of law, 87A-1-103



## INDEX

References are to Title and Section numbers

### E

#### ECONOMIC OPPORTUNITY

See PUBLIC WELFARE, Economic opportunity and poverty relief, 71-1601 to 71-1604

#### ELECTIONS

Absentee voting and registration

absentee ballots in precincts where voting machines are used, 23-3716

application for ballot, time limit, 23-3703

disposition of application, 23-3705

form, 23-3704

deposit of absentee ballots in ballot boxes, 23-3713

disposition of marked ballot upon return to election officials, 23-3708, 23-3709

election judges' duties, 23-3711

electors in United States service

definition, 23-3718

federal postcard application, 23-3721

oath, 23-3720

registration, 23-3719

federal post card application, classification of, 23-3721

mailing ballot, 23-3706

marking ballot, 23-3707

official misconduct, 23-3717

perjury, 23-3717

record of absentee ballots, 23-3710

registration card, 23-3723

registration of voters absent from country, 23-3722

rejection of ballot upon opening absentee ballot envelope, 23-3713

right to subsequently vote in person, 23-3714

school district elections, 23-3702

voting in person before election day, 23-3712

Alcoholic beverages

days retail beer establishments to be closed, 4-303

days retail establishments to be closed, 4-414

Arrest, electors privileged from arrest, 23-2705, 95-616

Ballots

arrangement and rotation of names on ballot, 23-3511

delivery prior to opening of polls, 23-3503

elections to be by ballots, 23-2602

form of, 23-3512, 23-3514, 23-3515

number to be provided precincts, 23-3516

offices, order of, 23-3513

party designation, 23-3509

pasters for nominee filling vacancy, 23-3510

printed by registrars, 23-3506, 23-3507

printing and distribution costs, 23-3508

stub, 23-3515

uniformity, 23-3508

Bonds

contests

grounds for challenge, 23-4201

hearing, 23-4202

creation or increase in municipal or school indebtedness, qualifications for voting, 84-4711

Challenging electors

grounds, 23-3611

how determined, 23-3613

proceedings upon determination, 23-3616

list of challenges, 23-3617

person refusing to be sworn, vote to be rejected, 23-3614

trial by election judges at time of challenge, 23-3615

## INDEX

References are to Title and Section numbers

### ELECTIONS (Continued)

#### Congressmen

- certificate of election, 23-4403
- general election, chosen at, 23-4401
- residency required, 23-4404
- vacancy in office, 23-4402

#### Constitutional amendments

- attorney general's summary placed on ballot, 37-104.1
- printing and publication of proposed amendments, 23-2802

#### Contests

- bond elections
- grounds for challenge, 23-4201
- hearing, 23-4202

#### Conventions to ratify proposed amendments to constitution of the United States, 23-4601

- ballot form, 23-4605
- certificate of result, 23-4609
- compensation of delegates and officers, 23-4608
- delegates, 23-4602
  - election of delegates, 23-4602
  - determination of election results, 23-4604
  - nomination of delegates, 23-4603
- federal law, superseding effect of, 23-4611
- officers and procedures, 23-4607
- qualifications of petitioners and electors, 23-4610
- quorum, 23-4607
- time for holding, 23-4606

#### County bond issue elections, electors, 16-2026

#### Definitions, 23-2601

#### Election judges

- appointment, 23-3201
- assistance to disabled electors, 23-3609
- choosing, manner of, 23-3202
- clerks appointed by judges, 23-3203
- compensation of judges and clerks, 23-3207
- duties, 23-3201
- instruction of judges, 23-3206
- notices of election, posting of, 23-3204
- notification of appointment, 23-3204
- number of judges, 23-3201
- oaths and their administration, 23-3205
- vacancies, 23-3203

#### Election laws, distribution of, 23-2904

#### Election precincts, 23-3101

- polling place, designation of, 23-3103
- ward boundaries, 23-3102

#### Electors

- arrest, privileged from, 23-2705
- presidential electors, 23-4301 to 23-4307—See Presidential electors, below
- qualifications, 23-2701
  - elections on constitutional amendments, 23-4610
  - elections on incurring state indebtedness, 23-2702
    - elector registered in one county and listed on assessment roll of another, 23-2703

#### Electronic voting systems

- approval of marking device or automatic tabulating equipment, 23-3906
- ballot information, 23-3904
- closing polls, procedure upon, 23-3905
- damaged or defective ballots, 23-3905
- definitions, 23-3902
- election laws in general, applicability of, 23-3907
- paper ballot, elector may request, 23-3903
- purpose of act, 23-3901
- returns, 23-3905
- rules, 23-3906

## INDEX

### References are to Title and Section numbers

#### ELECTIONS (Continued)

##### Electronic voting systems (Continued)

- testing of automatic tabulating equipment, 23-3904
- use, where authorized, 23-3903
- voting booths, 23-3904
- write-ins, 23-3904

##### General election, time for holding, 23-2604

##### Governor-elect, orderly transition of power to, 82-1311 to 82-1314

##### Initiative measures, attorney general's summary placed on ballot, 37-104.1

##### Justices of supreme court and district courts

- each vacancy a separate and independent office for election purposes, 23-4501
- endorsement by political party unlawful, 23-4511
- judicial primary ballots, 23-4505, 23-4506
  - separate counting and canvassing, 23-4507
- nominations, 23-4502
  - certification of candidates' names, 23-4504
  - declarations, 23-4503
  - fee, 23-4503
  - highest vote in primary, 23-4508
  - register of candidates for nomination, entry on separate page of, 23-4504
  - tie vote, 23-4509
- political party endorsement unlawful, 23-4511
- vacancies after primary, 23-4510

##### Nonpartisan nomination and election of judges, 23-4501 to 23-4511—See Justices of supreme court and district courts, above

##### Political parties

- central committees, 23-3403 to 23-3405
- committeemen, 23-3401, 23-3402
- convention expenses, payment of, 23-3407
- powers, 23-3406
- state conventions to nominate presidential electors, payment of delegates to, 23-3407

##### Polling place, designation of, 23-3103

##### Polls

- announcement of voter's name, 23-3618
- assistance to disabled electors, 23-3609
- poll watchers, 23-3618
- proclamation prior to opening or closing, 23-3602
- prohibited conduct, 23-3605
- putting ballot in box, 23-3608
  - election judge only to put ballot in box, 23-3607
- voting—See Voting, below
- voting booth, 23-3604

##### Precinct registers

- copies of, 23-3028
- entry of name upon, charge for, 23-3027

##### Presidential electors

- compensation, 23-4306
- list of electors elected, 23-4303
- list of persons voted for, 23-4305
- meeting and voting of electors, 23-4304
- nomination, 23-4302
- returns and canvassing, 23-4303
- to be elected, 23-4301
- vacancies, 23-4307
- votes for president and vice-president of each party counted for candidates for electors of the party, 23-4302

##### Primary nominating election

- abstracts of votes, 23-3313, 23-3314
- ballots, 23-3308, 23-3309
- candidates to be selected, 23-3301
- certificates of nomination, 23-3318, 23-3319
- cities over certain size, procedure in, 23-3302
- contesting nominations, 23-3316



## INDEX

### References are to Title and Section numbers

#### ELECTIONS (Continued)

##### Primary nominating election (Continued)

- counting of ballots, 23-3310
- date for holding, 23-3301
- declaration of nomination, 23-3304, 23-3305
- declining nomination, 23-3321
- election clerks and judges
  - compensation, certificate for, 23-3313
  - duties, 23-3310 to 23-3312
- errors, 23-3315
- notice, 23-3303
- penalty for violation of act, 23-3317
- political parties, 23-3320
- register of candidates, 23-3306
- registrar's or city clerk's duties, 23-3307
- removal of candidate from office, 23-3317
- secretary of state
  - canvass by, 23-3314
  - duties, 23-3307
- tally sheets, 23-3311
- tie, decision by lot in event of, 23-3313
- vacancies, 23-3321
- violation of act, penalty for, 23-3317
- wrongful acts, 23-3315

##### Proclamations

- county commissioners, 23-2903
- governor, 23-2901
  - publication, 23-2902

##### Questions submitted to popular vote, advertisement of, 23-2801

- application for, 23-4101
  - considering several applications together, 23-4108
- certificate of election
  - certification of recount results, 23-4117
  - effect of recount on, 23-4112
  - issuance by state board of canvassers, 23-4118
- conditions under which recount to be made, 23-4103
- counting of votes
  - determining total vote cast, 23-4113
  - persons entitled to appear at recount, 23-4116
  - sealing recounted ballots, 23-4111
- county recount board
  - certification of result, 23-4117
  - composition, 23-4114
  - meetings, 23-4115
- district court
  - disqualified judge, substituting for, 23-4105
  - jurisdiction retained until cause finally determined, 23-4105
  - limiting recount to certain precincts, 23-4106
  - service upon other candidate, opportunity to be heard, 23-4110
- expense of, 23-4107
  - apportionment of, 23-4108
- failure to comply with provisions for counting votes, presumption of incorrectness from, 23-4104
- limitations on recount, 23-4102
- manner of, 23-4109
- state board of canvassers, reconvening of, 23-4118
  - issuance of new certificate of election or nomination, 23-4118
- tie votes, 23-4119 to 23-4121

##### Referendum measures, attorney general's summary placed on ballot, 37-104.1

##### Registrar

- county clerk and recorder as ex officio registrar, 23-3002
- deputy registrars, 23-3003
- distribution of copies of election laws, 23-2904
- election judges to be notified of their appointment, 23-3204
- hours office open for registration, 23-3005

## INDEX

References are to Title and Section numbers

### ELECTIONS (Continued)

#### Registration

- cancellation of registry
  - for failure of elector in United States service to vote, 23-3013
  - for failure to vote, 23-3013
  - for other reasons, 23-3014
  - reregistration, 23-3013, 23-3014
- challenges, 23-3015
- closing of registration prior to election, 23-3016
  - registration during that period, 23-3017
- elections on incurring of certain state indebtedness, notice and closing of registration for, 23-2704
- elector's identity, 23-3018
- erroneous omission of elector's name from precinct register, 23-3020
- felony provision, 23-3006
- hours of registration, 23-3005
- infirm electors, registration at residence, 23-3007
- list of registered electors, 23-3012
- list of registered electors shown on precinct registers, 23-3023
- method of registering, 23-3006
  - absent electors in United States service, 23-3006
- name of elector in precinct register as prima facie evidence of right to vote, 23-3018
- naturalized citizens, 23-3021
- new-voter list, submission to major parties by highway patrol, 23-3001
- precinct registers
  - compelling entry of name, 23-3019
  - list of registered electors shown on, 23-3023
  - marking after elector has voted, 23-3610
  - omission of name, 23-3020
  - preparation of, 23-3012, 23-3024
  - right to vote, name in register as prima facie evidence of, 23-3018
  - signature of elector required, 23-3018
    - affidavit in behalf of those unable to sign, 23-3018
- prospective voter not qualified at time of registration, 23-3008
- registration cards, 23-3005
- registry book and card index, 23-3004
- residence, rules for determining, 23-3022
- transferring registry
  - elector's duties, 23-3009
  - registrar's duties, 23-3010
- United States citizenship, 23-3008

Residence, rules for determining as prerequisite to registration or voting, 23-3022

#### Returns

##### canvass

- commenced as soon as polls closed, 23-4001
- method of, 23-4002
- public and without adjournment, 23-4001

##### counting

- manner of, 23-4003
- rejected ballots, marking of, 23-4004

##### county canvass

- commissioners as board of county canvassers, 23-4009
- nonessentials to be disregarded, 23-4011
- public, 23-4011
- registrar as clerk of board of county canvassers, 23-4009

##### results

- certificates of election, 23-4014
- declaration of persons elected, 23-4013
- entered on record, 23-4012
- statement, contents, 23-4012
- tie, certification of, 23-4013
- time of, 23-4010

##### pollbooks, signing and certifying of, 23-4005

##### registrar, items to be sent to, 23-4006

- disposition of, 23-4007, 23-4008

## INDEX

References are to Title and Section numbers

### ELECTIONS (Continued)

#### Returns (Continued)

- state canvass
  - board, 23-4016
  - commissions
    - governor to issue to person elected, 23-4018
    - secretary of state to issue governor's commission, 23-4018
  - defects in returns, 23-4019
  - messenger may be sent for returns, 23-4017
- state returns, how made and transmitted, 23-4015

Rules of civil procedure, application to special proceedings, M. R. Civ. P., Rule 81(a), Table A

#### School bond elections

- notice of election, 75-3912
- qualifications of voters, 75-3938
- registration of electors, 75-3912

#### School matters, elections on

- additional tax levies, elections to authorize, 75-3804
- expenses of elections, 75-1620

#### Supplies

- election return forms, 23-3504, 23-3505
- items to be furnished by commissioners, 23-3501
- voting machines, 23-3810

#### Time

- general elections, time for holding, 23-2604
- hours for opening and closing of polls, 23-2605

#### Violations

- attempting to vote at second polling place after vote has been rejected, 23-3025
- deceiving illiterate, blind or disabled voter while assisting him, 23-3812
- election day, prohibited conduct on, 23-3605
- in general, 23-2606
- judicial candidates, endorsement by political party, 23-4511
- primaries, 23-3317
- registration, 23-3029
- voting machines, 23-3820, 23-3821

#### Voting

- absent or incapacitated voters, 23-3701 to 23-3723—See Absentee voting and registration, above
- announcement of voter's name, 23-3618
- assistance to disabled electors, 23-3609
- challenging elector—See Challenging electors, above
- delivery of ballots to elector, 23-3603
- instruction cards, 23-3601
- method of, 23-3606
- poll watchers, 23-3618
- precinct register book, marking of, 23-3610
- proclamation prior to opening or closing polls, 23-3602
- prohibited conduct, 23-3605
- putting ballot in box, 23-3608
  - only election judge to place ballot in ballot box, 23-3607
- voting booths, 23-3604

#### Voting machines

- approval, specifications required for, 23-3802
- assistance to illiterate, blind or disabled voters, 23-3812
  - punitive provision for deceiving elector, 23-3812
- counting votes, 23-3813
  - procedure after count, 23-3814
- election board, composition of, 23-3806
- election judges, instruction by registrar, 23-3807
- election laws in general, applicability of, 23-3822
- exhibition and demonstration, 23-3809
- experimental use, 23-3817
- information concerning machine, publication of, 23-3808
- machine breakdowns, 23-3818



## INDEX

References are to Title and Section numbers

### ELECTIONS (Continued)

#### Voting machines (Continued)

- paper ballot, elector may request, 23-3818
- paper ballots for voting on certain money issues, 23-3819
- payment for, 23-3803
- penalties
  - causing false statement, certificate or return to be signed, 23-3821
  - causing incorrect vote, 23-3821
  - deceiving illiterate, blind or disabled voters while assisting them, 23-3812
  - tampering with machine, 23-3820
- placement of machines, 23-3806
- preparation for use, 23-3804
- registrar to instruct election judges, 23-3807
- registry list, 23-3811
- return sheets, 23-3815
- secretary of state's duties, 23-3801
- supplies, 23-3810
- tally sheets, disposition of, 23-3815
- time voter may remain in booth, 23-3806
- write-ins, 23-3805
  - disposition of, 23-3815

### ELECTRICIANS

- Appeals from state electrical board, 66-2813
- Appliance sales and connections exempt from license requirements, 66-2812
- Apprentices, registration with board, 66-2817
  - exemption from license requirement, 66-2815
  - scope of work permitted apprentice, 66-2812
- Definition of terms, 66-2803
- Exemptions from provisions of act, 66-2812
- License required to work as electrician or contractor, 66-2806
  - annual license fees, 66-2815
  - contractors to be licensed annually, 66-2814
  - educational requirements for license, 66-2807
  - examination of applicants for license, 66-2807
  - exemptions from license requirements, 66-2812
  - experience required for license, 66-2807
    - schooling substituted for experience, 66-2815
  - expiration of licenses, 66-2807
  - fees for licenses
    - contractor's annual fee, 66-2814
    - disposition and use of fees, 66-2819
    - examination fees, 66-2815
  - municipal licensees, licensing without examination, 66-2811
  - previously qualified electricians, licensing without examination, 66-2816
  - reciprocal licensing of nonresidents, 66-2809
  - renewal of licenses, 66-2807
  - temporary permits, issuance and duration, 66-2810
  - unauthorized use of designation as electrician, 66-2808
- National Electrical Code to govern installations, 66-2802
- Penalties for violation of act, 66-2820
- Purpose of electrical safety law, 66-2802
- Receipts under act, deposit and use, 66-2819
- Short title of act, 66-2801
- State electrical board, composition, appointment, terms and compensation of members, 66-2804
  - oath of members of board, 66-2805
  - organization and powers of board, 66-2805
- Violations of act, penalties, 66-2820

### ELECTRIC LINES

- Financing statements of utility, contents and place of filing, 87A-9-302.2
  - definition of terms, 87A-9-302.1
- Uniform Commercial Code, application, 87A-9-302.3
- Tampering with or tapping lines, penalty, 94-3203

## INDEX

References are to Title and Section numbers

### EMBALMERS

See MORTICIANS AND FUNERAL DIRECTORS, 66-2701 to 66-2717

### EMINENT DOMAIN

Answer of defendant, filing and contents, 93-9910

Assessment of compensation, allowance for removal of personal property, 93-9913

Commissioners, appointment and meeting, 93-9912

Flood control projects, acquisition by county or municipality for, 89-3303

Preliminary condemnation order, 93-9911

Relocation assistance for persons affected by state highway department's land acquisitions, 32-3921 to 32-3931—See HIGHWAYS, BRIDGES AND FERRIES, right of way acquisition for state highways

no new element of condemnation damages created, 32-3931

Rules of civil procedure, application to proceedings, M. R. Civ. P., Rule 81(a), Table A

Urban renewal, power of municipality, 11-3908

### EMPLOYERS AND EMPLOYEES

Discrimination in employment, freedom from as civil right, 64-301

definition of terms, 64-302

denial of right to employment as misdemeanor, 64-303

Occupational disease act, 92-1301 to 92-1368

Winter work programs, 41-1901 to 41-1907—See WINTER WORK PROGRAMS

### EMPLOYMENT SECURITY

See UNEMPLOYMENT COMPENSATION

### ENGINEERS AND LAND SURVEYORS

Board of registration, biennial report to governor, 66-2334

Co-ordinate system, 67-2011 to 67-2019—See CO-ORDINATE SYSTEM

Corner recordation act, 67-2001 to 67-2010—See PROPERTY, Real property, corner recordation

Corporations for practice of professional engineering, 15-2101 to 15-2116—See PROFESSIONAL SERVICE CORPORATIONS

Employment of personnel by board of registration, 66-2333

Investment advice exempt from securities act, 15-2004

Moneys received by board of registration, deposit and use, 66-2333

Secretary of board of registration, salary, 66-2333

Unlicensed practice a public nuisance, 66-2332

### ESTATES AND PROBATE PROCEEDINGS

Appraisers of estate, appointment and compensation, 91-2202

Contest of probate

motions filed against contest, 91-901

petition filed after admission to probate, 91-1101

time within which contest to be filed, 91-1107

Deposits at financial institutions, withdrawals by surviving spouse, 91-2212

affidavit discharges institutions from liability, 91-2213

Devise or bequest to trustee of inter vivos trust created by testator, validity, 91-321

Escheated estates

deposit of money and property in agency fund, 91-502, 91-523

holding by state treasurer subject to claims, period, 91-502

investment of moneys pending proceedings, 91-504

legal representation of treasurer, 91-512

sale of property

agent, property held by, 91-507

order by court for sale, 91-504

personal property, manner of sale, 91-505

disposition of proceeds, 79-813

real property, manner of sale, 91-506

unclaimed property subject to escheat, 91-526

Inheritance tax deductions, 91-4407

Real estate brokers' act, exemptions from, 66-1926

Summary proceedings in lieu of probate

act inapplicable to pending estates, 91-5311

administration of estate in usual manner, 91-5310

## INDEX

References are to Title and Section numbers

### **ESTATES AND PROBATE PROCEEDINGS (Continued)**

#### **Summary proceedings in lieu of probate (Continued)**

- combination of proceedings to terminate life estate or joint tenancy with proceedings to set aside property, 91-5303
- decree, effect of, 91-5308
- existing statutes not repealed, 91-5312
- jurisdiction, collateral attack on, 91-5309
- net value of estate, determination of, 91-5302
- notice of hearing, 91-5305
- petition to set aside estate, 91-5304
  - notice, 91-5306
- setting aside of estate to surviving spouse or minor child, 91-5301
- special appraiser, 91-5307
- Support obligations of father of illegitimate child limited to those accrued before death of father, 93-2901-4

### **ESTOPPEL**

- Affirmative defense, M. R. Civ. P., Rule 8(c)
- Uniform Commercial Code supplemented by general provisions of law, 87A-1-103

### **EVIDENCE**

- Accident reports confidential, 32-1213
- Amendment of pleadings to conform to evidence, M. R. Civ. P., Rule 15(b)
- Certificate of compliance or noncompliance with provisions of occupational disease act, 92-1356**
- Criminal procedure, production and suppression of evidence, 95-1801 to 95-1806—See **CRIMINAL PROCEDURE, Evidence**
- Depositions, M. R. Civ. P., Rules 26 to 32—See **DEPOSITIONS**
  - criminal procedure, 95-1802
- Discovery, M. R. Civ. P., Rules 33 to 37—See **DISCOVERY**
  - criminal procedure, 95-1803
- Exceptions to rulings of court unnecessary, M. R. Civ. P., Rule 46
- Harmless error in admission or exclusion, effect on judgment or order, M. R. Civ. P., Rule 61
- Interpreters, M. R. Civ. P., Rule 43(f)
- Motions, evidence presented on hearing of motions, M. R. Civ. P., Rule 43(e)
- Notices, construction according to ordinary acceptance of terms, 93-401-22
- Offer of proof, recording in case evidence excluded, M. R. Civ. P., Rule 43(c)
- Official records, method of proof, M. R. Civ. P., Rule 44
- Pre-trial conference, agreements as to evidence, M. R. Civ. P., Rule 16
- Radar concerning motor vehicle violations, 32-2150.1
- Stenographic transcripts of previous evidence, M. R. Civ. P., Rule 80
- Subpoena for production of evidence, M. R. Civ. P., Rule 45(b)
- Variance from pleadings, amendment of pleadings, M. R. Civ. P., Rule 15(b)

### **EXAMINERS, STATE BOARD OF**

- Composition of board, 82-1101
- Liquidated claims not to be processed by board, 82-1101
- Record of proceedings, 82-1105

### **EXCHANGE**

- Uniform Commercial Code, applicability, 74-505

### **EXECUTION**

- Compensation under occupational disease act exempt from, 92-1329
- Delivery of possession, writ to secure, M. R. Civ. P., Rule 70
- Documents of title covering goods, surrender or injunction required for execution against, 87A-7-603
- Game wardens' retirement benefits, exemption from levy, 68-1420
- Judges' retirement benefits, exemption from levy, 93-1126
- Partnership interest, execution against, 93-5811
- Sales under execution validated despite defects, 93-5846
- Statutes govern execution, M. R. Civ. P., Rule 69
- Stay of proceedings to enforce judgment, M. R. Civ. P., Rule 62



## INDEX

References are to Title and Section numbers

### EXECUTION (Continued)

Supplementary proceedings, application of rules of civil procedure to, M. R. Civ. P., Rule 81(a), Table A

Unit ownership property, application of exemptions to, 67-2341

Waiver of statutory exemptions in unsecured note not enforceable, 93-5813.1

### EXECUTION OF SENTENCE IN CRIMINAL CASES

See CRIMINAL PROCEDURE, Sentence and judgment, execution of sentence, 95-2301 to 95-2312

### EXECUTORS AND ADMINISTRATORS

Action brought without joining beneficiaries as parties, M. R. Civ. P., Rule 17(a)

### EXECUTORS AND ADMINISTRATORS (Continued)

Bond required, exceptions, 91-1702

Bulk Transfer chapter inapplicable to sales by, 87A-6-103

Investments, retention permitted when received from source other than purchase, though not qualified investment, 86-327

Justices and judges not to act as executor or administrator for compensation, 93-902

Real estate brokers' act, exemptions from, 66-1926

Sale of property in good faith, validation, 91-4324, 91-4325

### EXEMPTIONS FROM EXECUTION

See EXECUTION

### EXPERIMENT STATIONS

Forest and conservation station, reports and disposition of income, 28-304

## F

### FACTORS

Lien of factors, 87A-9-101 to 87A-9-507—See SECURED TRANSACTIONS

### FAIR TRADE

Cigarette pricing, 51-301 to 51-314—See CIGARETTE SALES

### FEES

Boiler engineer's license, 69-1512

Clerk of district court, enumeration, 25-232

naturalization fees paid to county treasurer for credit to general fund of county, 25-210

probate proceedings, 25-233

Constables, enumeration, 25-309

Cooperative associations

amendment of articles, filing, 14-204

articles of incorporation, filing, 14-201

certificate of incorporation, issuance, 14-204

Cooperative marketing associations, filing fees, 14-422

County clerks, enumeration, 25-231

Insurance code, fees collectible under, 40-2726

Jurors' fees, 25-401

Justices of peace, fees collected by

civil actions, 25-301

criminal actions, 25-303

Legislative proceedings, fee for receiving one complete set of, 43-902

Recording marks and brands of livestock, 46-609

Rural electric and telephone cooperatives, filing fees, 14-527

Secretary of state, fees collectible by enumerated, 25-102

Water users' associations exempt from payment, exception, 25-110

Witnesses' fees, 25-404

### FELLOW SERVANT RULE

Affirmative defense, M. R. Civ. P., Rule 8(c)

### FIDUCIARIES

Investments, retention permitted when received from source other than purchase, though not qualified investment, 86-327

## INDEX

References are to Title and Section numbers

### FIDUCIARIES (Continued)

Sale of property in good faith, validation, 91-4324, 91-4325  
Voting of corporate shares, 15-2231

### FINE ARTS' COMMISSION

Commission abolished, 44-528—See HISTORICAL SOCIETY OF MONTANA

### FINES

Appeal, stay of execution, 95-2406  
County school fund, fines paid into, 75-3706  
Disposition of fines, 94-801-1  
    juvenile traffic offenders, collections from, 94-801-2  
Execution of, 95-2302  
Imposition of, 95-2206  
Lien of judgment to pay fine, 95-2208

### FIREARMS

Children, use of firearms by prohibited, 94-3579  
Concealed weapons, immigration and naturalization service officers may carry without permit, 94-3527  
Purchase of rifles and shotguns, 94-3578.1, 94-3578.2

### FIRE DISTRICTS

County attorney to act as counsel, 16-3101  
Examination of books by state examiner, 82-1008

### FIRE ESCAPES AND ALARMS

Permits for construction outside incorporated municipalities, fees, 69-1808  
Plans of construction submitted to state fire marshal, 69-1808

### FIRE HAZARDS

Hunting and fishing, closing of area to, 26-345  
Proceedings for abatement, application of rules of civil procedure, M. R. Civ. P., Rule 81(a), Table A  
Sawmill waste, 28-119

### FIRE MARSHAL, STATE

Acting fire marshal, 82-1208  
Advisory commissions, appointment, members, 82-1201  
Appointment and qualifications, 82-1201  
Employees, appointment of assistants and clerical employees, 82-1208  
Examination of buildings, authority to enter, 82-1218  
Fish and game wardens as ex officio fire wardens, 26-110.1  
Investigation of fires, 82-1209  
Powers, 82-1202  
Rules and regulations, promulgation of, 82-1202  
    hearings, notice, publication, adoption, effective date, 82-1202.2  
    rules to be reasonable, 82-1202.1  
    standards of fire protection adopted, 82-1202.1  
    violation a misdemeanor, 82-1202.1  
Special deputy fire marshals, 82-1208

### FIRE PREVENTION ADVISORY COMMISSION

Appointment by commissioner of insurance, members, 82-1201

### FISH AND GAME

Agents for selling licenses, compensation, inspection of accounts, 26-222  
Aquatic insects, commercial exportation prohibited, 26-708  
Big-game hunting  
    nonresident licensee to be accompanied by resident, 26-303.2  
    policy of state, 26-303.1  
    private property, permission required for hunting on, 26-303.3  
    violation of provisions as misdemeanor, 26-303.4  
Clothing worn by big game hunters, 26-302

## INDEX

References are to Title and Section numbers

### FISH AND GAME (Continued)

- Construction projects affecting fish and game
  - alternative plans and recommendations by fish and game commission, 26-1504
  - arbitration of disputes, 26-1505
  - assistance by fish and game commission in preparing plans, 26-1503
  - emergency conditions, exception to requirements, 26-1506
  - insufficiency of plans, notice to responsible agency, 26-1503
  - investigation of plans by fish and game commission, 26-1503
  - irrigation projects exempt from requirements, 26-1507
  - notice to be given to fish and game commission, 26-1502
  - plans and specifications to be furnished fish and game commission, 26-1502
  - policy of state, 26-1501
  - refusal by responsible agency to modify plans, 26-1505
  - state water conservation board projects exempt, 26-1507
  - vested water rights preserved, 26-1506
- Contests based on size of animals unlawful, 26-811
- Definitions, 26-201
- Federal aid moneys, deposit and use, 26-121
- Fish
  - methods of taking, 26-332
  - minors not required to have license, 26-215
  - reciprocal privileges granted to licensees of bordering states, 26-225
    - bodies of water covered by reciprocal privileges, 26-227
    - devices and equipment used under reciprocal privilege, 26-226
    - rules and regulations, 26-228
    - violations as misdemeanor, 26-228
  - restrictions concerning possession and sale, 26-332
- Fish and game commission
  - appointment of members, 26-102
  - motorboat regulations—See MOTORBOATS
  - oath of office of director and wardens, 26-111
  - officers, 26-103
  - outdoor recreational resources, development, 62-401 to 62-404—See OUTDOOR RECREATIONAL RESOURCES
  - principal offices, 26-103
- Fishing reservoirs, rules and regulations concerning health, safety and protection, 26-104
- Fund abolished, 26-121
- Furbearing animals, closed and open season, 26-321
- Grizzly bear
  - policy declaration, 26-307.2
  - regulatory powers of commission, 26-307.3
  - scientific purposes, delivery of parts of grizzly bear to commission for, 26-307
- Jackrabbits, hunting with artificial light, 26-215
- Landowner's restricted liability to gratuitous licensee for hunting or fishing, 67-808
  - definition of recreational purposes, 67-809
- Licenses
  - bear licenses, issuance to nonresidents, 26-202.5
  - big game, special licenses, 26-202.2
    - information to be included in license, 26-212.1
  - classifications, 26-202.1
  - exceptions, 26-202.1
  - fees, 26-202.1
    - disposition and use of fees, 26-121
  - license agents, compensation, 26-222
  - minors not required to have fishing license, 26-215
  - nonresident one day fishing license, 26-202.6
  - powers of holders of, 26-202.1
  - predatory animals, license not required for, 26-215
  - "resident" defined for purposes of, 26-202.3
  - wildlife conservation license
    - application, 26-230
    - expiration, 26-230
    - false statement, subscription to, 26-232
    - fees, 26-230
      - deposit of, 26-233



## INDEX

References are to Title and Section numbers

### FISH AND GAME (Continued)

#### Licenses (Continued)

##### wildlife conservation license (Continued)

hunting, fishing or trapping licenses, unlawful sale of, 26-231

hunting, fishing or trapping license tags, affixing to or recording on wildlife conservation license, 26-230

required to obtain hunting, fishing or trapping license, 26-229

#### Menageries, roadside

definitions, 26-1205

enforcement provisions, 26-1211

disposition of fines, bonds, penalties and fees, 26-1212

permit to obtain additional animals, 26-1208

permit to operate, 26-1206, 26-1207

permit not a commercial game propagating permit, 26-1209

revocation after inspection, 26-1210

transferring permit, 26-1207

Migratory bird reservations, consent to acquisition by United States, 83-113

Migratory game birds, exclusion from law providing permits for breeding game birds, 26-1201

Moneys received by commission, disposition and use, 26-121

Possession of illegally taken fish or game, misdemeanor, 26-701

Predatory animals, taking permitted without license, 26-215

Regulations and orders by commission, 26-301

Removal from state of illegally taken game, misdemeanor, 26-701

Salmonid fish and eggs

importation unlawful unless certified free of infectious organisms, 26-1701

certificate, information necessary on, 26-1703

certification unnecessary if organisms dead, 26-1702

misdemeanor provision, 26-1705

rule-making power of commission, 26-1704

Seasons and bag limits, authority of commission concerning, 26-104

#### Shooting preserves

amount of game recoverable under license or permit, 26-1605

area covered by preserves, 26-1602

classes of licenses and permits, 26-1612

fees for licenses and permits, 26-1604

game which may be hunted on preserve, 26-1603

inspections of preserves by commission, 26-1614

issuance of licenses or permits authorized for preserves, 26-1601

license required of shooters, 26-1611

limits established by preserve operators, 26-1606

lists of licenses and permits maintained by commission, 26-1612

location of preserves, 26-1602

posting of boundaries required, 26-1602

records required of operators, 26-1609

registration of shooters and game taken, 26-1609

revocation of license or permit, 26-1613

rules and regulations, 26-1601

season when hunting permitted on preserves, 26-1607

size of preserves, 26-1602

species of game to be hunted on preserve, 26-1603

stocking of preserve required of operator, 26-1603

tagging of game taken, 26-1608

wild game, hunting on preserve permitted, 26-1610

Special licenses, 26-202.1

#### Taxidermist

license, 26-907

records required to be kept, 26-907

#### Wardens for enforcement of laws

appointment of wardens, 26-107

duties of wardens, 26-107

ex officio fish and game wardens, 26-114

littering, 32-4410

oath of office, 26-111

protection of private property, 26-110.1

powers, 26-110.2

## INDEX

References are to Title and Section numbers

### FISH AND GAME (Continued)

#### Wardens for enforcement of laws (Continued)

- qualifications of wardens, 26-107

#### retirement system

- account in agency fund, establishment, 68-1408

- contributions paid into account, 68-1405

- control and investment of moneys in account, 68-1405

- transfer of amounts from public employees' retirement account, 68-1408

- actuarial investigations and valuations, 68-1406

- beneficiary, designation and changes, 68-1421

- board for administration of system, creation and composition, 68-1404

- contributions to system

- members, contributions by, 68-1409

- payment into retirement account, 68-1405

- state contributions, 68-1410

- death benefits, 68-1418

- employment, death attributable to, 68-1417

- definition of terms, 68-1401

- "state game warden," 68-1402

- disability retirement allowance, 68-1414

- dormant accounts, transfer to employer's account, 68-1428

- effective date for commencement of system, 68-1407

- errors, correction, 68-1423

- establishment of system, 68-1403

- exemption of benefits from taxation or process, 68-1420

- false or fraudulent statements, penalty, 68-1423

- involuntary retirement allowance, 68-1415

- membership in system, 68-1407

- military service, credit for, 68-1422

- monthly payment of allowances, 68-1419

- optional means of payment of benefits, 68-1427

- public employees' retirement act inapplicable to game wardens, 68-1429

- refund of contributions on resignation or discharge, 68-1416

- rules and regulations for administration of system, 68-1406

- service retirement, 68-1411

- allowance on retirement, 68-1413

- subrogation of state to claims against third persons, 68-1425

- suspension or revocation of benefits, grounds, 68-1424

- voluntary retirement on reduced allowance, 68-1412

- workmen's compensation, benefits supplemental to, 68-1426

#### Waste of game animals prohibited, 26-307

#### Wild turkey

- attaching of tag to turkey taken, 26-511

- fee for tag, 26-510

- tags for, issuing, 26-510

- violation of act concerning, misdemeanor, 26-512

### FIXTURES

- Ownership of fixtures by landowner, exceptions, 67-1301

- Security interests in fixtures, priority between, 87A-9-313

### FLOOD CONTROL AND WATER CONSERVATION

#### County and municipal participation in projects

- acceptance of federal, state or other aid, 89-3304

- acquisition and condemnation of property, 89-3303

- alternative method of organization of projects, amendment or repeal of provisions limited, 89-3314

- assessment of property benefited, levy and collection, 89-3309

- authority for participation, 89-3301

- bond issues by counties or municipalities, 89-3312

- charges for services or facilities, authority of counties or municipalities, 89-3309.1

- contributions to right of way costs, acceptance, 89-3307

- costs, contemplated apportionment, 89-3305

- direction of project by state or federal government, 89-3306

## INDEX

References are to Title and Section numbers

### FLOOD CONTROL AND WATER CONSERVATION (Continued)

- County and municipal participation in projects (Continued)
  - division of work into parts, 89-3311
  - highway property, contracts for use, 89-3310
  - indebtedness, contracting by counties or municipalities, 89-3312
  - maintenance of works, counties and municipalities may assume, 89-3307
  - public purpose of activities declared, 89-3302
  - railroad property, contracts for use, 89-3310
  - separate proceedings for parts of work, 89-3311
  - street or road fund, allocation for costs, 89-3308
  - supplementary nature of powers, 89-3313
  - tax levy for payment of indebtedness assumed, 89-3312
  - works with respect to which county or municipality may participate, 89-3301

### FOOD AND DRUGS

- Beef or veal, persons exempted from having meat inspected, stamped or being licensed, 46-504
- Board of food distributors, report to governor, 27-306
- Food, Drug and Cosmetic Act, 27-701 to 27-723
  - adulterated or misbranded articles
    - additives to conform to regulations permitted, 27-713
    - condemnation proceedings, destruction of article, 27-706
    - correction of defect, bond of claimant, 27-706
    - definitions, 27-710, 27-711, 27-714, 27-715, 27-718, 27-719
    - detention or embargo of article, 27-706
    - nuisance, abatement of, 27-706
    - prohibited acts, penalties, 27-703, 27-705
  - citation of act, 27-701
  - cosmetic
    - adulterated cosmetic defined, 27-718
    - adulteration or misbranding, see adulterated or misbranded articles above
    - definition, 27-702
    - misbranded cosmetic defined, 27-719
  - definition of terms, 27-702
  - drug or device
    - adulterated drug or device defined, 27-714
    - adulteration or misbranding, see adulterated or misbranded articles above
    - curative properties, representation of, false advertising, 27-720
    - "device" defined, 27-702
    - dispensing of prescription drugs, 27-716
      - labeling requirements, 27-716
    - "drug" defined, 27-702
    - false advertising prohibited, 27-703, 27-705, 23-720
    - misbranded drug or device defined, 27-715, 27-716
    - narcotic drugs, law governing, 27-716
    - new drug, dispensing of
      - application required, exceptions, 27-717
      - labeling proposed, 27-717
      - "new drug" defined, 27-702
      - tested for safe use, 27-717
    - simulating mark or label prohibited, 27-703
    - substituting drugs without consent prohibited, 27-703
  - enforcement vested in state board of health, 27-721
  - examination of samples by state department of health for violations of act, 27-722
  - false advertising prohibited, 27-703
    - criminal penalties, exemptions, 27-705
    - what deemed false advertising, 27-720
- food
  - adulterated food defined, 27-710
  - adulteration or misbranding, see adulterated or misbranded articles above
  - definition, 27-702
  - misbranded food defined, 27-711
  - permits for manufacture, processing and packing
    - conditions governing, 27-712
    - inspection of premises of permittee, 27-712
    - suspension and reinstatement, 27-712



## INDEX

References are to Title and Section numbers

### FOOD AND DRUGS (Continued)

#### Food, Drug and Cosmetic Act (Continued)

##### food (Continued)

- standards, regulations establishing, 27-709
- unwholesome food, condemnation or destruction, 27-706
- hearings under act, conduct of, 27-721
- inspection of buildings and premises by state department of health, 27-722
- prohibited acts, enumeration, 27-703
  - criminal penalties, 27-705
  - restraining by injunction, 27-704
- regulations of state board of health
  - adoption, amendment, or repeal, procedure, 27-713, 27-721
  - factors considered, 27-713
  - hearings, when required, 27-721
  - effective date, 27-721
  - food and color additives, use of, 27-713
  - food standards, 27-709
  - notice of proposal to promulgate regulations, 27-721
- reports of state department of health, 27-723
- samples or specimens for analysis, securing by state department of health, 27-722
- violations of act, penalties, 27-705
  - examination of samples to determine violations, 27-722
  - exemption of advertising media, 27-705
  - minor violations, prosecution not required, warning notice, 27-708
  - prosecution instituted without delay, 27-707
  - reliance on guaranty or undertaking as a defense, 27-705
  - right of defendant to be heard by department of health, 27-707
  - summary reports by state department of health, 27-723

#### Food service establishments

- definition of terms, 27-612
- diseased person not to handle food or work in establishment, 27-619
- enforcement of act by state board, agreements with other agencies, 27-620
- fraud, obtaining food with intent to defraud, penalty, evidence of intent, 94-1831
- frozen food plants
  - definition, 27-612
  - game, beef or veal not properly stamped or tagged, operator to require signed declaration, 27-624
  - lien for rental on compartments, 27-623
  - loss of food, liability for, 27-622
  - owners and operators not responsible for violation of game laws by persons who rent lockers, 27-624
  - requirements on receipt of game and beef carcasses, 27-624
- inspections by health officers and sanitarians, reports to department, 27-621
- license from state department of health required, 27-613
  - application for license, form and contents, 27-614
  - denial or cancellation of license
    - appeal from decision of state board, 27-618
    - grounds, 27-615
    - hearing, demand for, 27-616
    - notice in writing, 27-616
    - proposed plan of correction, effect, 27-617
  - expiration date, 27-613
  - granted as a matter of right, 27-613
  - license fee, 27-614
  - multiple-type establishment, 27-613
    - partial denial or cancellation, 27-615
  - nontransferable, 27-613
  - publicly owned establishments exempt, 27-613
- regulation of establishments required to protect public health, 27-611
- rules adopted by state board, 27-620
  - violations, penalties, 27-625
- samples of food furnished by licensees for analysis, 27-621
- violations of act, penalties, 27-625
  - corrective plan submitted, approval by department bars prosecution, 27-617
  - notice, proposed plan of correction, 27-617

## INDEX

References are to Title and Section numbers

### FOOD AND DRUGS (Continued)

Food stores, license required, 27-310  
fees and expenses of board, 27-313

### FORECLOSURE

Attorney fee to be allowed by court, 93-8613  
Deficiency judgment, docketing, 93-6001  
Parties to foreclosure action, 93-6001  
Power of sale contained in mortgage, alternatives available, 93-6004  
advertising required for sale under power, 93-6005  
attorney fees allowed to mortgagee, 93-6007  
redemption rights of mortgagor, 93-6006  
Proceeds of sale, application, 93-6001  
Sale of property directed by court, 93-6001

### FOREIGN LAW

Reasonable written notice of intent to raise issue concerning law of foreign country  
necessary, M. R. Civ. P., Rule 44.1

### FORESTS AND FORESTRY

Bond of person engaged in cutting of forest products as to reduction or management  
of fire hazard, 28-404  
Enjoining violations concerning disposal of slash, 28-407  
Experiment station, reports and disposition of income, 28-304  
Fire protection  
classification of forest land for protection and assessment purposes, 28-109  
compliance with protection requirements, what constitutes, 28-110  
costs of protection, determination and assessment against land, 28-111  
moneys available for fire protection, 28-123  
deposit and payment of moneys, 28-124  
plan for fire protection, preparation, 28-111  
Reduction or management of fire hazards, 28-404  
Sawmills on forest land, license application and fee, 81-1502  
Sawmill waste as fire hazard, 28-119  
Slash and debris  
certificate of clearance, 28-412  
contracts for reduction or management of fire hazards, state forester may enter  
into, 28-410  
contracts with forest protective agencies, 28-411  
disposal of slash, 28-407  
hazard reduction agreement, purchaser of forest products to insure compliance,  
28-406  
injunctions where slash and debris not disposed of properly, 28-407  
methods of reducing hazards, 28-411  
reduction, 28-405  
reduction or management of fire hazard, 28-404  
slash and debris along right-of-way, 28-405  
state forester, supervision, 28-408  
state forest fire wardens, delegation of powers to, 28-409  
violation of provisions, penalty, 28-405  
State board of forestry, powers, 28-105  
State forester, appointment, compensation and term of office, 81-1403  
report to governor, 81-1411  
State forests  
conservation appropriations and allotments, receipt by state treasurer, 81-1410  
sale of timber, supervision and scaling by state forester, 81-1408  
State lands in general, sale of timber from, 81-1601  
Transportation of coniferous trees, bill of sale required, 28-701

### FORFEITURES

Bail, forfeiture, procedure, disposition of judgment and execution, 95-1116, 95-1117  
Disposition of fines and forfeitures, 94-801-1  
juvenile traffic offenders, fines collected from, 94-801-2  
Vehicles used in transporting stolen livestock, 94-35-204

### FORGERY

Identification cards, false procurement, penalty, 94-2014

## INDEX

References are to Title and Section numbers

### **FRATERNAL BENEFIT SOCIETIES**

See INSURANCE, Fraternal benefit societies, 40-5301 to 40-5359

### **FRAUD**

Accommodations, obtaining with intent to defraud, penalty, evidence of intent, 94-1831  
Affirmative defense in civil proceedings, M. R. Civ. P., Rule 8(c)

circumstances to be stated with particularity, M. R. Civ. P., Rule 9(b)

Obtaining money, property or service by false pretenses, 94-1805

Statute of frauds, 13-606—See STATUTE OF FRAUDS

Uniform Commercial Code supplemented by general provisions of law, 87A-1-103

### **FUNERAL DIRECTORS**

Licensing requirements, 66-2701 to 66-2717—See MORTICIANS AND FUNERAL DIRECTORS

### **FUR-BEARING ANIMALS**

Production defined as agricultural pursuit, 3-110.1

### **FURNISHING BOARD**

Board abolished, 82-3322

## **G**

### **GALEN STATE HOSPITAL**

See also STATE INSTITUTIONS

Cost of support, payment by resident or responsible person, 80-1601 to 80-1604

Industrial activities permitted, 80-1501 to 80-1503

Juvenile reception and evaluation center, committal, duties, transportation provided, 80-1704

Location of hospital, 80-1701

Management and control of hospital by department of institutions, 80-1401 et seq.

Purposes of hospital, 80-1701

Superintendent, qualifications, 80-1702

Transfer of patients from other institutions

Boulder river school and hospital, 80-2308

center for the aged, 80-2502

Transfer of patients to mental institutions, 80-1703

Tuberculosis treatment facilities to be maintained by hospital, 69-4317

charges for care and treatment of patients, 69-4316

### **GAMBLING**

Parimutuel betting permitted at licensed horse races, 62-511

percentage of pool retained by licensee, 62-512

tax on bets, withholding by licensee, 62-513

### **GAME WARDENS**

See FISH AND GAME, Wardens for enforcement of laws

### **GARBAGE**

Disposal areas regulated, 69-4001 to 69-4010—See REFUSE DISPOSAL AREAS

### **GARNISHMENT**

Availability of remedy before and during action, M. R. Civ. P., Rule 64

Compensation under occupational disease act exempt from, 92-1329

### **GAS COMPANIES**

Financing statements of utility, contents and place of filing, 87A-9-302.2

definition of terms, 87A-9-302.1

Uniform Commercial Code, application, 87A-9-302.3

### **GEOPHYSICAL EXPLORATION**

Restoration of surface to original condition required, 69-3304



## INDEX

References are to Title and Section numbers

### GIFTS

Unsolicited goods deemed a gift, 67-1706.1

### GONORRHEA

See VENEREAL DISEASE, 69-4601 to 69-4617

### GOVERNOR

Adjutant general, appointment, 77-117

Chief budget officer, governor constitutes, 79-1012

Director of budget, appointment, 79-1012

Governor-elect, orderly transition of power to, 82-1311 to 82-1314

Industrial accident board member, appointment, 92-104

Interstate compact on juveniles, appointment of administrator, 10-1002

Method of selecting in event of enemy attack and person in line for succession unable to act, 82-1309

Post-attack resource management, powers and duties, 77-1504 to 77-1506

Post-enemy-attack, succession to governorship, V, 46; 82-3802

Reports to, 82-4002—See REPORTS

Salary, 25-501

State board of forestry, members, appointment, 28-101

Water resources board, ex officio member of, 89-103

Wheat research and marketing committee, appointment, 3-2905  
removal of members, 3-2907

### GRAND JURY

Challenge of panel or juror, 95-1403

Charge by court, 95-1404

Composition and drawing of jury, 95-1401

Discharge upon completion of business, 95-1404

Disclosure of proceedings, restrictions and requirements, 95-1409

Dismissal of indictment, motion on grounds jury not selected, drawn or summoned according to law, 95-1402

Evidence before grand jury, requirements, 95-1408

Foreman, appointment, powers and duties, 95-1403

Indictment

amending charge, 95-1505

endorsement as "a true bill," 95-1410

evidence required to find, 95-1408

finding and presentment, 95-1410

form of charge, 95-1503

joinder of offenses and of defendants, 95-1504

number required to find indictment, 95-1401, 95-1410

prior conviction, charge of, notice and procedure, 95-1506

Number of regular jurors and alternate jurors, 95-1401

Objections to panel or juror, 95-1402

Powers and duties of jury, 95-1405

Proceedings before jury, who may give advice, who may be present, transcript of testimony, 95-1406

Secrecy of proceedings, 95-1409

Subpoena of witnesses, issuance, 95-1407

Summoning grand juries, discretion of district judge, 95-1401

### GRASS CONSERVATION

Commission expenses and compensation of members, 46-2306

biennial report to governor, 46-2306

Fees imposed against districts, disposition, 46-2331

### GRAZING DISTRICTS

Appeal procedure, application of rules of civil procedure to, M. R. Civ. P., Rule 81(a), Table A

### GROUND WATER

See WATERS AND WATER RIGHTS, Ground water regulation, 89-2911 to 89-2936

## INDEX

References are to Title and Section numbers

### **GUARDIANSHIPS**

- Action brought without joining ward as party, M. R. Civ. P., Rule 17(a)
- Appointment of guardian ad litem, M. R. Civ. P., Rule 17(c)
- Guardian for receiving public welfare aid to dependent children payments, 71-509
- Investments, retention permitted when received from source other than purchase, though not qualified investment, 86-327
- Sale of property in good faith, validation, 91-4324
- Service of process on guardians, M. R. Civ. P., Rule 4D(2)

## **H**

### **HABEAS CORPUS**

- Appeal to supreme court from order discharging petitioner, 95-2714
- Application by petition, contents, verification, 95-2703
- Bail, habeas corpus to obtain admission to, 95-2702
- Contempt of court for refusal to obey, 95-2706
- Contents of writ, 95-2707
- Discharge of person detained, 95-2713
- Eligibility for writ, 95-2701
- Grounds for issuance, no release for technical defects, 95-2716
- Hearing
  - evidence, depositions authorized, 95-2712
  - summary hearing authorized, 95-2711
- Issuance of writ, by whom issued, 95-2704
  - granting without delay required, 95-2705
  - writ and process issued and served at any time, 95-2715
- Obedience to writ, refusal, contempt of court, 95-2706
- Petition for writ, contents, verification, 95-2703
- Post-conviction hearing, 95-2601 to 95-2608—See CRIMINAL PROCEDURE, Post-conviction hearing
- Production of person detained required, exception, 95-2710
- Return of person on whom writ served
  - contents, 95-2709
  - courts, justices or judges before whom returnable, 95-2704
  - hearing on return, 95-2711
- Rules of civil procedure, application to proceedings, M. R. Civ. P., Rule 81(a), Table A
- Service of writ, 95-2708
  - writ and process issued and served at any time, 95-2715
- Supreme court proceedings, M. R. App. Civ. P.—See SUPREME COURT, Original proceedings in supreme court

### **HAIL INSURANCE, STATE**

- Account in agency fund created, 82-1511
- Borrowing power of state board, 82-1517
- Claims for losses, appraisal, arbitration and appeal, 82-1516
- Compensation of board members and employees, 82-1519
- Counties, payments to, 82-1511
- General fund, transfer of funds to, 82-1511
- Payment of losses, 82-1517
- Reinsurance authorized, 82-1505
- Report to governor, 82-1519
- Reserve, deposit and use, 82-1507
- Tax levy
  - delinquent taxes, deduction from payment for losses, 82-1517
  - expenses to be covered by levy, 82-1507
  - refund of taxes in excess of needs, 82-1507
- Warrants for money borrowed, 82-1517

### **HEALTH, LOCAL BOARDS OF**

- Appropriations to support boards, 69-4508
- City board, composition, 69-4505
- City-county board, agreement and composition, 69-4506
- County board, composition, 69-4504
- Definition of terms, 69-4501

## INDEX

References are to Title and Section numbers

### HEALTH, LOCAL BOARDS OF (Continued)

District board, agreement and composition, 69-4507  
Federal funds, allocation to local boards, 69-4503  
Financing of local boards, 69-4508  
Powers and duties of boards generally, 69-4509  
Supervision by state board of health, 69-4502  
Tax levy for support of board, 69-4508  
Violation of rules or order, penalty, 69-4519  
Visiting nurse services provided by board, 69-4512

### HEALTH OFFICERS

Appointment by local board, 69-4509  
    state board to appoint after failure by local governing board, 69-4511  
Communicable diseases to be reported to health officer, 69-4514  
    diseased prisoners, removal from jail, 69-4516  
Law enforcement officers to assist in enforcement, 69-4513  
Obstructing performance of duties unlawful, 69-4517  
    penalty, 69-4519  
Powers and duties in general, 69-4510  
Violation of orders, penalty, 69-4519

### HEALTH SERVICE CORPORATIONS

Organization under Nonprofit Corporation Act, 15-2304  
State employee group insurance plans, 40-3905.1

### HEALTH, STATE BOARD OF

See DEPARTMENT OF HEALTH, Board of health

### HEARING AID DISPENSERS

Board of hearing aid dispensers, 66-3002, 66-3004 to 66-3006  
    review, 66-3023  
Exclusions, 66-3009  
Licenses, 66-3007, 66-3013, 66-3014  
    disciplinary proceedings, 66-3017, 66-3022  
    examinations, 66-3011, 66-3012  
    fee and requirements, 66-3010  
    practicing without license a misdemeanor, 66-3021

### HIGHWAY PATROL

Appeals from supervisor, application of rules of civil procedure, M. R. Civ. P., Rule 81(a), Table A  
Chief of patrol, appointment, 31-104  
Reserve patrolmen, filling vacancies, 31-105  
Retirement system  
    actuarial investigations and data, 31-206  
    administration of act, 31-206  
    definition of terms, 31-201  
    payments into retirement account, 31-205  
        members, contributions by, 31-209  
        state contributions from driver's license fees, 31-210  
    rules and regulations, 31-206  
    surplus moneys in account, investment, 31-205  
Submission of new-voter list to major political parties, 23-3001  
Vehicle equipment safety compact, duties under, 32-21-166 to 32-21-175—See MOTOR VEHICLES, Equipment safety compact ratified

### HIGHWAYS, BRIDGES AND FERRIES

Abandoned vehicles, removal and sale, 53-901 to 53-909—See MOTOR VEHICLES, Abandoned vehicles  
Advertising regulation along highways, 32-4701 to 32-4714—See Zoning regulation along highways, below  
Beautification of highways  
    expenditure of funds  
        nonmatching funds, limitation to, 32-2425  
        purposes for which federal funds expended, 32-2423



## INDEX

References are to Title and Section numbers

### HIGHWAYS, BRIDGES AND FERRIES (Continued)

#### Beautification of highways (Continued)

- land acquired, extent of interest and methods of acquisition, 32-2424
- purposes of act, 32-2422

#### Checking stations along highways authorized, 32-2419

- co-operation by highway commission with other agencies required, 32-2421
- major highways entering state, checking stations required, 32-2420

#### Classes of highways enumerated and defined, 32-2301

#### Controlled access facilities

- commercial enterprises prohibited on public land, 32-4310
- definition of terms, 32-4302

- traffic regulatory act, 32-2119

- designation of highway by state highway commission, 32-4303

- local authorities empowered to make designations, 32-4305

- local authorities, when consent required for designation, 32-4304

- design of facilities, powers of highway authorities, 32-4306

- driving violations on facility, penalty, 32-4311

- grade crossing elimination, powers of highway authorities, 32-4307

- intersections with facilities, power of authorities to permit, 32-4307

- interstate sign manual, adoption for use on controlled access highways, 32-2133

- plan for proposed highway, filing with county clerk, 32-2413

- policy of state, 32-4301

- resolution designating highway, findings and statements to be included, 32-4303

- local authorities empowered to pass resolutions, 32-4305

- right of way acquisition for highway, 32-3920

- county acquiring property, 32-4018

- service roads, design, construction and regulation, 32-4308

- signs required to show points of ingress and egress, 32-4309

- traffic regulation, powers of local authorities, 32-4305

- violation of traffic regulations, penalties, 32-4311

#### County bonds

- amortization bonds preferred, provisions for repayment, 32-3806

- emergency repairs after disaster, limitation on amount of bond issues, 32-3804

- inability of county to pay total indebtedness, refunding agreements, 32-3802

- interest rate on bonds, 32-3805

- maximum amount of indebtedness outstanding, 32-3801

- additional limitation except for emergency and refunding purposes, 32-3804

- purposes for which bonds may be issued, 32-3801

- single purpose defined, 32-3803

- redemption of bonds before maturity, provision for, 32-3805

- refunding bonds authorized, 32-3801

- inability of county to pay total indebtedness, 32-3802

- maximum term of refunding bonds, 32-3805

- serial bonds permitted, provisions for repayment, 32-3806

- term of bonds limited, 32-3805

#### County bridges

- bond issues for construction of bridges, 32-2903

- contracts for work on bridges to be let by board, procedure and requirements, 32-4204

- minimum amount to be done by contract, 32-2802

- election to authorize bridge construction, 32-2903

- intercounty bridges, construction and maintenance, 32-2906

- maintenance as responsibility of county commissioners, 32-2901

- management and control of bridges by commissioners, 32-2905

- municipalities, responsibility for construction and maintenance within, 32-2902

- police regulation of bridges, 32-2905

- repair of bridges, duty of commissioners, 32-2904

- state highway personnel assisting county commissioners, 32-2502

- stream beds and banks, repair to protect bridge, 32-2905

- street or suburban railway sharing bridge, sharing of costs, 32-3603

- tax levy on property in county for bridge construction and maintenance, 32-3602

- additional levy on approval by voters in election, 32-3605

- municipality, special levy for bridge in, 32-3604

## INDEX

References are to Title and Section numbers

### HIGHWAYS, BRIDGES AND FERRIES (Continued)

- County motor vehicle fund, license and registration fees paid into, 32-3701, 53-122
- city road fund in population centers, segregation, 32-3702
  - use of city road fund, 32-3703
- city road fund other than in population centers, segregation, 32-3704
  - use of city road fund, 32-3705
- transfer of remaining funds to county road fund, 32-3702, 32-3704
  - use of county road fund, 32-3706
- County roads
  - accounts of labor, equipment and materials furnished, 32-3003
  - appropriations for expenditures within district, 32-2812
  - auto passes on county roads, construction and maintenance, 32-2811
    - state or federal highway, pass at connection with, 32-2810
  - bonds, power of commissioners to issue, 32-2802
  - cattle guards, appurtenances and gates adjacent to county roads, 32-2802
  - certification of labor, equipment and materials furnished, 32-3003
  - continuation in effect until properly abandoned or vacated, 32-4014
  - contracts for work on roads to be let by board, 32-4201
    - acceptance of work required for completion of contract, 32-4203
    - advertising for bids, 32-4201
    - bond required of bidders, 32-4202
    - bond required of contractor, 32-4203
    - minimum amount to be done by contract, 32-2802
    - preference given to resident bidders, 32-4202
    - wage scale required of contractor, 32-4202
  - definition, 32-2301
  - districts, division of county into, 32-2801
  - drains and ditches, construction and protection, 32-3007
  - employment of laborers by superintendent, 32-3006
  - expenditures in road districts limited by quarterly apportionments, 32-2812
  - Federal-aid system, contracts for county work on, 32-2804
  - guideposts, erection, 32-2801
  - improvement district proceedings, 32-3101 to 32-3131—See Local improvement districts, below
  - information to be furnished to highway commission, 32-2815
  - inspections and reports on county road work, 32-2805
  - machinery for road work, purchase by county, 32-2806
    - use of machinery within municipality, 32-2807
  - material for road building, acquisition, use and disposal, 32-2806
  - obstructions, duty of commissioners to remove, 32-2904
  - opening, discontinuing or changing road
    - canal or ditch crossing, duty of owner to prepare, 32-4013
    - damages determined by board, 32-4006
      - payment of damages from county fund, 32-4008
    - eminent domain on failure to reach agreement as to damages, 32-4007
    - investigation by board of desirability of action, 32-4004
    - joint action required on county line roads, 32-4002
    - notice by board of decision on proposed action, 32-4004
    - notice to road supervisor of action, 32-4010
    - petition required for action, 32-4001
      - contents of petition, 32-4003
      - number of signatures required on petition, 32-4002
    - railroad crossing, duty of railroad owner to prepare, 32-4013
    - recording of findings, plat, and surveyor's report, 32-4011
    - section or subdivision lines, petition to change road to, 32-4009
    - survey and platting of road to be opened, 32-4005
  - payment of claims on superintendent's certificate, 32-3004
  - plat books prepared by surveyor, 32-2803
  - powers of county commissioners in general, 32-2801, 32-2802
  - reports by county commissioners to highway commission, 32-2801
  - right of way, power of county commissioners to acquire, 32-2802
  - secondary road information to be given county commissioners by highway commission, 32-2608

## INDEX

References are to Title and Section numbers

### HIGHWAYS, BRIDGES AND FERRIES (Continued)

#### County roads (Continued)

- seeding of right of way areas along county roads, 32-2813
- special fuel dealers and users licenses tax, disposition of funds, 84-1840
- state land equalization payments, allotment from, 81-1120
- state personnel assigned to assist commissioners, 32-2502
- stock lanes, establishment and maintenance, 32-4015
- subdivision and section lines, roads to follow when practicable, 32-2809
- superintendent of roads, appointment by board of commissioners, 32-2803
  - bond filed by superintendent, 32-3001
  - compensation of superintendent, 32-3001
  - duties of superintendent in general, 32-3002
  - oath of office, 32-3001
  - requisition and use of equipment, tools and implements, 32-3005
- supervisor, employment by board of commissioners, 32-2803
- tax levy on property in county for road construction and maintenance, 32-3601
  - additional levy on approval by voters at election, 32-3605
- traffic limitations, power of commissioners to impose, 32-2802
- transfer of county roads to state highway commission, 32-4016
- weed control along county roads, 32-2814
- width of roads prescribed, 32-2808

Debris, dumping on highway, 32-4410

Definition of terms, 32-2203

#### Emergency construction area

- designation by county commissioners, 32-317
- livestock not to run at large in area, 32-319
  - impounding of animals at large, 32-320
  - penalty for violations, 32-321
- notice of designation of area, 32-318
- removal of designation, 32-318

#### Encroachments on highway

- abatement as nuisance by judicial action, 32-4408
- notice to remove encroachment, manner of giving, 32-4406
- penalty for failure to remove after notice, 32-4407
- prosecution of actions by county attorney, 32-4409
- removal at expense of owner after notice, 32-4408
- removal by road supervisor or county surveyor without notice, 32-4405

Excavations across highways, permit and bridging required, 32-4403

#### Federal aid highways

- assent to provisions of Federal acts, 32-2401
- canal or ditch crossing by highway, duty of owners to prepare crossing, 32-3918
- continuation of highways until properly abandoned or vacated, 32-3917
- contracts for implementation of Federal aid authorized, 32-2401
- contracts for work on highways to be let by highway commission, 32-4101
  - bond required of contractors, 32-4103
  - competitive bidding required, 32-4102
  - counties to do work, agreements for, 32-4102
  - wage scale required of contractors, 32-4101
- county contracts for work on Federal-aid system, 32-2804, 32-4102
- county road, transfer to Federal-aid system, 32-4016
- designation of highways included in Federal-aid systems, 32-2407
- highways not continuously in state, designation as part of Federal-aid system, 32-2408
- railroad crossing by highway, preparation of crossing, 32-3918
- rules necessary for compliance with Federal acts authorized, 32-2401
- seeding along highways, 32-2412
- utility facilities along Federal-aid and interstate highways, location, 32-2414
  - costs paid by highway commission, 32-2415
  - definition of terms, 32-2416

Ferries, county acquisition of property for, 32-4017

- tax levy for construction, maintenance and repair, 32-1518

Ferries uniting two counties, construction, maintenance and operation, 32-2907

Flood control projects, contracts for use of highway property for, 89-3310



## INDEX

References are to Title and Section numbers

### HIGHWAYS, BRIDGES AND FERRIES (Continued)

- Funds available, allocation by highway commission
  - bridge construction and reconstruction on Federal-aid system, special allocations for, 32-2604
  - districts to which funds apportioned, 32-2603
  - increase in funds allocated to particular district, 32-2610
  - interstate highway system, allocation of funds for, 32-2609
  - matching of federal funds, allocations for, 32-2605
  - primary federal-aid system, allocation of funds for, 32-2606
  - secondary federal-aid system, allocation of funds for, 32-2607
  - urban federal-aid funds, allocation, 32-2611
- Garbage, dumping on highway, 32-4410
- Gasoline tax proceeds, use for highway purposes, 32-2601
- Good Roads Day, annual observance, 32-4401
- Herdng on public highways, flagmen escorts and nighttime prohibitions, violations, 32-1021, 32-1022
- Injuries to highways, signs and trees, punishment, 32-4402
- Interstate highways, weight of vehicles on highways, controlled by federal law, 32-1123
- Junkyards along roads
  - agreements with the United States, 32-4522
  - definition of terms, 32-4514
  - injunction against noncomplying junkyard, 32-4521
  - license required for operation, 32-4515
    - duration of license, 32-4516
    - fee for license, 32-4516
    - issuance of license, 32-4516
    - renewal of license, 32-4516
    - screening required for license, 32-4517
  - location of junkyards, restrictions, 32-4517
  - purpose of act, 32-4513
  - removal of junkyards, 32-4520
  - restrictive ordinances and regulations not abrogated by statute, 32-4523
  - screening of junkyards, specifications, 32-4517
    - acquiring land for screening purposes, 32-4520
    - existing junkyards, 32-4518
    - regulations governing screening, 32-4519
- Legislative findings, 32-2201
- Legislative policy and intent, 32-2202
- Lewis and Clark highway designated, 32-2302
- Littering highway as misdemeanor, penalty, 32-1629
  - garbage or debris blown from vehicle, penalty, 32-1629.1
  - posting notice of prohibition required, 32-1631
  - reward for informing on litterbugs, 32-1630
- Livestock gates on county roads, 32-2811
  - state or Federal highway, gate at intersection with, 32-2810
- Local improvement districts
  - assessment of benefits
    - apportionment of cost among parts of district, 32-3111
    - apportionment of costs and expenses to land, 32-3115
    - approval and certification of assessment roll by board, 32-3117
    - board to levy and collect assessment, 32-3101
    - confirmation of assessment roll, 32-3116
    - correction of errors in assessment roll, 32-3117
    - front-foot plan for levy of assessments, 32-3112
    - lien of assessment on land, 32-3101, 32-3111, 32-3117
    - notice of filing of assessment roll, publication, 32-3116
    - objections to assessment roll, hearing by board, 32-3116
    - parts into which district divided for assessment, 32-3110
    - roll of assessment, contents and filing, 32-3115
    - units for levy of assessment, 32-3112
    - valuation of lands according to tax assessment roll, 32-3106
  - audit of claims and accounts of district, 32-3129
  - board of county commissioners, powers and duties in general, 32-3101

## INDEX

References are to Title and Section numbers

### HIGHWAYS, BRIDGES AND FERRIES (Continued)

#### Local improvement districts (Continued)

##### bond issues

- amount of bonds not to exceed costs and expenses, 32-3123
- board of county commissioners to issue bonds, 32-3101
- call of bonds before maturity, 32-3127
- contractor, issuance of bonds to in payment for improvement, 32-3126
  - progress payments during construction, 32-3130
- form of bonds, 32-3123
- immediate payment of assessment to release lands from bonds, 32-3125
- interest payments by treasurer, 32-3127
- interest rate on bonds, 32-3118, 32-3123
- maturity date of bonds, 32-3123
- notice of assessment roll and proposed issue of bonds, 32-3124
- redemption of land from bonds by immediate payment of assessment, 32-3125
- remedies of bondholders on default, 32-3128
- sale of bonds to pay costs and expenses, 32-3126

##### boundaries of district and parts of district, 32-3110

##### claims and accounts, approval, certification and payment, 32-3129

##### committee of supervisors, election and qualification, 32-3105

##### compensation of supervisors, 32-3113

##### duties of committee, 32-3106

##### construction or improvement of road

- county performing construction or improvement work, 32-3114
- inspector, appointment, duties and compensation, 32-3113
- progress payments to contractor, 32-3130

##### contracts for work of improvement

- acceptance of work required for completion of contract, 32-4206
- advertising for bids, 32-4205
- bond required of bidders, 32-4205
- bond required of contractor, 32-4206
- county not liable on contract, 32-4207
- execution of contract by board of county commissioners, 32-4207
- opening of bids, 32-4205
- preference given to resident bidders, 32-4206
- price of contract not to exceed cost estimates, 32-4205
- progress payments authorized, 32-4206
- wage scale required of contractors, 32-4206

##### costs of construction or improvement

##### county share of cost, maximum and order of payment, 32-3109

##### agreement with district to share costs, 32-3108

##### damage or injury to property, release obtained by committee and surveyor, 32-3106

##### estimates of cost prepared by superintendent of roads, 32-3106

##### reports of estimates to board, 32-3107

##### maximum costs allowed, 32-3107

##### damage or injury to property, releases obtained by committee and surveyor, 32-3106

##### maximum damages, costs and expenses, 32-3107

##### meeting of road superintendent and landowners

##### conduct of meeting, 32-3105

##### election of committee of supervisors, 32-3105

##### notice of time and place of meeting, publication, 32-3104

##### resolution fixing time and place of meeting, 32-3104

##### municipalities, roads within not to be included, 32-3103

##### order creating improvement district, 32-3107

##### payment of cost and expenses

##### alternative plans available, 32-3118

##### immediate payment plan, notice of assessment roll to landowners, 32-3119

##### contents of notice, 32-3120

##### installment payment plan

##### bonds authorized for installment payments, 32-3122

##### collection of installments by treasurer, 32-3121

##### immediate payment of assessment to release land from bonds, 32-3125

##### notice of assessment and proposal to issue bonds, 32-3124

## INDEX

References are to Title and Section numbers

### HIGHWAYS, BRIDGES AND FERRIES (Continued)

#### Local improvement districts (Continued)

- payment of cost and expenses (Continued)
- installment payment plan (Continued)
  - order of board levying assessment, 32-3121
  - redemption of land from bonds by immediate payment of assessment, 32-3125
  - sale of land for collection of delinquent installments, 32-3121
- remaining funds after payment, refund, rebate or other disposition, 32-3131
- petition for construction or improvement of road, contents and filing, 32-3102
- plans and specifications prepared by road superintendent, 32-3106
- refunds and rebates of assessments, 32-3131
- remaining money after payment of costs and expenses, disposition, 32-3131
- report of surveys and estimates by road superintendent, 32-3107
- resolution of public interest to be passed by board on receipt of petition, 32-3103
- survey and examination of road and lands by committee and surveyor, 32-3106

#### National park approach roads, agreements with federal agencies for, 32-2601

#### Overflow of highway, liability for damages and repairs, 32-4404

#### Policy of state, 32-2202

#### Ports of entry, establishment on highways authorized, 32-2419

- co-operation by highway commission with other agencies, 32-2421
- major highways entering state, checking stations required, 32-2420

#### Preference of Montana labor in awarding contracts, 41-701

- penalties for violations, 41-703

#### Refuse, dumping on highway, 32-4410

#### Right of way acquisition for county roads

- controlled access facility, acquisition for, 32-4018
- conveyance of right of way, execution and recording, 32-4012
- damages determined by board, 32-4006
  - payment of damages out of county fund, 32-4008
- eminent domain proceedings after failure to agree on damages, 32-4007
  - recording of copy of judgment, 32-4012
- estates which may be acquired by public, 32-3901
- ferry, acquisition of property for, 32-4017
- interest acquired by public, 32-4001
- investigation by board of desirability of acquisition, 32-4004
- joint action required on county line roads, 32-4002
- notice by board of decision on proposed acquisition, 32-4004
- opening and survey of road, 32-4005
- petition of landowners required for acquisition, 32-4001
  - contents of petition, 32-4003
  - number of signatures required on petition, 32-4002
- power of board of commissioners, 32-2802

#### Right of way acquisition for state highways

- controlled access facilities, 32-3920
  - plan filed with county clerk, 32-2413
  - improvements after filing not compensable, 32-3908
- eminent domain power, procedure for exercise, 32-3904
- entire parcel acquired where portion not needed will have little market value, 32-3905
- estates which may be acquired by public, 32-3901
- future highway purposes, power to acquire for, 32-3906
- instrument of transfer, reference to parcel and project number, 11-614.2
- irrigable lands rendered unusable, compensation paid, 32-3916
- lease of unused property, disposition of rentals, 32-3906
- materials needed for road building, right of commission to remove and use, 32-3907
- plan filed with county clerk, 32-2413
  - improvements after filing not compensable, 32-3908
- plat to be filed where part of parcel acquired, 32-3905
- power of highway commission in general, 32-3902
- purposes for which property may be acquired, 32-3903
- relocation assistance, 32-3921 to 32-3931
  - advisory assistance, 32-3924



## INDEX

References are to Title and Section numbers

### HIGHWAYS, BRIDGES AND FERRIES (Continued)

- Right of way acquisition for state highways (Continued)
  - relocation assistance (Continued)
    - definitions, 32-3923
    - element of damages, 32-3931
    - highway commission's rule-making power, 32-3922
    - moving expenses, 32-3921
    - payments not income for state tax purposes, 32-3930
    - payments to landowners, 32-3925 to 32-3927
    - review of application for assistance, 32-3928
    - rules and regulations, 32-3929
  - resolution required for exercise of eminent domain power, 32-3904
  - surplus property disposition
    - demand by former owner that land be offered for sale, 32-3909
    - determination by commission that property is not needed, 32-3909
    - exchange for property needed, 32-3909
    - sale of property, power of commission, 32-3910
      - appraisal of property required before sale, 32-3911
      - conveyance of property to purchaser, 32-3915
      - minimum price of sale, 32-3911
      - notice of sale, publication, 32-3911
      - preferential right of previous owner to repurchase, 32-3912
      - private sale after unsuccessful public offering, 32-3913
      - public sale, when required, 32-3910
      - title not to pass until purchase price paid, 32-3911, 32-3913
  - toll bridge, acquisition for, 32-3919
- Roadblocks, arrest at, 95-618
- Secondary road information to be provided to county commissioners, 32-2608
- Seeding along state and federal highways, 32-2412
- Signs along highways, injury to or removal prohibited, penalty, 32-2134.1
  - posting of notices of act along highways, 32-2134.3
  - reward for informing on violators, 32-2134.2
- Special fuel dealers and users license tax, disposition of funds, 84-1840
- State highway commission
  - accounts maintained by commission, 32-2417
  - advice to county officers, 32-2410
  - appointment of members, 32-2402
  - bonds given by commission members, 32-2404
  - chairman of commission, selection and voting power, 32-2405
  - claims against commission, certification and payment, 32-2417
  - co-operation with local agencies, 32-2406
  - county commissioners, state personnel assigned to assist, 32-2502
  - districts from which members appointed, 32-2403
  - division of maintenance and control, organization and operation, 32-2503
  - employment, compensation and assignment of personnel, 32-2502
  - Federal aid, acts necessary to secure authorized, 32-2401
  - fencing along highways through open range, 32-2426, 32-2427
  - funds credited to account of highway commission, 32-3205
  - investigation of construction methods, 32-2410
  - meetings of commission, 32-2405
  - number of votes required for action, 32-2405
  - office to be open as required, 32-2409
  - per diem payments to members, 32-2404
  - political affiliations of members, 32-2403
  - powers of commission in general, 32-2406
  - qualifications of members, 32-2403
  - quorum of commission, 32-2405
  - records of commission, 32-2409
  - records, sale to public of records and publications, 32-3914
  - removal of members from office, grounds, 32-2403
  - reports to governor and legislative assembly, 32-2409
  - report to budget director, 79-1013
  - residence of members, 32-2403
  - rules and regulations for government of commission, 32-2409
  - sale of personal property by commission, disposition of proceeds, 32-3914
  - sign manual for use on highways, adoption, 32-2133

## INDEX

References are to Title and Section numbers

### HIGHWAYS, BRIDGES AND FERRIES (Continued)

#### State highway commission (Continued)

- state highway administrator, appointment, salary, duties and removal, 32-2501
- state officers and employees not to be appointed to commission, 32-2403
- statistical compilations by commission, 32-2410
- terms of office of members, 32-2403
- toll bridge authority, commission acts as, 32-2701
- vacancies on commission, filling, 32-2403
- weight of vehicles on highways, studies and testing by commission, 32-2411

#### State highways

- bypassing of municipality, when consent of governing body required, 32-1628
- canal or ditch crossing by highway, duty of owners to prepare crossing, 32-3918
- continuation of state highway until properly abandoned or vacated, 32-3917
- contracts for work on highways to be let by highway commission, 32-4101
  - bond required of contractors, 32-4103
  - competitive bidding, when required, 32-4102
  - counties doing work, agreements for, 32-4102
  - preference to resident bidders, 32-4102
  - wage scale to be paid by contractors, 32-4101
- county road, transfer to state highway system, 32-4016
- designation of highways by highway commission, 32-2407
- fencing along highways through open range, 32-2426, 32-2427
- municipalities, payment of construction and maintenance costs within, 32-1627
- railroad crossing by highway, duty of railroad to prepare crossing, 32-3918
- seeding along state highways, 32-2412
- weed control by county board, 32-2814

#### Toll bridges

##### bond issues

- additional bonds authorized if proceeds of original sale insufficient, 32-3504
- construction fund, credits to and expenditures from, 32-3507
- deposit of funds, 32-3506
- disclaimer of general obligation of state, 32-3501
- extension of time, covenant against, 32-2709
- form of bonds, 32-3502
- funds created for each bond series, 32-3506
- lien of bondholders on proceeds of sale, 32-3505
- maturity dates of bonds, 32-3502
- negotiability of bonds, 32-3501
- pledge of revenues permitted, 32-2707
- proceeds of sale, restrictions on use, 32-3504
- rate provisions, covenants as to, 32-2707
- redemption before maturity, provisions for, 32-3502
- registration of bonds, provisions for, 32-3503
- remedies of bondholders, provisions for, 32-2709
- replacement of lost, destroyed or mutilated bonds, provision for, 32-2709
- reserve and contingency funds, provisions as to, 32-2707
- reserve fund, provision for, 32-3509
- resolution for issuance of bonds, contents and adoption, 32-3501
- retirement of bonds, sinking fund used for, 32-3509
  - bridge becomes free after retirement, 32-2716
- revenue fund, credits to, 32-3508
  - disbursements and transfers from revenue fund, 32-3509
- sale of bonds, 32-3503
- security of bondholders, provisions for, 32-2709
- signatures valid though signer no longer in office, 32-3501
- sinking fund, payments into and disbursements from, 32-3509
- surplus proceeds of sale, disposition, 32-3504
- temporary bonds, authority to issue, 32-3502
- terms of bonds determined by authority, 32-3502
- construction contracts by competitive bidding, 32-2712
- cost estimates to be made by toll bridge authority, 32-2703
- distance of bridge from existing free bridge, 32-2704
- distance of new public bridges from existing toll bridge, 32-2715
- engineer to have charge of bridges and toll collections, 32-2713
- financial accounts and statements required, 32-2714

## INDEX

References are to Title and Section numbers

### **HIGHWAYS, BRIDGES AND FERRIES (Continued)**

#### **Toll bridges (Continued)**

- findings as to revenues and costs required for construction of bridge, 32-2703
- free public bridge after retirement of bonds, 32-2716
- highway commission as toll bridge authority, 32-2701
- instruments of authority, execution and attestation, 32-2701
- officers of toll bridge authority, 32-2701
- petition required for construction within fifty miles of free bridge, 32-2704
  - action by toll bridge authority on petition, 32-2706
  - contents of petition, 32-2705
  - form and certification of petition, 32-2705
  - resolution of toll bridge authority on petition, 32-2706
  - sufficiency of petition, findings of toll bridge authority conclusive, 32-2706
- powers of toll bridge authority, 32-2702
- rates, tolls and charges, fixing by toll bridge authority, 32-2710
  - bond provisions for establishment of rates, 32-2707
  - exemption of governmental vehicles from payment of tolls, 32-2707
  - revenue fund, deposits in and transfers from, 32-2711
- records open to public inspection, 32-2714
- reserve and contingency funds, creation and deposit of moneys, 32-2708
  - bond provision requiring reserves, 32-2707
- resolution of public convenience and necessity, requirement and contents, 32-2703
  - petition for construction within fifty miles of existing bridge, resolution on, 32-2706
- retirement of bonds, bridge becomes free after, 32-2716
- revenue fund, deposits in and transfers from, 32-2711
- right of way acquisition for toll bridge, 32-3919
- seal of authority, affixing to instruments and records, 32-2701

#### **Traffic safety program**

- definition of terms, 32-4602
- federal program, participation of state, 32-4605
- funds, acceptance and use, 32-4606
- governor to administer act, 32-4605
- highway traffic safety board, creation, 32-4603
  - duties, 32-4605
  - organization, 32-4604
- local programs, approval required, 32-4607
- purpose of act, 32-4601
- superintendent of public instruction responsible for driver education, 32-4605

#### **Trees along highways, injury to, 32-4402, 94-3202**

- Utility facilities, location along Federal-aid and interstate highways, 32-2414
  - costs paid by highway commission, 32-2415
  - definition of terms, 32-2416

#### **Violations of highway code, prosecution, 32-2418**

#### **Wage scales of contractors, 41-701**

- penalties for violations, 41-703

#### **Water overflowing highway, liability for damages and repairs, 32-4404**

#### **Weed control along highways, 32-2814**

#### **Weight of vehicles on highways**

- co-operative studies by highway commission and other agencies, 32-2411
- finest and penalty assessments, disposition of, 32-1131
- interstate and defense highways, 32-1123

#### **Width required for roads, 32-2808**

#### **Zoning regulation along highways**

- agreements with the United States, 32-4712
- commercial zoning, areas and uses permitted, 32-4704
- compensation for removal of sign, rights acquired, 32-4709
- congressional action or nonaction, state law amended or null and void, 32-4714
- declaration of policy, 32-4701
- definition of terms, 32-4702



## INDEX

References are to Title and Section numbers

### HIGHWAYS, BRIDGES AND FERRIES (Continued)

#### Zoning regulations along highways (Continued)

- enforcement methods, 32-4711
- guarantee against loss of federal funds, state highway commission to promulgate rules consistent with federal law, 32-4713
- judicial proceedings to uphold state law, prosecution by attorney general, 32-4712
- nonconforming signs, removal, 32-4708
- obstruction of lawful signs prohibited, 32-4711
- outdoor advertising, limitations, 32-4703
- permits for private off-premise signs, 32-4707
- signs, regulation of size, lighting and spacing, 32-4706
- unlawful advertising, notice and removal, 32-4710
- unzoned commercial and industrial areas, description, 32-4705

### HISTORICAL SOCIETY OF MONTANA

#### Agency of state government, 44-516

#### Antique automobile collection, use of proceeds, 44-529

#### Board of trustees

- appointment and terms of members, 44-519
- duties of board, 44-523
- executive committee, selection and duties, 44-521
- mileage reimbursement of trustees, 44-522
- powers of board, 44-523
- qualifications of trustees, 44-520

#### Commercial enterprises authorized, 44-525

#### Continuation and perpetuation as "Montana Historical Society," 44-516

#### Definition of terms, 44-517

#### Director, powers and duties, 44-524

#### Fine arts' commission property, transfer to society, 44-528

#### Fund raising drives authorized, 44-525

#### Library independent of other libraries, 44-518

#### Microfilm division, creation and function, 82-3205

#### Moneys received by society, deposit and use, 44-527

#### Museum independent of other institutions, 44-518

#### Purposes of society, 44-516

#### Quarters in Veterans and Pioneers Memorial Building, 44-526, 78-202

#### Seal of society, description, 44-525

### HOLIDAYS

#### Arbor day, date of observance, 75-2212

#### Bank closing, holidays on which permitted, 19-107

#### Good Roads Day, annual observance, 32-4401

### HOMES FOR THE AGED

See NURSING HOMES

### HOMICIDE

#### State criminal jurisdiction, 95-304

#### Venue, death and cause of death in different counties, 95-406

### HORSE RACING

#### Commission created, composition and terms of members, 62-501

##### chairman of commission, selection, 62-503

##### duties of commission, 62-505

##### expenses of commission, 62-503

##### auditing and approval of expenses, 62-505

##### qualifications of members, 62-501

##### quorum of commission, 62-503

##### records and reports of commission, 62-504

##### removal of commissioner for cause, 62-501

##### supervisory powers of commission, 62-506

##### vacancies on commission, filling, 62-501

#### Days of week when racing permitted, 62-508

#### Definition of terms, 62-502

#### Liability insurance required of licensees, 62-510

## INDEX

References are to Title and Section numbers

### HORSE RACING (Continued)

#### Licenses

- cancellation or revocation of license, 62-507
- conviction of crime precluding issuance of license, 62-507
- fails to comply with license requirements, 62-507
- participants in race meet to have license, 62-505
- penalty for unlicensed operation, 62-508
- race meets, license required for, 62-507

Montana bred horses, special races for, 62-509

Parimutuel betting permitted, restrictions, 62-511

percentage of pool retained by licensee, 62-512

tax on bets withheld by licensee, 62-513

tax on gross receipts, collection and disposition, 62-514

Rules and regulations governing race meets and parimutuel system, 62-505

Supervisory powers of commission, 62-506

Violations of act as misdemeanor, 62-508

Visitations and inspections by commission, 62-506

### HOSPITALS AND RELATED FACILITIES

Advisory council on hospitals and long-term care facilities, composition and appointment, 69-5214

meetings of council, 69-5215

terms of members, 69-5215

Alcoholic beverage, administration by hospital, 4-139

Alterations to be approved by state board, 69-5212

Child abuse reports required, 10-901 to 10-905—See CHILDREN AND MINORS,

Abuse of children

Confidential nature of information received by state department, 69-5218

Consent by minors to medical or surgical care, 69-6101 to 69-6105—See CHILDREN AND MINORS

Counties, powers of commissioner, 16-1008A.

Discrimination prohibited in subsidized facilities, 69-5313

Extended care facilities defined, 69-5201

Fraud, obtaining accommodations with intent to defraud, penalty, evidence of intent, 94-1831

Freedom of choice of physician protected, 69-5217

In-hospital medical staff committees, information available to, 69-6301 to 69-6304

Injunction for protection of health and welfare, 69-5220

Joint county hospitals authorized, 16-1040

definition of terms, 16-1039

terms of contract between counties, 16-1041

state aid in construction, application for, 69-5312

License required for operation of facility, 69-5203

application for license, procedure, 69-5205

definition of terms, 69-5201

denial, suspension or revocation of license, grounds, 69-5209

judicial review of denial, suspension or revocation, 69-5211

procedure for denial, suspension or revocation, 69-5210

federal facilities exempt from requirement, 69-5202

fee for license, 69-5204

inspection of hospital and issuance of license, 69-5206

penalty for violations of licensing chapter, 69-5221

records and reports required of facilities, 69-5219

Occupational disease reports, contents and filing, 69-4204

Phenylketonuria test required at birth, 69-4116

Registered facilities, registration of, 69-5219.1

Rules and standards, adoption by state board, 69-5216

Survey and construction of hospitals

application for construction projects, agencies entitled to file, 69-5309

hearing and forwarding of application to federal agency, 69-5310

consolidated facilities serving two or more counties, application and construction, 69-5312

contracts with federal agencies authorized, 69-5302

definition of terms, 69-5301

federal funds, acceptance and use, 69-5311

## INDEX

References are to Title and Section numbers

### HOSPITALS AND RELATED FACILITIES (Continued)

- Survey and construction of hospitals (Continued)
  - plans for construction of facilities, preparation and submission, 69-5305
  - publication and hearing before submission, 69-5306
  - relative need specified in plan, 69-5308
  - rules for administration of chapter, 69-5304
  - standards for maintenance and operation of subsidized facilities, 69-5307
  - state department of health as principal agency, 69-5302
  - powers and duties of state department, 69-5303
- Vital statistics information to be furnished by institution, 69-4430

### HOTELS AND MOTELS

- Co-operative agreements for enforcement of regulations, 34-306
- Declaration of policy of regulatory law, 34-301
- Definition of terms, 34-302
- Fraud, obtaining accommodations with intent to defraud, penalty, evidence of intent, 94-1831
- Inspections by state and local officers, 34-307
- License required, 34-303
  - cancellation of license, procedure, 34-305
  - denial of license, procedure, 34-305
  - duration of license, 34-304
  - fee for license, 34-304
  - superseding other fees, 34-310
  - penalty, 34-309
  - subpoenas, authority of board to issue, 34-308
- Penalty for violation of act or regulations, 34-309
- Rules and regulations, promulgation, 34-306
- Subpoenas, use in enforcement proceedings, 34-308

### HOUSE TRAILERS

- Fees in addition to registration and license fees, 32-3305
- Taxation of, 84-6601 to 84-6607—See TAXATION, Mobile homes

### HUSBAND AND WIFE

- Abandonment of wife without support as misdemeanor, 94-301
- Alienation of affections
  - acts within state not to give rise to cause of action, 17-1203
  - cause of action abolished, 17-1201
  - litigation and threat of litigation prohibited, 17-1204
  - penalty for bringing action, 17-1206
  - settlement and compromises void, 17-1205
- Conciliation of controversies
  - agreement between parties, reduction to writing, 36-204
  - budget for conciliation court, 36-203
  - citation of act, 36-201
  - confidential nature of communications, 36-203
  - counselor for conciliation, appointment and duties, 36-203
  - counties in which chapter applies, determination by district judges, 36-202
  - court of conciliation, designation, 36-203
    - powers of court, 36-205
  - definition of terms, 36-202
  - discretionary jurisdiction where no children involved, 36-204
  - fees not charged in conciliation proceedings, 36-204
  - filing of petition for conciliation, 36-204
  - hearings, time and place, 36-204
  - judge of conciliation court, selection, 36-203
  - jurisdiction of courts, 36-203
  - orders for conduct of parties, 36-204
  - petition for conciliation, form, contents, and filing, 36-204
  - powers of conciliation court, 36-205
  - privacy of hearings, 36-203
  - probation officer, assistance to conciliation court, 36-203
  - procedure for conciliation, 36-204
  - purposes of chapter, 36-202
  - reference of controversy to counselor, 36-203
  - short title of act, 36-201
  - stay of other proceedings during attempted conciliation, 36-204



## INDEX

References are to Title and Section numbers

### **HUSBAND AND WIFE (Continued)**

- Married minors, consent to medical or surgical care, 69-6101 to 69-6105—See **CHILDREN AND MINORS**
- Nonsupport of wife as misdemeanor, 94-301
- Separate maintenance, action for
  - stay of proceedings to attempt reconciliation, 21-135.1
  - conciliation petition filed, 36-204
  - waiting period before decree granted, 21-135.1

## I

### **IDENTIFICATION CARDS**

- False procurement, penalty, 94-2014

### **ILLEGALITY**

- Affirmative defense in civil proceedings, M. R. Civ. P., Rule 8(c)

### **ILLEGITIMATE CHILDREN**

- Disclosure of illegitimacy, court order required for, 69-4422
- Legitimation, new birth certificate issued after, 69-4423
- Support obligations of father, 93-2901-1 to 93-2901-11—See **BASTARDY PROCEEDINGS**

### **INDIANS**

- Criminal jurisdiction of Flathead Indian country
  - county commissioners' consent required for assumption of jurisdiction, 83-802
  - customs and culture of Indians to be preserved, 83-805
  - date of assumption of jurisdiction, 83-803
  - obligation of state to assume jurisdiction, 83-801
  - proclamation of governor assuming jurisdiction, 83-802
  - resolution of tribes requesting state jurisdiction, 83-802
  - rights, privileges and immunities preserved, 83-804
  - withdrawal of tribal consent to state jurisdiction, 83-806
- Sale of imitation Indian articles
  - authentic articles, designation of, 85-303
  - definitions, 85-301
  - imitation articles to be identified as such, 85-302
  - violation, misdemeanor, 85-304
- Schools, children to attend, 75-2907 to 75-2910—See **SCHOOLS, Attendance**

### **INDICTMENT**

- See **GRAND JURY**, 95-1401 to 95-1423; 95-1501 to 95-1506

### **INDUSTRIAL DEVELOPMENT**

- Bonds, issuance by county or municipality, terms and sale, 11-4103
  - proceeds of sales, use, 11-4107
  - refunding of bonds, 11-4106
  - security of bondholders, provisions for, 11-4104
- Costs, determination by governing body, 11-4105
  - elements included in cost, 11-4107
- Definition of terms, 11-4101
- Lease of project, terms and conditions, 11-4105
  - cost of project, elements included, 11-4107
- Mortgage to secure bonds, terms permitted, 11-4104
- Powers of municipality or county, 11-4102
  - cumulative nature of powers, 11-4109
- State planning board to give advice and information, 11-4110
- Taxation of property, 11-4108

### **INDUSTRIAL HYGIENE**

- Definition of "occupational disease," 69-4201
- Hazardous conditions, correction and prevention, 69-4202
- Penalty for violations, 69-4205
- Reports on occupational disease by physicians and hospitals, 69-4204
- State department investigations and reports, 69-4203

## INDEX

References are to Title and Section numbers

### INDUSTRIAL SCHOOL

See STATE INSTITUTIONS, Juvenile facilities, 80-2202 et seq.

### INFORMATION

See CRIMINAL PROCEDURE, Information, 95-1301 to 95-1303; 95-1501 to 95-1506

### INHERITANCE TAX

Adjustments of tax on payment of debts by legatee, 91-4418

Charitable exemption, 91-4414

Clear market value, tax imposed on, 91-4407

Deductions, 91-4407

Discount for payment within eighteen months, procedure in case of refund, 91-4416, 91-4418

Estimated amount of tax, deposit with clerk of court, 91-4418

Exemptions from tax, 91-4414

Lien of tax on property transferred, 91-4415

Proceeds of tax, disposition, 84-1901

Transfer of property within three years of death

appraisal and certification of value by county assessor, 91-4461

appraisal of value by state board of equalization, 91-4466

certificate of inheritance tax due, 91-4463

county clerk to furnish description to assessor, 91-4460

form provided to grantee, contents, 91-4462

inclusion of property in gross estate of decedent, 91-4465

maximum value subject to special procedure, 91-4467

payment by grantee of tax due, 91-4464

purpose of special procedure, 91-4467

Waiver of tax of surviving spouse, 91-4414.1

### INITIATIVE AND REFERENDUM

Attorney general's summary of measures for placement on ballot, 37-104.1

Statement by secretary of state for referendum measures, 37-104.1

### INJUNCTIONS

Appeal pending, suspension or modification of injunction, M. R. Civ. P., Rule 62(c)

Consumer loan act violations, enjoining, 47-227

Cosmetology licensing act, enjoining violations, 66-817

Dentistry, enjoining unauthorized practice, 66-911

Statutory provisions unchanged by rules, M. R. Civ. P., Rule 65

Supreme court proceedings, M. R. App. Civ. P.—See SUPREME COURT, Original proceedings in supreme court

ex parte proceedings in supreme court, M. R. App. Civ. P., Rule 40

### INQUESTS

Coroner's inquests, 95-803 to 95-809—See COUNTY CORONER, Inquests

### INSANE AND MENTALLY ILL

Boulder river school and hospital, 80-2301 to 80-2312—See BOULDER RIVER SCHOOL AND HOSPITAL

Criminal cases, provisions relating to competency of accused, 95-501 to 95-509—See CRIMINAL PROCEDURE, Competency of accused

Division of mental hygiene

clinics and community services, 80-2406

discrimination in providing services prohibited, 80-2409

powers and duties of division, 80-2403

public mental health programs, control by department of institutions, 80-2405

continuation of existing services, 80-2408

regions, conformity to state plan, regional mental health boards, duties, 80-2407

standards for mental health programs, 80-2405

state funds, limitation on appropriations, 80-2406

state hospital in division, 80-2401

supervisor of division, 80-2402

Glasgow center, staffing, supervision by board of institutions, 80-2410, 80-2411

Glendive mental retardation center, 80-2310 to 80-2312

## INDEX

References are to Title and Section numbers

### INSANE AND MENTALLY ILL (Continued)

#### Hearing and examination

- certificate by physicians, form, 38-207

- moneys of person committed, custody and disposition, 38-210

- rules of civil procedure, application to proceedings, M. R. Civ. P., Rule 81(a),

#### Table A

- Miles City center, staffing, supervision by board of institutions, 80-2410, 80-2411

- Release of insane person to friends outside state, 38-107

- Release of insane person to institution outside state, 38-108

- Representation in actions by and against, M. R. Civ. P., Rule 17(c)

- Service of process on persons of unsound mind, M. R. Civ. P., Rule 4D(2)

- State hospital, 80-2401 to 80-2411—See WARM SPRINGS STATE HOSPITAL

- State training school and hospital, 80-2301 to 80-2312—See BOULDER RIVER

#### SCHOOL AND HOSPITAL

- Voluntary admission for diagnosis and treatment of mental illness, 38-406.1, 38-406.2

- Warm Springs state hospital, 80-2401 to 80-2411—See WARM SPRINGS STATE

#### HOSPITAL

### INSECTS

- Aquatic insects, commercial exportation prohibited, 26-708

### INSTALLMENT SALES ACT

- Complaints regarding violations, 74-605

- Contents of installment contract, 74-607

#### Contracts

- containing in more than one document, when authorized, 74-607

- delivery to buyer, 74-607

- refinancing, 74-610

- required contents, 74-607

- writing, requirements, 74-607

- Definitions, 74-602

- Delinquency charge, 76-607

- Filling in of blank spaces after signing of contract, 74-607

#### Finance charges

- computation, method, 74-608

- maximum on motor vehicles, 74-608

- maximum on service and goods other than motor vehicles, 74-608

- Insurance, requiring of buyer, when authorized, 74-607

- Investigative power of superintendent, 74-605

#### License of sales finance company

- application, 74-603

- banks, trust companies or savings and loan associations, excepted, 74-603

- expiration, 74-603

- fee, 74-603

- license not transferable or assignable, 74-603

- posting of license on premises, 74-603

- required, 74-603

- suspension, revocation or failure to renew

  - grounds, 74-604

  - hearing, 74-604

  - judicial review, 74-604

- Prepayment, refund, 74-609

- Refinancing of contract, 74-610

- Refunds on prepayments, 74-609

- Rules and regulations, 74-606

- Secured transactions, application to, 87A-9-203

- Secured Transactions chapter, effect on installment act, 87A-9-201

- Short title, 74-601

- Subpoena power of superintendent, 74-606

#### Superintendent

- investigations, power, 74-605

- powers, 74-606

- Transfer of equity in goods by buyer, 74-607

- Violations of act, penalties, 74-611

- Waiver of provisions of act unenforceable and void, 74-612



## INDEX

References are to Title and Section numbers

### INSURANCE

#### Adjusters

- affidavit as to lost, stolen or destroyed license, 40-3331
- attorneys excluded from definition, 40-3306
- definition of term, 40-3306
- examinations by commissioner, 40-2714
  - conduct of examination, 40-2715
  - expenses of examination, 40-2717
  - reports on examination, 40-2716
- fees payable to commissioner, 40-2726
- license required, 40-3327
  - acting without license, penalty, 40-3332
  - continuation of license, 40-3328
  - expiration of license, 40-3328
  - qualifications of licensee, 40-3327
  - refusal to continue license, 40-3329
  - return of license after expiration, suspension or revocation, 40-3331
  - revocation of license, 40-3329
    - procedure following revocation, 40-3330
  - suspension of license, 40-3329
    - procedure following suspension, 40-3330
- out of state adjusters, when license not required, 40-3327

Advisory board contract, offer as inducement to insurance prohibited, 40-3513

#### Agents and solicitors

- affidavit as to lost, stolen or destroyed license, 40-3331
- appointment by insurer required, 40-3307
  - continuation of appointments, 40-3317
  - filing of appointments, 40-3317
  - termination of appointment, 40-3317
    - rights of agent following termination, 40-3318
- Consumer Loan Act lender not to require insurance through particular agent, 47-214
- corporations, licensing as agents, 40-3310
- countersignature of policy required, 40-2822
  - commission of resident agent on policy originating outside state, 40-2824
  - issuance of policy at home or branch office, 40-2825
  - nonresident agent may not sign, 40-3336
  - salaried personnel prohibited from countersigning, 40-2823
- definition of terms
  - "agent," 40-3302
  - "life insurance agent," 40-3303
  - "solicitor," 40-3304
- employees of agents and insurers excluded from definition, 40-3305
- examination of affairs by commissioner, 40-2714
  - conduct of examination, 40-2715
  - expenses of examination, 40-2717
  - reports on examination, 40-2716
- exchange of business, 40-3325
- firms, licensing as agents, 40-3310
- fraternal benefit society agents, 40-5344 to 40-5349—See Fraternal benefit societies, agents, below

group insurance, acts to implement excluded from definition, 40-3305

#### license required, 40-3307

- acting without license, penalty, 40-3332
- application for license, contents and filing, 40-3312
- association of agents, licensing, 40-3311
- contents of license, 40-3315
- continuation of licenses, 40-3328
- corporations, licensing, 40-3310
- countersigning of policies, by resident agents only, 40-3336
- display of license in place of business, 40-3323
- examination of applicants for license, 40-3313
  - conduct of examination, 40-3314
- existing licenses, expiration and renewal, 40-2612
- expiration of license, 40-3328
- fees payable to commissioner, 40-2726

## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Agents and solicitors (Continued)

##### license required (Continued)

firms, licensing, 40-3310

forms prescribed and furnished by commissioner, 40-3307

issuance of license, 40-3315

number of licenses required of agent, 40-3316

qualifications of licensees, 40-3308

life insurance agents, 40-3309

reciprocity as to nonresident agents, 40-3333 to 40-3335

refusal to continue license, 40-3329

return of license after expiration, suspension or revocation, 40-3331

revocation of license, 40-3329

procedure following revocation, 40-3330

separate license required for each life or disability insurer, 40-3316

service of process on nonresident agents, 40-3337

suspension of license, 40-3329

procedure following suspension, 40-3330

temporary licenses, issuance, 40-3319

rights under temporary license, 40-3320

misappropriation of funds by agent as larceny, 40-3324

nonresident agent subject to insurance code, 40-3338

place of business to be maintained in state, 40-3323

premiums, reporting and accounting for, 40-3324

records to be maintained by agents, 40-3323

surplus line insurance, 40-3419

retaliatory tax provisions, 40-2826

revocation or suspension of insurer's certificate, effect on agent's authority, 40-2816

salaried employees of insurers excluded from definition, 40-3305

scope of chapter, 40-3301

sharing of commission, 40-3325

solicitors, rights and relationship with agent, 40-3321

surplus line agent, license, fee and bond, 40-3414

authority under license, 40-3415

revocation of license, 40-3422

vending machine licenses, 40-3322

Amount of insurance on one risk by one insurer limited, 40-2909

Annuity contracts, 40-3818 to 40-3825—See also Life insurance, below

deferred annuities incidental to life insurance not included in provisions, 40-3818

dividends, provision for, 40-3823

entire contract included in written contract, 40-3821

exemption from securities act, 15-2004

grace period for payment of premiums, 40-3819

incontestability clause, 40-3820

misstatement of age or sex, provision for adjustment of payments, 40-3822

participating contracts, provision for dividends, 40-3823

reinstatement provisions, 40-3824

reversionary annuities, standard provisions, 40-3825

single premium contracts, inapplicable provisions omitted, 40-3818

standard provisions required, 40-3818

#### Application for insurance

admissibility in evidence of application, 40-3712

alteration of application prohibited, exception, 40-3712

form of application, approval required, 40-3714

grounds for disapproval, 40-3715

insured must apply for life or disability insurance, exceptions, 40-3711

statements and descriptions in application, effect on contract, 40-3713

Arrest bond certificates, 95-1121 to 95-1123

Automobile insurance, reimbursement for total loss to be based on actual replacement value, 40-4404

Benefit certificate, offer as inducement to insurance prohibited, 40-3513

#### Benevolent associations

agents, appointment and licensing, 40-4909

officers as agents, 40-4910

amendment of articles, rules or contract, filing, 40-4907

annual statement of association, contents and filing, 40-4916

## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Benevolent associations (Continued)

- assessments of members
  - death benefit, assessment to pay, 40-4915
  - expenses, assessments to cover, 40-4913
- death claims, numbering and payment, 40-4914
  - assessment of members for payment, 40-4915
- definition, 40-4902
- exemption from general provisions of code, 40-2610
- expenses, annual maximum, 40-4913
- foreign associations excluded, 40-4906
- laws applicable, 40-4901, 40-4917
- "member" defined, 40-4903
- "membership contract" defined, 40-4904
- minimum membership, 40-4912
- new associations prohibited, 40-4906
- officers of association
  - agents, acting as without license, 40-4910
  - definition, 40-4905
  - number of officers permitted, 40-4908
- receipt or evidence of payment to association to be issued, 40-4911
- scope of chapter, 40-4901
- treasurer, bond, 40-4908

#### Binders for temporary insurance, effect, 40-3726

#### Boycotts prohibited, 40-3508

#### Casualty insurance

- definition, 40-2905
- reserve for unearned premiums, 40-3005
- sovereign immunity, waiver of defense required
  - policies issued to public agencies, 40-4402
  - state-owned properties, 40-4401
- unfair discrimination prohibited, 40-3512
- uninsured motorist coverage included unless rejected by insured, 40-4403

#### Claims for losses

- acts by insurer not deemed waiver of defenses, 40-3733
- forms for proof of loss to be furnished by insurer, 40-3732

#### Coercive practices prohibited, 40-3508

#### Commercial air operators required to carry insurance, 1-314

- amount set by aeronautics commission, 1-315
- continuation in force required, 1-318
- evidence of insurance deposited with commission, 1-316
  - copies of policies acceptable as evidence, 1-317
- rules established by commission, 1-319
- unauthorized insurers' policies acceptable, 1-321
- violation of act as misdemeanor, 1-320

#### Commissioner of insurance—See Department of insurance, below

#### Common owners, transfer of interest by one does not avoid insurance, 40-3708

#### Companies—See Insurers, below

#### Compliance with applicable provisions of code required, 40-2609

#### Consumer loan act, restrictions and limitations concerning with regard to consumer loans, 47-214

#### County funds, use to pay indemnity insurance premiums, 16-1001

#### Coverages not mutually exclusive, 40-2901

#### Credit life and disability insurance

- amount of insurance permitted, 40-4206
- application for insurance, copy delivered to debtor, 40-4209
- authorized insurers only to issue policies, 40-4212
- citation of chapter, 40-4202
- claims for losses, 40-4213
- competition not prohibited or discouraged, 40-4201
- Consumer Loan Act, insurance required under, 47-214
- contents of policy or certificate, 40-4208
- definition of terms, 40-4204
- enforcement powers of commissioner, 40-4215
- forms, filing, approval and withdrawal, 40-4210
- forms of insurance enumerated, 40-4205



## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Credit life and disability insurance (Continued)

- judicial review of commissioner's orders, 40-4216
- liberal construction of chapter, 40-4201
- penalties for violation of commissioner's orders, 40-4217
- policy or certificate to be delivered to debtor, 40-4208
- premium rates, filing and compliance, 40-4211
  - limit on amount charged, 40-4211
- purpose of chapter, 40-4201
- refund of excess and unused premiums, 40-4211
- scope of chapter, 40-4203
- selection of policy or insurer left to debtor, 40-4214
- term of coverage, 40-4207
- time of delivery of policy or certificate to debtor, 40-4209

#### Death of insured, passage of property insurance to successor in interest, 40-3707

#### Deceptive practices prohibited, 40-3502

#### Definition of terms, 40-2602 to 40-2608

- types of coverage not mutually exclusive, 40-2901
- types of insurance, 40-2901 to 40-2908

#### Department of insurance

- appeals from commissioner, 40-2725
- appropriation of funds by legislative assembly, 40-2702
- certificates and certified copies as evidence, 40-2708
- commissioner
  - attorney-in-fact for service of process on nonresident agent, 40-3337
  - control and supervision of department, 40-2702
  - definition of "commissioner," 40-2605
  - delegation of authority, 40-2706
  - power to impose fine, 40-2709
  - responsibility for acts of assistants and employees, 40-2706
  - seal of office, description and use, 40-2703
  - state auditor ex-officio commissioner, 40-2701
- compensation of employees limited to that provided by law, 40-2705
- contractual services, procurement by commissioner, 40-2704
- creation of department, 40-2702
- definition of "commissioner" and "department," 40-2605
- employment and compensation of deputies and assistants, 40-2704
- evidence produced before commissioner or examiner, 40-2718
- examinations by commissioner
  - adjusters, 40-2714
  - agents and solicitors, 40-2714
  - conduct of examinations, 40-2715
  - expenses of examination, 40-2717
  - insurers, 40-2713
  - managers and promoters, 40-2714
  - reports on examinations, 40-2716
- fees collectible for certificates, licenses and copies of documents, 40-2726
- financial interest in insurers prohibited to employees of department, 40-2705
- fire prevention advisory commission, appointment, 82-1201
- hearings by commissioner
  - authority for hearings, 40-2720
  - demand for hearing, 40-2720
  - notice of hearing, 40-2722
  - orders on hearing, 40-2724
  - procedure on hearings, 40-2723
  - stay of action pending hearing, 40-2721
- notices by commissioner, contents and service, 40-2711
- orders of commissioner, contents and service, 40-2711
- powers and duties in general, 40-2709
- records of proceedings, 40-2707
- rules and regulations, adoption, 40-2710
- service of process through commissioner, 40-2818, 40-2819
- witnesses before commissioner or examiner, 40-2718, 40-2719

#### Deposits through commissioner

- amounts required, 40-2809
- appraisal of assets deposited, 40-3208

## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Deposits through commissioner (Continued)

- assignment of securities to commissioner and successors, reassignment, 40-3207
- bank or trust company as custodian, 40-3204
- custodial arrangements, 40-3204
- deficiency in deposits, 40-3212
- deposits subject to chapter, 40-3201
- excess deposits authorized, 40-3210
- income to be paid to depositor, 40-3209
- inspection rights of depositor, 40-3209
- levy on deposits, 40-3211
- liability as to safekeeping of deposits with custodian, state and commissioner exempt, 40-3206
- life insurance policy reserves, 40-3012
- purpose of deposits, 40-3202
- records as to assets and securities deposited, 40-3205
- release of deposit, 40-3213
- safe deposit boxes used for safekeeping of deposits, specifications, 40-3204
- securities eligible for deposit, 40-3203
- substitution of other eligible assets, 40-3209
- time for which deposits held, 40-3213

#### Desist orders for prohibited practices, 40-3514

#### Disability insurance

- age of applicant, acceptance of premiums after maximum is reached, 40-4032
- apportionment of loss with other insurers, 40-4021
  - expense incurred benefits, 40-4020
- autopsy, right of insurer to require, 40-4013
- blanket disability insurance
  - applications and certificates not required, 40-4106
  - definition of term, 40-4104
  - persons to whom payable, 40-4107
  - required provisions of policy, 40-4105
- bylaws of insurer, incorporation by reference in policy prohibited, 40-4002
- change of beneficiary, rights reserved to insured, 40-4015
- change of occupation, adjustment of premiums and benefits, 40-4017
- charter of insurer, incorporation by reference in policy prohibited, 40-4002
- claims for losses
  - forms for filing of claims, 40-4009
  - notice of claim, provision for, 40-4008
  - persons to whom payable, 40-4012
  - proofs of loss, 40-4010
  - time allowed for payment before bringing action, 40-4014
  - time of payment provision, 40-4011
- conformity with state statutes provision, 40-4024
- consideration to be expressed in policy, 40-4002
- credit disability insurance—See Credit life and disability insurance, above
- deduction of unpaid premiums from payment of claim, 40-4023
- definition, 40-2903
- earnings, relation to insurance, 40-4022
- effective date of policy to be expressed, 40-4002
- entire contract to be incorporated in policy, 40-4004
- exceptions to be stated in policy, 40-4002
- excess insurance with same insurer void, provisions for, 40-4019
- excess risk, placement by agent with insurer other than that as to which licensed, 40-3326
- foreign jurisdiction, conformity to requirements, 40-4030
- format of policy, 40-4002
- franchise insurance plan, 40-4033
- grace period for payment of premiums, 40-4006
- group disability insurance, eligible groups, 40-4101
  - direct payment for medical services, 40-4103
  - required provisions of policies, 40-4102
- illegal occupation exclusion, 40-4025
- inapplicable provisions, omission from policy, 40-4003
- incidental to life insurance, not covered by chapter, 40-4001
- incontestability provisions, 40-4005

## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

- Disability insurance (Continued)
  - intoxication exclusion, 40-4026
  - minors, power to contract for insurance, 40-3710
  - misstatement of age, adjustment of benefits, 40-4018
  - narcotics exclusion, 40-4026
  - nonconforming policies, construction, 40-4031
  - number of persons to be insured by one policy, 40-4002
    - older persons, extended insurance for, 40-5401 to 40-5408—See Health insurance for persons over 65, below
  - optional policy provisions, form required, 40-4016
  - order of required and optional provisions in policy, 40-4028
  - physical examination, right of insurer to require, 40-4013
  - physicians, freedom of choice, 40-4108
    - scope of practice not enlarged, 40-4109
  - reduction in indemnity to be stated in policy, 40-4002
  - reinstatement of lapsed policy, 40-4007
  - rejected risk, placement by agent with insurer other than that as to which licensed, 40-3326
  - renewal of policy, provision for insurer's right to refuse, 40-4006, 40-4027
  - required provisions, insertion in policy, 40-4003
  - reserve for unearned premiums, 40-3007
  - rules of insurer, incorporation by reference in policy prohibited, 40-4002
  - scope of chapter, 40-4001
  - substitutions for optional policy provisions, 40-4016
  - substitutions for required policy provisions, 40-4003
  - termination date of policy to be expressed, 40-4002
  - third party ownership permitted, 40-4029
  - violations of chapter, penalty, 40-4034
- Discharge of insurer by payment, 40-3730
  - minor may give acquittance, 40-3731
- Discriminatory practices prohibited
  - life and disability insurance, 40-3509
    - exceptions, 40-3511
  - property, casualty and surety insurance, 40-3512
- Endowment contracts—See Annuity contracts, above
- Exemption of proceeds from process
  - annuity contract proceeds, 40-3737
  - disability insurance proceeds, 40-3736
  - life insurance proceeds, 40-3734
    - group life insurance, 40-3735
- False information as to terms of policy or condition of insurer, 40-3503 to 40-3505
- False statements in applications and claims, penalty, 40-3522
- Farm mutual insurers
  - accumulation of profits prohibited, 40-4839
  - agents, license not required, 40-4831
  - annual statement of affairs
    - contents and filing, 40-4832
    - exclusive report required, 40-4833
    - failure to file statement, 40-4833
    - presentation at annual meeting of members, 40-4822
  - applications for insurance to be in writing, 40-4843
    - forms filed with commissioner, 40-4844
  - articles of incorporation, contents and filing, 40-4808
    - amendment of articles, 40-4810
    - approval and endorsement, 40-4809
    - certified copies as evidence, 40-4811
  - assessment plan insurance, 40-4806
  - assessments against members
    - suit for collection, 40-4850
    - time payable, 40-4849
  - bylaws
    - adoption, amendment and revocation, 40-4817
    - binding effect on members, 40-4819
    - contents, 40-4818



## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Farm mutual insurers (Continued)

- cancellation of insurance, 40-4826
- cash premium plan, collection of premiums, 40-4806
- certificate of authority required, issuance and renewal, 40-4816
- churches, insurance on, 40-4846
- claims for losses
  - action against insurer for collection, 40-4852
  - apportionment of payments when funds insufficient, 40-4851
  - arbitration by committee of reference, 40-4848
  - directors' and officers' liability for failure to pay, 40-4850
  - notice of loss, 40-4847
  - time of payment, 40-4849
- commencement of corporate existence, 40-4809
- community houses, insurance on, 40-4846
- corporate powers in general, 40-4812
- "county" insurer defined, 40-4802
- declaration of intent to incorporate, filing, 40-4808
- directors
  - election, qualification and term of office, 40-4828
  - general management of affairs of insurer, 40-4827
  - quorum, 40-4827
- discriminatory rates prohibited, 40-4845
- dividends, payments prohibited, 40-4839
- educational purposes, expenditures of funds for, 40-4836
- exemption from general provisions of code, 40-2610
- fees payable, 40-4842
- forms filed with commissioner, 40-4844
- incorporators, number and property ownership required, 40-4807
- investigation of affairs by commissioner, expenses, 40-4834
- investment of funds authorized, 40-4835
- laws applicable, 40-4801, 40-4853
- maximum amount of insurance on single risk, 40-4804
- meetings of members
  - annual statements, presentation at meeting, 40-4822
  - notice of adjourned annual meetings, 40-4823
  - place of meetings, 40-4821
- membership
  - insurance of property required for membership, 40-4820
  - liability of members, limitations, 40-4825
  - minimum number of members required, 40-4820
  - proxies, 40-4824
  - voting rights of members, 40-4824
  - withdrawal of member, 40-4826
- minimum amount of insurance applied for before commencement of business, 40-4813
- officers
  - bonds of treasurer and secretary, 40-4830
  - election and terms of office, 40-4829
- property insurable by farm mutual, 40-4803
- public buildings, insurance on, 40-4846
- rates, filing with commissioner not required, 40-4845
- records, maintenance and availability, 40-4841
- reinsurance, 40-4805
- reserves required on cash premium plan, 40-4838
- safety fund, creation and use, 40-4837
- school buildings, insurance on, 40-4846
- scope of chapter, 40-4801
- "state" insurer defined, 40-4802
- surplus funds required, 40-4815
  - deficiency, correction required, 40-4840
  - definition of "surplus," 40-4814
- taxes payable, 40-4842
- Fictitious groupings for preferred premiums prohibited, 40-3520

## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

Fine, imposition by commissioner, 40-2709

Fire prevention advisory commission, appointment by commissioner, 82-1201

#### Fraternal benefit societies

##### agents

- applications for agent's license, 40-5346
- compensation not allowed to agents of exempt society, 40-5305
- definition of "insurance agent," 40-5344
- expiration of licenses, 40-5347
- license required, 40-5345
- part-time agents exempt from license requirements, 40-5344
- qualifications for agent's license, 40-5346
- refusal to issue or renew license, grounds, 40-5346
- renewal of licenses, 40-5347
- revocation of license, 40-5349
- salaried persons exempt from licensed requirements, 40-5344
- suspension of license, 40-5349
- termination of appointment, notice to commissioner, 40-5348

alien societies, admission to transact business in state, 40-5307

suspension, revocation or refusal of license, grounds and procedure, 40-5308

annual statement of affairs, form, filing and publication, 40-5337

penalty for failure to comply, 40-5339

##### articles of incorporation

- amendments, procedure and filing, 40-5317
- changes, binding effect on members, 40-5329
- contents, 40-5309
- failure to complete organization, articles void, 40-5311
- filing with commissioner, 40-5310

attachment of benefits prohibited, 40-5327

beneficiaries of certificate, designation and change, 40-5326

bond for return of advance payments if organization not completed, 40-5310

cash surrender values, computation, 40-5325

certificate of authority, issuance and effect, 40-5313

certificate of benefits required, 40-5329

changes to articles, constitution or laws, binding effect on members, 40-5329

form to be filed with commissioner, 40-5330

prohibited provisions, 40-5331

standard provisions required, 40-5330

commissions to be paid only to agents or exempt persons, 40-5345

consolidation of societies, 40-5353

effect of consolidation, 40-5354

##### constitution and laws

- amendments, procedure and filing, 40-5317
- changes, binding effect on members, 40-5329
- power to adopt and amend, 40-5314
- waiver, authority to prohibit, 40-5318

definition, 40-5301

disability insurance, filing and approval of certificates, 40-5333

discrimination in rates or benefits prohibited, 40-5351

examinations by commissioner

domestic societies, 40-5340

foreign and alien societies, 40-5341

publication of reports deferred until after notice to society, 40-5342

exemption from general provisions of code, 40-2610

exemption from process of benefits, 40-5327

exempt societies, 40-5305

false and misleading statements, penalties and forfeitures, 40-5350

family coverage authorized, 40-5323

foreign society, admission to transact business in state, 40-5307

suspension, revocation or refusal of license, grounds and procedure, 40-5308

forfeiture for failure to pay loan, restrictions on provisions, 40-5331

funds, purposes for which used, 40-5335

authorized investments, 40-5336

funeral benefits, maximum amount, 40-5326

funeral homes, operation by societies prohibited, 40-5320

## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Fraternal benefit societies (Continued)

- garnishment of benefits prohibited, 40-5327
- impairment of reserves, assessments against members, 40-5322
- incorporators, number required and qualifications, 40-5309
- initial solicitations, 40-5312
- injunction from doing business, 40-5356
  - exclusive power of attorney general and commissioner, 40-5357
- institutions, maintenance by societies authorized, 40-5320
- investment of funds, 40-5336
- laws applicable, 40-5304, 40-5359
- license to transact business, annual expiration and renewal, 40-5306
- limitation of actions on certificate, minimum period, 40-5331
- liquidation of society, action for, 40-5356
- loans on certificates, authority and computation of value, 40-5325
- "lodge system" defined, 40-5302
- meetings of members, place of holding, 40-5319
- membership, qualification for, 40-5321
- merger of societies, 40-5353
  - effect of merger, 40-5354
- minors, admission to membership, 40-5321
  - insurance authorized without membership, 40-5324
- misrepresentation, penalties and forfeitures, 40-5350
- nonforfeiture benefits, authority and computation, 40-5325
- personal liability for benefits, officers and members exempt, 40-5328
- pre-existing societies
  - incorporation of associations required, 40-5316
  - powers retained by incorporated society, 40-5315
- preliminary certificate of authority
  - issuance of certificate, 40-5310
  - period during which valid, 40-5311
  - solicitation under preliminary certificate, 40-5312
- "premiums" defined, 40-5332
- principal office of society, location, 40-5319
- rebates prohibited, 40-5351
- receivership proceedings, 40-5356
- records of proceedings to be in English language, 40-5319
- reinsurance agreements, 40-5334
- "representative form of government" defined, 40-5303
- reserves required, computation, 40-5338
- retroactive certificates, maximum period, 40-5331
- review of actions of commissioner, 40-5358
- service of process on society through commissioner, 40-5352
- social members without voice in insurance affairs, 40-5321
- tax exemption, 40-5343
- time allowed for completing organization, 40-5311
- types of benefits authorized to be provided by societies, 40-5323
- valuation of certificates, computation and filing, 40-5338
- voluntary discontinuation of business, procedure, 40-5356
- waiver of constitution and laws, provision prohibiting, 40-5318

Gaming policies void, 40-3709

Guaranteed arrest bond certificates, 95-1121 to 95-1123

Hail insurance, 82-1501 to 82-1520—See HAIL INSURANCE, STATE

Health insurance for persons over 65

- agents authorized to write insurance, 40-5404
- association to provide insurance
  - corporate powers of association, 40-5405
  - definition, 40-5402
  - examination of books and records of association, 40-5405
  - filing by association with commissioner, 40-5407
  - name of association not to be deceptive, 40-5407
  - policy issued to association, 40-5403
  - reports by association to commissioner, 40-5406
  - service of process on association, 40-5405



## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Health insurance for persons over 65 (Continued)

- cancellation prohibited except for nonpayment of premiums, 40-5403
- definition of terms, 40-5402
- disapproval of forms by commissioner, 40-5406
- eligibility of all persons over 65 for coverage, 40-5403
- exemption from provisions of other laws, 40-5408
- Federal insurance program, adjustment of benefits and premiums to, 40-5406
- forms of policies, applications and certificates to be approved by commissioner, 40-5406
- joint underwriting and administration permitted, 40-5403
- promotional material not to be deceptive, 40-5407
- purpose of act, 40-5401
- rate regulation by commissioner, 40-5406
- reduction of benefits if other benefits recoverable, 40-5403

#### Health insurance for state employee groups, 40-3905.1

#### Health service corporations, exemption from insurance code, 40-2611

#### Holding Companies Act

- definition of terms, 40-5502
- examination of foreign and domestic companies, 40-5505
  - annual reports, submission, 40-5505
  - frequency of examination, 40-5505
- filing false information, penalty, 40-5508
- short title, 40-5501
- transfers of stock, restrictions, 40-5503
  - exemptions from prohibitions, 40-5504
  - petition for approval by commissioner, submission, 40-5506
- violations of act, penalty, 40-5507

#### Injunction of unfair and deceptive practices, 40-3515

#### Installment sales act, provisions concerning obtaining of insurance by buyer, 74-607

#### Insurable interest

- personal insurance, 40-3704
- property insurance, 40-3705
- stipulations for payment of loss without regard to insurable interest void, 40-3709

#### Insurers

- additional types of insurance, qualification of mutuals to write, 40-4713
- affiliations unreliable, denial of authority to transact insurance, 40-2810
- agreements not to sell property prohibited, 40-4727
- alien insurers
  - definition of term, 40-2606
  - trust agreements for deposits of assets
    - amendment of agreement, 40-5207
    - authority of insurer to make agreement, 40-5206
    - Canadian insurers, officers in lieu of manager, 40-5215
    - continuation of existing trust under previous instruments, 40-5203
    - examination of assets by commissioner, 40-5212
    - filing and approval of agreement, 40-5205
    - form and contents of agreement, 40-5205
    - period during which deposit maintained, 40-5204
    - purpose of deposits, 40-5204
    - required deposits, amount, 40-5202
    - scope of chapter, 40-5201
    - separation and record of assets, 40-5210
    - statement of trustee as to character and amounts of asset, 40-5211
    - substitute trustee, 40-5214
    - title to trustee assets, 40-5209
    - withdrawal of assets by insurer, 40-5213
    - withdrawal of commissioner's approval, 40-5208
- amount of insurance required for formation of mutual, 40-4708
- annual statement filed with commissioner, 40-2820
  - false statements, penalty, 40-2820
- applications for mutual insurance to take effect on issuance of certificate of authority, 40-4710

## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Insurers (Continued)

- articles of incorporation
  - amendment of articles, 40-4707
  - contents required, 40-4705
  - filing and approval, 40-4706
- assets and liabilities
  - allowable assets in determining financial condition, 40-3001
  - bonds, valuation, 40-3013
  - deduction of assets from liabilities and liabilities from assets, 40-3002
  - domestic insurer's assets to be kept in state, 40-4725
  - excluded assets in determination of financial condition, 40-3003
  - liabilities considered in determining financial condition, 40-3004
  - purchase money mortgages, valuation, 40-3016
  - real estate valuation, 40-3015
  - reserves for unearned premiums, 40-3005 to 40-3012—See Reserve for unearned premiums, below
  - securities other than bonds, valuation, 40-3014
  - tangible personal property, valuation, 40-3015
- "authorized" insurers defined, 40-2607
- benevolent associations, 40-4901 to 40-4917—See Benevolent associations, above
- bonding of officers of mutual insurer, 40-4722
- bond or deposit required of mutual insurers, 40-4709
- borrowed surplus, 40-4738
- bulk reinsurance, 40-4747
  - mutual insurers, 40-4748
- buying and selling of votes by proxy prohibited, 40-4719
- bylaws
  - modification or revocation of bylaws of stock insurer, 40-4716
  - mutual insurers, adoption, contents and filing, 40-4715
- capital funds required, 40-2807
  - mutual insurers, 40-4708
- certificate of authority required, 40-2801
  - application for certificate, contents and filing, 40-2811
  - exceptions, 40-2802
  - existing certificates, expiration and renewal, 40-2612
  - expiration, renewal and reinstatement of certificate, 40-2813
  - fees payable to commissioner, 40-2726
  - issuance and ownership of certificate, 40-2812
  - refusal of certificate, 40-2812
  - revocation or suspension of certificate
    - discretionary grounds, 40-2815
    - duration of suspension, 40-2817
    - mandatory grounds, 40-2814
    - notice of revocation or suspension, 40-2816
    - reinstatement of suspended certificate, 40-2817
- certificate of incorporation, issuance and effect, 40-4706
- combinations of insuring powers, 40-2806
- consolidation of insurers, 40-4745
  - mutual insurers, 40-4746
- contingent liability of mutual members, 40-4729
  - assessment, levy by directors, 40-4730
  - enforcement of liability, 40-4731
  - nonassessable policies, issuance, 40-4732
  - revocation of authority for issuance, 40-4733
- conversion of mutual to stock insurer, 40-4744
- conversion of stock insurer to mutual, 40-4743
- corporation statutes of state, application to insurers, 40-4704
- corrupt practices with respect to meetings of stockholders or members, 40-4719
- defamatory statements, 40-3507
- deficits in capital or assets to be made good, 40-4739
  - assessment of stockholders or members, 40-4740
  - directors' liability for losses during deficit, 40-4741
  - transfer of stock during impairment does not release liability, 40-4742

## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Insurers (Continued)

- definition of "insurer," 40-2603
- deposits of initial premiums received by mutual insurer, 40-4711
- deposits through commissioner—See Deposits through commissioner, above
- directors, number, term and election, 40-4720
  - participation of policyholders in election, 40-4721
- dividends, funds from which payable, 40-4735
  - mutual insurers, 40-4736
  - penalties for unlawful dividends, 40-4737
- "domestic" insurer defined, 40-2606
- eligibility for certificate of authority, 40-2804
- examinations by commissioner, 40-2713
  - conduct of examination, 40-2715
  - destruction of books to hinder examination, penalty, 40-2716
  - expenses of examination, 40-2717
  - managers and promoters, 40-2714
  - reports on examinations, 40-2716
- exclusive agency contracts subject to commissioner's approval, 40-4724
- existing domestic insurers continue corporate existence, 40-2614
- extinguishment of charters, 40-4750
- failure of mutual to qualify for certificate, return of premiums, 40-4712
- false financial statements, 40-3506
- farm mutual insurers, 40-4801 to 40-4853—See Farm mutual insurers, above
- foreign insurers
  - definition of "foreign" and "alien" insurers, 40-2606
  - investments permitted, 40-3134
  - retaliatory tax provisions, 40-2826
  - "state" defined, 40-2606
- fraternal benefit societies, 40-5301 to 40-5359—See Fraternal benefit societies, above
- funeral directors, prohibited relations with, 40-3521
- governmentally owned insurers prohibited, 40-2804
- home office of domestic insurer, 40-4725
- impairment of capital or assets, deficiency to be made good, 40-4739
  - assessment of stockholders or members, 40-4740
  - directors' liability for losses during deficiency, 40-4741
  - transfer of stock during impairment does not release liability, 40-4742
- incorporators, number required, 40-4705
- insider trading in securities, monthly statement to be filed with commissioner of insurance, 40-4751
  - arbitrage transactions exempt from restrictions, 40-4755
  - brokers, when exempt from restrictions, 40-4754
  - closely-held securities exempt from restrictions, 40-4757
  - delivery of securities sold, when required, 40-4753
  - market specialists, when exempt from restrictions, 40-4754
  - profits from security transactions accruing to company, 40-4752
  - registered securities exempt from restrictions, 40-4757
  - rules and regulations of commissioner, 40-4758
  - securities subject to restrictions, 40-4756
  - short sales by insiders prohibited, 40-4753
- interlocking ownership and management, when permitted, 40-3517
- investment advice exempt from securities act, 15-2004
- investments
  - abstract plant and equipment, acquisition by title insurer, 40-3132
  - amount of investment limited, date of determination of insurer's funds, 40-3102
  - authorization by directors or investment committee required, 40-3104
  - building and loan shares and savings account, 40-3123
  - Canadian governmentally guaranteed loans, 40-3107
  - Canadian government direct obligations, 40-3106
  - certificate of authority not required, 40-2803
  - chattel mortgages, 40-3127
  - collateral loans, 40-3122
  - controlling interest in corporation, acquisition prohibited, 40-3133



## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Insurers (Continued)

##### investments (Continued)

- corporate securities
  - bonds and debentures, 40-3114
  - common stock, 40-3116
  - insurance stock, 40-3117
  - maximum amount invested, 40-3105
  - preferred or guaranteed stock, 40-3115
  - subsidiary stocks, 40-3118
- date of determination of eligibility, 40-3102
- director, officer or controlling stockholder of insurer, loans to prohibited, 40-3133
- disposal of unauthorized investments, time allowed
  - failure to dispose of property, effect, 40-3131
  - personal property and securities, 40-3130
  - real estate, 40-3129
  - unlawfully acquired property, 40-3131
- diversification of investments required, 40-3105
- equipment trust certificates, 40-3119
  - maximum amount invested, 40-3105
- federal agency obligations, 40-3112
- federal direct obligations, 40-3106
- federally guaranteed loans, 40-3107
- foreign insurers, investments permitted, 40-3134
- foreign investments, 40-3124
- improvement district obligations, 40-3110
  - maximum amount invested, 40-3105
- income-bearing quality required, 40-3103
- international bank obligations, 40-3113
- investment trust securities, 40-3120
  - maximum amount invested, 40-3105
- irrigation district obligations, 40-3111
- market value, purchase price restricted to, 40-3103
- miscellaneous investments not otherwise prohibited, 40-3125
- own capital stock, investment in or loans on prohibited, 40-3133
- policy loans, 40-3121
- previously held investments, eligibility, 40-3102
- real estate, 40-3128
- real estate mortgages, 40-3126
- scope of chapter, 40-3101
- state, county and municipal obligations, 40-3108
  - revenue bonds, 40-3109
- underwriting prohibited, 40-3133
- liquidation of assets and liabilities, certificate of authority not required, 40-2802
- loans to officers, directors and employees prohibited, 40-4723
- management contracts subject to commissioner's approval, 40-4724
- management unreliable, denial of authority to transact insurance, 40-2810
- maximum amount insured on one risk, 40-2909
- meetings of stockholders or members, 40-4717
- membership in mutual insurers, 40-4714
- merger of insurers, 40-4745
  - mutual insurers, 40-4746
- "mutual" insurer defined, 40-4703
- names of insurers, prevention of confusing similarity, 40-2805
- participating policies, authority for issuance, 40-4734
- pecuniary interest of officers, directors and employees, restrictions, 40-4723
- "person" defined, 40-2604
- political contributions prohibited, penalty, 40-3518
- principal place of business of domestic insurers, 40-4725
- proxies of stockholders, revocability, 40-4718
- reciprocal enforcement against domestic insurers of unauthorized insurer laws of other states, 40-4728
- reciprocal insurance, 40-5001 to 40-5028—See Reciprocal insurers, below

## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Insurers (Continued)

- records of domestic insurer to be kept in state, 40-4725
- rehabilitation and liquidation
  - appeals to supreme court in delinquency proceedings, 40-5102
  - assessments against members or subscribers
    - judgment for assessment, 40-5133
    - levy of assessment, 40-5132
    - notice of assessment, 40-5133
    - order for payment of assessments, 40-5133
    - order of assessments, 40-5132
    - petition for assessment, 40-5131
    - presumption that assessment is correct, 40-5133
  - attachment of assets during proceedings prohibited, 40-5120
  - borrowing power of commissioner, 40-5124
  - claims against insurers
    - contents of claim, 40-5118
    - contingent and unliquidated claims, 40-5129
    - employees' claims, priority, 40-5127
    - filing of claim, 40-5118
    - hearing and order on claims filed, 40-5118
    - judgments, restrictions on effect as evidence, 40-5129
    - nonresident claims against domestic insurers, 40-5116
    - offset of debts and credits, 40-5128
    - preferred claims, 40-5119
    - priority of claims, 40-5119
    - report and notice of claims filed, 40-5118
    - resident claims against foreign insurer, 40-5117
    - secured claimant, maximum value allowed, 40-5129
    - time for filing, 40-5130
  - commencement of delinquency proceedings, 40-5103
  - definition of terms, 40-5101
  - deposit of moneys collected by commissioner, 40-5122
  - employees' claims, priority, 40-5127
  - exclusiveness of delinquency proceedings as method, 40-5102
  - execution against assets during proceedings prohibited, 40-5120
  - fees for filing and recording of papers, exemption of commissioner, 40-5123
  - garnishment of assets during proceedings prohibited, 40-5120
  - grounds for conservation of foreign insurer, 40-5107
    - alien insurers, 40-5108
  - grounds for liquidation, 40-5106
    - ancillary liquidation of foreign insurer, 40-5109
  - grounds for rehabilitation of domestic insurers, 40-5105
  - injunctions on application of commissioner, 40-5104
  - jurisdiction of delinquency proceedings, 40-5102
  - liens voidable, 40-5126
  - mutual insurer, distribution of assets on liquidation, 40-4749
  - order of conservation of foreign or alien insurer, 40-5113
  - order of liquidation, 40-5111
    - alien insurer, 40-5112
    - ancillary liquidation of foreign insurer, 40-5113
  - order of rehabilitation or termination of rehabilitation, 40-5110
  - receivership, appointment and proceedings by commissioner, 40-5113
    - alien insurers, 40-5114
    - foreign insurers, 40-5115
  - report of commissioner to court, 40-5131
  - time of determination of rights on liquidation, 40-5125
- transfers void, 40-5126
  - uniform insurers liquidation act, sections comprising, interpretation and construction, 40-5121
  - venue of delinquency proceedings, 40-5102
- scope of chapter on organization and corporate procedures, 40-4701
- service of process through commissioner, 40-2818
  - proceedings after service, 40-2819

## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Insurers (Continued)

- "stock" insurer defined, 40-4702
- surplus requirements, 40-2808
- time allowed for mutual insurer to qualify, 40-4712
- unauthorized insurers
  - actions by unauthorized insurers prohibited, 40-3402
  - aiding unauthorized insurers prohibited, felony, 40-3401
  - definition of term, 40-2607
  - representation of unauthorized insurer prohibited, felony, 40-3401
  - service of process on insurers
    - attorney's fees, when allowed in judgment, 40-3408
    - citation of act, 40-3403
    - commissioner as agent, 40-3404
    - defense of action, 40-3407
    - exemptions from service of process provisions, 40-3406
    - judgment, when allowed, 40-3405
    - motion to quash or set aside service, 40-3407
    - procedure for service, 40-3405
    - uniformity of interpretation, 40-3403
- unused corporate charters, extinguishment, 40-4750
- vouchers for disbursement of funds, 40-4726

Joint owners, transfer of interest by one does not avoid insurance, 40-3708

Lender favoring agent or insurer, prohibition, 40-3516

#### Liability insurance

- architects on public projects to carry insurance, 66-114
- horse racing licensees required to carry insurance, 62-510
- sovereign immunity defense to be waived, 40-4401, 40-4402

#### Life insurance

- agents—See also Agents and solicitors, above
  - disability insurance, authority of agent to write, 40-3303
  - practices prohibited to unlicensed persons, 40-3303
- beneficiaries of industrial policies, provisions as to change, 40-3815
- benefits arising out of debt of another policyholder prohibited, 40-3833
- cash surrender values, provisions as to table of values to be included, 40-3810
- claims for benefits, payment, 40-3814
- credit life insurance—See Credit life and disability insurance, above
- deduction of unpaid premiums and loan from policy proceeds, 40-3830
- definition, 40-2902
- dividends payable to policyholder, provision as to, 40-3808
- entire contract to be contained in policy, 40-3806
- excess risk, placement by agent with insurer other than that as to which licensed, 40-3326
- grace period required, 40-3804
- group life insurance
  - application as part of policy, 40-3913
  - certificates for individual insured persons, 40-3917
  - conversion rights
    - death of insured pending conversion, 40-3920
    - notice as to conversion rights, 40-3921
    - termination of eligibility of individual, 40-3918
    - termination of policy or coverage, 40-3919
  - credit union groups, requirements, 40-3907
  - debtor groups, requirements, 40-3906
  - dependents' coverage, 40-3909
  - employee groups defined, 40-3902
  - "employee life insurance" defined, 40-3922
  - established group required, 40-3901
  - grace period for payment of premiums, 40-3911
  - incontestability provision required, 40-3912
  - labor union groups, requirements, 40-3903
  - maximum coverage for one person, 40-3908
  - misstatement of age, provision for adjustment of premiums or benefits, 40-3915
  - nonforfeiture provisions required, 40-3910



## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Life insurance (Continued)

- group life insurance (Continued)
    - payment of benefits, provisions as to, 40-3916
    - proof of insurability, provisions as to requiring, 40-3914
    - public employee groups, requirements, 40-3905
    - required provisions in group contracts, 40-3910
    - state employee groups, provision for, 40-3905.1
    - trustee groups, requirements, 40-3904
    - violations of chapter, penalty, 40-3923
  - guaranteed installment payments, table of amounts to be included, 40-3811
  - incontestability provision required, 40-3805
    - contest as to validity or restriction or exclusion not precluded, 40-3817
  - "industrial life insurance" defined, 40-3802
    - nonforfeiture provisions, 40-3831
  - lapse or termination of other policy, benefits arising from prohibited, 40-3833
  - loan value of policy, provisions as to, 40-3809
    - table of values to be included, 40-3810
  - minors, power to contract for insurance, 40-3710
  - misstatement of age, provision as to adjustment of benefits, 40-3807
  - nonforfeiture benefits, 40-3831
    - old policies, 40-3832
      - table of values to be included, 40-3810
  - participating policies, provision as to dividends payable, 40-3808
  - premium payment provision to be included, 40-3813
  - prohibited provisions, 40-3826
    - industrial life insurance, 40-3827
  - reinstatement provisions to be included, 40-3812
    - contestability and exclusions after reinstatement same as for original policy, 40-3828
  - rejected risk, placement by agent with insurer other than that as to which licensed, 40-3326
  - reserve for unearned premiums, 40-3008
    - amount of reserve required, 40-3011
    - deposit of reserves, 40-3012
  - retention of policy proceeds by insurer under agreement, 40-3829
  - scope of chapter, 40-3801
  - single premium policies, inapplicable provisions omitted, 40-3803
  - standard provisions required, 40-3803
  - standard valuation law, 40-3011
  - term policies, inapplicable provisions omitted, 40-3803
  - title required on policies, 40-3816
  - types of insurance forbidden to life insurers, 40-2806
  - unclaimed funds when presumed abandoned, 67-2203—See PROPERTY, Un-
  - claimed property
  - valuation of policies for determination of reserves, 40-3011
- Marine insurance
- definition, 40-2907
  - reserve for unearned premiums, 40-3006
- Maximum amount insured on one risk by one insurer, 40-2909
- Minors, gift of policy to, 67-1801 et seq.
- Minors, power to contract for life and disability insurance, 40-3710
- Misrepresentation of terms of policy or condition of insurer, 40-3503 to 40-3505
- Monopolistic practices prohibited, 40-3508
- Named insured, restriction of property insurance to interest of, 40-3706
- Partnership, transfer of interest by partner does not avoid insurance, 40-3708
- Payment discharges insurer, 40-3730
  - minor may give acquittance, 40-3731
- Penalty for violations, 40-2617
- Policies
- additional provisions permitted to be included, 40-3719
  - annuity contracts—See Annuity contracts, above
  - assignment of policies, 40-3729
    - exclusion from chapter on secured transactions, 87A-9-104

## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Policies (Continued)

- binders for temporary insurance, 40-3726
  - bylaws of insurer, incorporation by reference prohibited, 40-3720
  - charter of insurer, incorporation by reference prohibited, 40-3720
  - combination policies, issuance by two or more insurers, 40-3722
  - construction of entire policy, 40-3725
  - contents of policy in general, 40-3718
  - countersignature by agent required, 40-2822
    - commission of resident agent on policy originating outside state, 40-2824
    - issuance of policy at home or branch office, 40-2825
    - salaried personnel prohibited from countersigning, 40-2823
  - definition of term, 40-3702
  - delivery of policy, 40-3727
  - disability insurance—See Disability insurance, above
  - duplicate policy issued to holder of security interest, 40-3727
  - entire contract contained in policy, 40-3717
  - execution of policies, 40-3721
  - exemption from securities act, 15-2004, 15-2013
  - existing forms remaining in effect, 40-2613
  - extension by certificate, 40-3728
  - form, approval required, 40-3714
    - grounds for disapproval, 40-3715
  - identifying characters on policy forms, 40-3718
  - life insurance policies, 40-3803 to 40-3833—See Life insurance, above
  - loans on policies authorized, 40-3121
  - named insured, restriction of insurance to interest of, 40-3706
  - noncomplying provisions, construction as if in compliance, 40-3724
  - pledge of policies, 40-3729
  - renewal by certificates, 40-3728
  - scope of chapter, 40-3701
  - security interest in policies excluded from Uniform Commercial Code, 87A-9-104
  - signature of policies, 40-3721
  - standard provisions required, when omissions and substitutions permitted, 40-3716
  - underwriters' policies, joint issuance, 40-3722
  - valued policy law applicable to real estate improvements, 40-4302
- Power of persons to contract for insurance, 40-3710
- Preferred rate plans to be approved by commissioner, 40-3520
- "Premium" defined, 40-3703
- Premiums, collection when not due prohibited, 40-3519
- Property insurance
- definition, 40-2904
  - measure of indemnity, 40-4301
  - reserve for unearned premiums, 40-3005
  - unfair discrimination prohibited, 40-3512
  - valued policy law applicable to real estate improvements, 40-4302
- Public grain warehousemen, insurance coverage required, 3-228
- Rates and rating organizations
- administration and enforcement of chapter, 40-3668
  - advisory organizations, 40-3652
    - records and examination, 40-3655
  - casualty insurance, apportionment of, 40-3645
  - commissioner's examinations, 40-3655 to 40-3658
  - concerted action by insurers, 40-3641
    - admitted insurers with common ownership or management, 40-3642
    - cosurety bonds, 40-3642
  - definitions, 40-3635 to 40-3638
  - dividends and return of savings or unabsorbed premium deposits not regulated by chapter, 40-3666
  - exchange of information and experience data, 40-3644
  - existing filings remaining in effect, 40-2613
  - information affecting rates not to be withheld, 40-3665
  - joint underwriters and reinsurers, 40-3646
  - joint underwriting and reinsurance groups, filings by, 40-3653
    - records and examination, 40-3654, 40-3655

## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Rates and rating organizations (Continued)

- loss and expense experience, recording and reporting of, 40-3669
- noncompliance of rates, 40-3660
  - disciplinary action, 40-3662 to 40-3665
  - hearings, 40-3661
- organizations
  - license, 40-3647 to 40-3649
  - membership rules, 40-3650, 40-3651
  - records and examination, 40-3655
  - subscribers' use of rates, systems, rules or forms, 40-3643
- other laws not violated by conduct authorized by chapter, 40-3667
- purpose of chapter, 40-3634
- review of rates, 40-3659
- scope of chapter, 40-3639
- standards for rate-making, 40-3640
- supplementation or modification of chapter, 40-3668

#### Rebates prohibited

- life and disability insurance, 40-3510
  - exceptions, 40-3511
- property, casualty and surety insurance, 40-3512

#### Reciprocal insurers

- actions by and against insurers, 40-5005
- advance of funds to insurer, limitations on retainment, 40-5015
- annual statement of insurer, filing, 40-5014
- assessments against subscribers
  - aggregate liability, maximum in one year, 40-5023
  - authority for levy, 40-5021
  - computation of amounts, 40-5021
  - time limit for levy of assessment, 40-5022
- assets and liabilities considered in determining financial condition, 40-5016
- attorney-in-fact
  - action on attorney's bond, 40-5013
  - bond of attorney, 40-5012
  - definition, 40-5006
  - foreign attorney not doing business by representing authorized insurer, 40-5006
  - powers of attorney, 40-5010
    - modifications of power, 40-5011
- certificate of authority, issuance, suspension or revocation, 40-5009
- conversion into stock or mutual insurer, 40-5027
- declaration by attorney-in-fact, content and filing, 40-5008
- definition, 40-5001, 40-5002
- existing insurers, compliance with chapter required, 40-5003
- foreign insurers, application of chapter to, 40-5003
- impairment of surplus, deficiency to be made up, 40-5028
- insuring powers of reciprocal, 40-5004
- life insurance by reciprocal arrangement prohibited, 40-2806
- liquidation, distribution of assets to subscribers, 40-5026
- merger of insurers, 40-5027
- modifications of subscribers' agreement or power of attorney, 40-5011
- name of insurer, 40-5005
- nonassessable policies, issuance, 40-5024
- organization of insurer, 40-5008
- reinsurance authorized, 40-5004
- savings, distribution to subscribers, 40-5025
- subscribers
  - advisory committee representing subscribers, selection and powers, 40-5018
  - eligibility to become subscriber, 40-5017
  - fiduciaries of subscribers not personally liable, 40-5017
  - judgment against insurer required for direct liability, 40-5020
  - liability of subscribers, 40-5019
- surplus funds required, 40-5007

#### Reinsurance authorized, 40-2910

- certificate of authority not required, 40-2802
- original insured has no interest, 40-3723
- state hail insurance, 82-1505



## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

- Reserve for unearned premiums
  - casualty insurance, 40-3005
  - disability insurance, 40-3007
  - increase of inadequate reserves, 40-3009
  - liability insurance, 40-3008
  - life insurance, 40-3011
    - deposit of reserves, 40-3012
  - marine insurance, 40-3006
  - property insurance, 40-3005
  - surety insurance, 40-3005
  - title insurance, 40-3010
  - workmen's compensation insurance, 40-3008
- Retaliatory tax provisions, 40-2826
- Rules of civil procedure, application to special proceedings, M. R. Civ. P., Rule 81(a), Table A
- Saving clause as to rights and liabilities accrued, 40-2615
- Securities of insurance companies, insider trading in, 40-4751 to 40-4758—See Insurers
  - insider trading in securities, above
- Solicitation of business defined as transaction of insurance, 40-2608
- Sovereign immunity defense waived by insurers, 40-4401, 40-4402
- Special provisions in code prevail over general, 40-2616
- State buildings, deposit and use of insurance proceeds for damage, 78-1101
- Stock offer as inducement to insurance prohibited, 40-3513
- Surety insurance
  - definition, 40-2906
  - official bonds, power of insurers to rights, 40-4502
  - powers of surety insurers generally, 40-4501
  - release of corporate insurers from liability, 40-4503
  - reserve for unearned premiums, 40-3005
  - unfair discrimination prohibited, 40-3512
- Surplus line insurance
  - affidavit as to prerequisites, 40-3411
  - agent, license, fee and bond, 40-3414
    - authority under license, 40-3415
    - revocation of license, 40-3422
  - annual statement of agent, contents and filing, 40-3419
  - certificate of authority not required, 40-2802
  - certificate or policy of insurance, issuance and contents, 40-3417
  - endorsement of contract, 40-3412
  - exemptions from surplus line law, 40-3426
  - liability of insurer as to losses and unearned premiums, 40-3418
  - prerequisites to issuance of surplus line insurance, 40-3410
  - records maintained by agent, 40-3419
  - rules and regulations prescribed by commissioner, 40-3425
  - service of process on insurer, 40-3424
  - short title of act, 40-3409
  - solvency of insurer, 40-3416
  - tax on premiums, 40-3420
    - penalty for failure to file or pay, 40-3421
  - validity and enforcement of surplus line insurance, 40-3413
- Tax on premiums, 40-2821
  - fire insurance premiums, 82-1231
    - proceeds paid to relief associations, 11-1919
    - report of premiums from various cities, 11-1918
  - independently procured coverage, 40-3427
  - police department payments from proceeds of tax, 11-1834 to 11-1837—See CITIES AND TOWNS, Police department, state payments
  - retaliatory tax provisions, 40-2826
  - surplus line premiums, 40-3420
    - penalty for failure to file or pay, 40-3421

## INDEX

References are to Title and Section numbers

### INSURANCE (Continued)

#### Title insurance

- abstract or legal opinion required as basis for insurance, 40-4601
- definition, 40-2908
- guaranty fund required, 40-4603
- investments in abstracting plant and equipment authorized, 40-4603
- mutual title insurers prohibited, 40-2806
- rates, filing with commissioner, 40-4602
- reserve for unearned premium, 40-3010

#### Title of Code, 40-2601

#### Trade practices

- false financial statements, penalty, 40-3506
- purpose of regulation, 40-3501

#### "Transact" defined, 40-2608

#### Types of insurance enumerated, 40-2902 to 40-2908

#### Unfair competition prohibited, 40-3502

#### Uninsured motorist coverage added to motor vehicle policies, 40-4403

#### Unit ownership property, obtaining insurance for, 67-2331

#### Valued policy law applicable to real estate improvements, 40-4302

#### Vending machines, license required, 40-3322

#### Vendor of property favoring agent or insurer, prohibition, 40-3516

#### Vested rights preserved, 40-2615

#### Wagering policies void, 40-3709

#### Workmen's compensation insurance

- reserve for unearned premiums, 40-3008
- subject to workmen's compensation act, 92-1005

#### Workmen's compensation insurance premium rates

##### applicability of act, 40-5602

##### enforcement of filed rates

- higher rates, application for use of, 40-5614
- lower rates, 40-5613
- uniform percentage changes, permission for, 40-5615

##### exclusion of certain reciprocal insurers, 40-5603

##### filings by insurers with commissioner, 40-5607

##### notice of disapproval, 40-5610, 40-5611

##### review of filings, 40-5609

##### standards for approval, 40-5612

##### suspension or modification of requirements, 40-5608

##### public welfare, declaration of policy, 40-5601

##### purpose of act, 40-5601

##### rates, provisions as to making of, 40-5604

##### excessive, inadequate or discriminatory rates prohibited, 40-5605

##### uniformity neither required nor prohibited, 40-5606

##### rating organization, composition of, 40-5617

##### committee on operation of organization, 40-5618

##### membership in required, 40-5616

### INTEREST

#### Consumer loan act—See CONSUMER LOAN ACT

#### Legal interest rate, 47-124

#### Usury laws unaffected by Secured Transactions chapter, 87A-9-201

### INTERLOCAL CO-OPERATION

#### Commission, 11-4403 to 11-4414, 11-4416

##### additional powers and duties, 11-4414

##### comprehensive program, 11-4409

##### implementation, 11-4410

##### formulation of proposal, 11-4408, 11-4411

##### meetings and vacancies, 11-4406, 11-4407

##### organization, 11-4403 to 11-4405

##### public hearings, 11-4412

##### recommendations, procedure for submitting proposals, 11-4413

##### term, 11-4416

#### Definitions, 11-4402

## INDEX

References are to Title and Section numbers

### **INTERLOCAL CO-OPERATION** (Continued)

- Interlocal agreements, terms and conditions, 16-4904
  - appropriation of funds, 16-4904
  - approval by attorney general, 16-4904
  - filing with county clerk and recorder and secretary of state, 16-4904
  - furnishing of services, 16-4904
- Policy and purpose of act, 11-4401
- "Public agency" defined, 16-4903
- Purpose of act, 16-4901
- Short title of act, 16-4902

### **INTERPLEADER**

- Bailee under document of title requiring interpleader of conflicting claims, 87A-7-603
- Form suggested by rules, M. R. Civ. P., Appendix of Forms, Form 14
- Joinder of parties by interpleader, M. R. Civ. P., Rule 22(a)
- Substitution of parties by interpleader, M. R. Civ. P., Rule 22(b)

### **INTERVENTION**

- Constitutional questions, M. R. Civ. P., Rule 24(c)
- Permissive intervention, M. R. Civ. P., Rule 24(b)
- Procedure, M. R. Civ. P., Rule 24(c)
- Right to intervene, M. R. Civ. P., Rule 24(a)

### **INVESTMENT ADVISERS**

- See SECURITIES REGISTRATION, Investment advisers

### **INVESTMENT COMMISSIONER**

- See SECURITIES REGISTRATION, Investment commissioner

### **INVESTMENT COMPANIES**

- See SECURITIES REGISTRATION, 15-2001 to 15-2025

### **INVESTMENTS**

- Bonds issued for urban renewal projects, 11-3911
- Special improvement district interest and sinking fund moneys, 11-2288

### **INVESTMENT SECURITIES**

- See also SECURITIES REGISTRATION, 15-2001 to 15-2025

- Agreements as to applicable state law, restrictions on, 87A-1-105
- Altered security enforceable according to original terms, 87A-8-206
- Assessments, liability of registered owner for, 87A-8-207
- Attachment of securities, method of levy, 87A-8-317, 93-4307
- Authenticity of third-party documents presumed, 87A-1-202
- Bank deposits and collections, extent to which subject to chapter, 87A-4-102
- Blanks in security, authority to fill, 87A-8-206
- Brokers
  - adverse claims to securities held by broker for customer, 87A-8-313
  - definition of "broker," 87A-8-303
  - fiduciary obligations, not liable for breach by principal, 87A-8-318
  - rights of customer in securities held by broker, 87A-8-313
  - warranties given by broker in transfer or registration of security, 87A-8-306
- Burden of proof as to signatures and defenses in actions on security, 87A-8-105
- Call for redemption or exchange, time lapse after call giving notice of defect or defense, 87A-8-203, 87A-8-305
- Calls, liability of registered owner for, 87A-8-207
- Citation of Uniform Commercial Code chapter, 87A-8-101
- Clearing corporations, pledge or transfer of securities by entries on books, 87A-8-320
- Commercial Paper chapter inapplicable to securities, 87A-3-103
- Conditional delivery ineffective as defense against purchaser for value, 87A-8-202
- Conflict of laws on validity of security and rights and duties of issuer, 87A-8-106
- Counterfeit securities invalid, 87A-8-202
- Course of dealing between parties, application, 87A-1-205
- Creditors' remedies to reach security, 87A-8-317
- Defective securities, validity in hands of purchaser for value, 87A-8-202



## INDEX

References are to Title and Section numbers

### INVESTMENT SECURITIES (Continued)

Definition of terms, 87A-8-102

“bona fide purchaser,” 87A-8-302

“broker,” 87A-8-303

general definitions in Uniform Commercial Code, 87A-1-201

“issuer,” 87A-8-201

Endorsement of security

blank endorsement, definition, 87A-8-308

delivery required to complete transfer, 87A-8-309

delivery to purchaser without endorsement, effect, 87A-8-307

fiduciary endorsement, effect of want of authority, 87A-8-308

form of endorsement, 87A-8-308

guarantee of signature or endorsement, effect, 87A-8-312

notice to purchaser of adverse claims, form of endorsement constituting, 87A-8-304

bearer endorsement, 87A-8-310

partial transfer, endorsement making, 87A-8-308

persons with power to endorse, 87A-8-308

special endorsement, definition, 87A-8-308

unauthorized endorsement, when ineffective against owner, 87A-8-311

Fiduciary transfers

adverse claims, duties of corporation or agent after notice, 15-656

agent or bailee not liable for breach by principal, 87A-8-318

assignment by fiduciary, corporation or agent not bound to inquire, 15-654

authorized transfers, nonliability of corporation and agent, 15-657

breach of duty by fiduciary, nonliability of innocent parties, 15-658

citation of act, 15-662

conflict of laws, 15-659

definition of terms, 15-652

evidence required for assignment by fiduciary not registered owner, 15-655

guarantor of signature, restriction on liability, 15-658

registration in name of fiduciary, corporation or agent not bound to inquire, 15-653

short title of act, 15-662

tax obligation unaffected by act, 15-660

territorial application of act, 15-659

uniformity of interpretation, 15-661

Forgery as defense against purchaser for value, 87A-8-202

Fractional interest in rights or property, creator as “issuer,” 87A-8-201

Good faith required, 87A-1-203

Guarantor of security, obligation as “issuer,” 87A-8-201

Incomplete security, authority to fill, 87A-8-206

Incorporation by reference to other documents and laws, 87A-8-202

Injunction to reach security, 87A-8-317

Judicial process to reach security, 87A-8-317

Levy on security, procedure required, 87A-8-317

Lien of issuer to be noted on security, 87A-8-103

Negotiable nature of securities, 87A-8-105

Nondelivery ineffective as defense against purchaser for value, 87A-8-202

Notice by issuer to registered owner sufficient, 87A-8-207

Notice to purchaser of adverse claims, conditions constituting, 87A-8-304

staleness as notice, 87A-8-305

Overissue of security, effect on provisions validating or compelling issuance of security, 87A-8-104

Pleadings as to signatures and defenses in action on security, 87A-8-105

Pledge of securities by entries on books of clearing corporation, 87A-8-320

Possessory action against security after wrongful transfer, 87A-8-315

References to other documents and laws, effect, 87A-8-202

Registration of security

action by adverse claimant to prevent registration, 87A-8-403

agent for registration, rights and duties, 87A-8-406

assessments, liability of registered owner for, 87A-8-207

assurances required by issuer before registering transfer, 87A-8-402

authenticating trustees, rights and duties, 87A-8-406

bearer endorsement, right of holder to registration under, 87A-8-310

calls, liability of registered owner for, 87A-8-207

delay in registration, liability of issuer for loss resulting from, 87A-8-401

## INDEX

References are to Title and Section numbers

### INVESTMENT SECURITIES (Continued)

#### Registration of security (Continued)

- destroyed security, obligations of parties, 87A-8-405
- duty of issuer to register transfer, 87A-8-401
- exemption of issuer from liability for loss from registration, 87A-8-404
- fiduciary obligations, duty of issuer to inquire into, 87A-8-403
- inquiry into adverse claims, duty of issuer before registration, 87A-8-403
- liability of issuer for loss from registration of transfer, 87A-8-404
- lost securities, obligations of parties, 87A-8-405
- notice to registered owner by issuer sufficient, 87A-8-207
- proof of authority to transfer furnished to purchaser, 87A-8-316
- requirements of issuer for registration of transfer, 87A-8-402
- stolen securities, obligations of parties, 87A-8-405
- transfer agent, rights and duties, 87A-8-406
- transfer books, maintenance creating status of "issuer," 87A-8-201
- unauthorized endorsement, when ineffective against owner, 87A-8-311
- voting rights of registered owner, 87A-8-207
- warranties of person presenting security for registration, 87A-8-306

Reservation of rights by party while performing or accepting performance, 87A-1-207

Sale of securities

- "bona fide purchaser" defined, 87A-8-302
- delivery to purchaser, acts constituting, 87A-8-313
  - exchange or brokers, sale through, 87A-8-314
  - form of security acceptable, 87A-8-107
- delivery without endorsement, effect, 87A-8-307
- notice to purchaser of adverse claims, conditions constituting, 87A-8-304
- staleness as notice, 87A-8-305
- price, recovery by seller when buyer fails to pay, 87A-8-107
- proof of authority to transfer furnished to purchaser, 87A-8-316
- rights acquired by purchaser, 87A-8-301
- warranties of registrar or transfer agent to purchaser, 87A-8-208
- warranties of transferor to purchaser, 87A-8-306

Short title of Uniform Commercial Code chapter, 87A-8-101

Staleness of called or matured security as notice of defect or defense, 87A-8-203

Statute of frauds, 87A-8-319

Street name account, right of owner to securities in, 87A-8-313

Successor issuer, responsibility, 87A-8-201

Time allowed for required actions, 87A-1-204

#### Transfer of security

- clearing corporation entries as means of transfer, 87A-8-320
- delivery required for transfer, 87A-8-309
- delivery without endorsement, effect, 87A-8-307
- form of security acceptable from person obligated to deliver, 87A-8-107
- guarantee of signature or endorsement, warranties included, 87A-8-312
- notice to purchaser of adverse claims, conditions constituting, 87A-8-304
- staleness as notice, 87A-8-305
- possessory action after wrongful transfer of security, 87A-8-315
- proof of authority to transfer furnished to purchaser, 87A-8-316
- registration of transfer, 87A-8-401 to 87A-8-406—See Registration of security, above
- restrictions on transfer to be noted on security, 87A-8-204
- warranties of registrar or transfer agent to purchaser, 87A-8-208

Unauthorized signature in course of issue, when effective, 87A-8-205

Usage of trade, application, 87A-1-205

Validity of defective security in hands of purchaser for value, 87A-8-202

Voting rights of registered owner, 87A-8-207

Warranties of registrar or transfer agent to purchaser, 87A-8-208

"When issued" contract, cancellation by purchaser on material change in security, 87A-8-202

### IONIZING RADIATION

See RADIATION CONTROL, 69-5801 to 69-5816

### IRRIGATION DISTRICTS

Bonds, signatures on, 89-1705

## INDEX

References are to Title and Section numbers

### IRRIGATION DISTRICTS (Continued)

#### Commissioners

- compensation of officers and employees of board, 89-1206
- organization of appointed commissioners, 89-1206
- place of office of commissioners, 89-1206

#### Examination of by state examiner, fee, 5-907

#### Joint operation

- apportionment of costs and expenses, 89-1216
- authority for, 89-1209

#### board of control

- bond of member, 89-1210
- employment of manager, 89-1214
- establishment of office, 89-1213
- examination by state examiner, 89-1215
- member at large, 89-1210
- members, 89-1210
- per diem and expenses, 89-1212
- powers and duties, enumeration, 89-1211
- records required to be kept, 89-1215
- vacancies occurring in, 89-1210

#### custodian of funds for, 89-1217

#### election on question, method of holding, 89-1218

#### existing contracts for joint operation, 89-1218

#### manager

##### bond, 89-1210

##### employment, 89-1214

##### office, 89-1213

##### payments from funds, 89-1217

##### purpose of act, 89-1220

##### records and papers of, 89-1213

##### withdrawal from contract for joint operation, 89-1219

#### Rules of civil procedure, application to special proceedings, M. R. Civ. P., Rule 81(a), Table A

#### Special examination by state examiner, fee, 5-910

#### Taxation

##### annual levy, 89-1804

##### apportionment by board of commissioners, 89-1803

##### cancellation of levy to pay indebtedness when bond issued, 89-1804

##### divided ownership, apportionment of taxes, 89-1804

##### elevation considered in apportioning assessment, 89-1803

##### maximum levy per acre, 89-1804

##### minimum charge, 89-1803

##### transmission of funds from county to county, 89-1814

##### uniformity of assessment rate against irrigable lands, 89-1803

## J

### JAILS

#### Diseased prisoners, removal to hospital, 69-4516

#### Medical expense for prisoners, reimbursement, 16-2818

#### Venereal disease, examination and treatment of prisoners for, 69-4606

#### Work release program for prisoners, 95-2216

### JOINT TENANCY

#### Direct conveyance of real estate creating joint tenancy, 67-1602.1

### JUDGES

#### Arrest, judges privileged from arrest, 95-616

#### Disqualification of judges

##### civil cases, 93-901

##### criminal cases, 95-1709

#### Retirement system

##### actuarial investigations and valuations, 93-1112

##### administrative expenses, appropriation, budgets, 93-1110



## INDEX

References are to Title and Section numbers

### JUDGES (Continued)

#### Retirement system (Continued)

- beneficiary, nomination of, 93-1127
  - board for administration of system, creation and composition, 93-1109
  - call of retired judge for duty, reimbursement, 93-1130
  - contributions to system
    - back payments, payroll deduction, 93-1113
    - members, contributions by, 93-1115
    - payment into retirement fund, 93-1111
    - state contributions, 93-1116
  - death benefits, 93-1123, 93-1124
  - definition of terms, 93-1107
  - disability retirement allowance, 93-1119
  - dormant accounts, transfer to pension accumulation fund, 93-1132
  - errors, correction, 93-1129
  - establishment of system, 93-1108
  - exemption of benefits from taxation or process, 93-1126
  - false or fraudulent statements, penalty, 93-1129
  - funds
    - payments into judges' retirement fund, investment, 93-1111
    - transfer of dormant accounts to pension accumulation fund, 93-1132
  - involuntary retirement allowance, 93-1120
  - membership in system, 93-1113
  - military service, credit for, 93-1128
  - monthly payment of allowances, 93-1125
  - optional means of payment of benefits, 93-1131
  - penalty retirement allowance, 93-1121
  - refund of contributions on resignation or discharge, 93-1122
  - rules and regulations for administration of system, 93-1112
  - service allowance, computation of, certificate issued, 93-1114
  - service retirement allowance, amount, 93-1118
  - voluntary retirement, requirements for vesting of proportional retirement allowance, 93-1117
- Salary increase during term permitted, Art. VIII, § 29

### JUDGMENTS

- Amendment to conform to new findings of fact, M. R. Civ. P., Rule 52(b)
- Amount of judgment, M. R. Civ. P., Rule 54(c)
- Assignment excluded from Uniform Commercial Code, 87A-9-104
- Contents of judgment, M. R. Civ. P., Rule 54(a)
- Costs included in judgment, M. R. Civ. P., Rule 54(d)
- Counterclaim, separate judgment on, M. R. Civ. P., Rule 13(i)
- Criminal procedure, 95-2201 to 95-2312—See CRIMINAL PROCEDURE, Sentence and judgment
- Cross-claim, separate judgment on, M. R. Civ. P., Rule 13(i)
- Declaratory judgment, action for, M. R. Civ. P., Rule 57
- Default judgment
  - amount not to exceed that demanded, M. R. Civ. P., Rule 54(c)
  - entry of judgment, M. R. Civ. P., Rule 55(a)
  - extension of time by court or stipulation, M. R. Civ. P., Rule 55(c)
  - real estate broker residing outside state, entry against, 66-1936
  - setting aside default, M. R. Civ. P., Rule 55(c)
- Definition, M. R. Civ. P., Rule 54(a)
- Enforcement proceedings governed by statutes, M. R. Civ. P., Rule 69
- Entry of judgment on verdict, M. R. Civ. P., Rule 58
  - notice of entry served on adverse party, M. R. Civ. P., Rule 77(d)
- Findings of fact by court, separate statement, M. R. Civ. P., Rule 52(a)
- Harmless error, effect on judgment, M. R. Civ. P., Rule 61
- Mistaken judgment, grounds and procedure for relief from, M. R. Civ. P., Rule 60
- Multiple claims or parties, judgment as to portion, M. R. Civ. P., Rules 4 D(10), 54(b)
- Offer of judgment before trial, M. R. Civ. P., Rule 68
- Part of defendants served, application of judgment to defendant later served, M. R. Civ. P., Rule 4 D(10)
- Pleading of judgments, manner, M. R. Civ. P., Rule 9(e)
- Pleadings, motion for judgment on, M. R. Civ. P., Rule 12(c)

## INDEX

References are to Title and Section numbers

### JUDGMENTS (Continued)

Sales after judgment validated despite defects, 93-5846  
Specific acts required by judgment, M. R. Civ. P., Rule 70  
Stay of proceedings to enforce judgment, M. R. Civ. P., Rule 62  
Summary judgments, motion for, M. R. Civ. P., Rule 56  
Third-party practice, separation of judgment, M. R. Civ. P., Rule 14(a)  
Tort action against state, judgment in, 83-705  
Validation of recorded judgment despite defects in proceedings, 93-5710.1, 93-5710.2  
Vesting of title by judgment, M. R. Civ. P., Rule 70

### JUNKYARDS

Regulation of junk yards along roads, 32-4513 to 32-4523—See HIGHWAYS,  
BRIDGES AND FERRIES, Junkyards along roads

### JURIES AND JURORS

Additional jurors, drawing of, 93-1512  
Advisory jury trial, M. R. Civ. P., Rule 39(c)  
Alternate jurors, seating, M. R. Civ. P., Rule 47(c)  
Challenges for cause, trial by court, M. R. Civ. P., Rule 47(a)  
Coroner's inquest, number of jurors, jurors to be sworn, 95-803, 95-804  
Court ordering jury trial, M. R. Civ. P., Rule 39(b)  
Criminal cases, 95-1901 et seq.—See CRIMINAL PROCEDURE, Juries and jurors  
Demand for jury trial, M. R. Civ. P., Rule 38(b)  
Examination of prospective jurors, M. R. Civ. P., Rule 47(a),(b)  
Fees payable to jurors, 25-401  
Grand jury, 95-1401 to 95-1410—See GRAND JURY  
Instructions to jury, objections and exceptions, M. R. Civ. P., Rule 51  
Interrogatories to jury, M. R. Civ. P., Rule 49(b)  
Issues, designation for jury trial, M. R. Civ. P., Rule 38(c)  
Jury lists  
    officers required to make, 93-1401  
    time for making, 93-1401  
Mileage allowances to jurors for use of own vehicles, 59-801  
    liability for approval of excess amount, 59-802  
Reduced juries by stipulation of parties, M. R. Civ. P., Rule 48  
Right to jury trial in civil cases, M. R. Civ. P., Rule 38(a)  
    declaratory judgment actions, M. R. Civ. P., Rule 57  
Right to jury trial in criminal cases  
    district court, 95-1901  
    justices' and police courts, 95-2004  
Selection and examination of jurors, M. R. Civ. P., Rule 47(b)  
Summoning of jurors, 93-1509  
Verdict—See VERDICTS  
    criminal cases, 95-1915—See CRIMINAL PROCEDURE, Verdicts  
Waiver of right to jury trial, M. R. Civ. P., Rule 38(d)

### JURISDICTION

Coroner, jurisdiction of, 95-812  
Courts, jurisdiction of persons, M. R. Civ. P., Rule 4 B  
Criminal cases, jurisdiction of courts and state criminal jurisdiction, 95-301 to 95-304

### JUSTICES' AND POLICE COURTS (CIVIL MATTERS)

Pleadings—See PLEADINGS (CIVIL) in Parent Volume

### JUSTICES OF THE PEACE

Criminal cases, proceedings, 95-2001 to 95-2009—See CRIMINAL PROCEDURE,  
Justices' courts  
Criminal jurisdiction, 95-302  
Depositions, 93-7712  
Disqualification  
    civil cases, 93-901  
    criminal cases, 95-1709  
Fees collected by justices  
    civil actions, 25-301  
    criminal actions, 25-303

## INDEX

References are to Title and Section numbers

### JUSTICES OF THE PEACE (Continued)

Hours offices open for business, 25-306

Pleadings

demurrers and pleas abolished, 93-6802.2

enumeration of permissible pleadings, 93-6802.1

Practice of law by justice, restrictions on, 16-3605, 93-902

Quarters, selection by county commissioners, 25-306

Salaries, 25-306

### JUVENILE COURT

Commitment of child to institution, reception and evaluation center, authority to commit to, 10-611.1

Delinquent children—See CHILDREN AND MINORS, Delinquent children

Hearings, exclusion of public, 10-611

Interstate compact on juveniles, 10-1001 to 10-1006—See CHILDREN AND MINORS, Interstate compact on juveniles

Probation officers and deputies, appointment and salaries, 10-622

Publicity forbidden, 10-633

Rules of civil procedure, application to proceedings, M. R. Civ. P., Rule 81(a), Table A

## K

### KIDNAPING

Prisoner holding hostage, 94-2604

Venue of prosecution, 95-411

## L

### LABELS

Paints and paint products, 3-1510 to 3-1515—See PAINTS AND PAINT PRODUCTS

### LABOR

Apprenticeship council, 41-1201, 41-1202—See APPRENTICESHIP COUNCIL

Commissioner of labor and industry, term of office, salary, and oath, 41-1603

Labor activity interfering with operation of sole proprietor or two man partnership retail or amusement establishment

beer and liquor establishments excepted from act, 41-1804

“immediate family” defined, 41-1803

intent of act, 41-1801

unfair labor practice, 41-1802

violation of act, penalty, 41-1805

Restaurant, bar and tavern wage protection, 41-2001 to 41-2011—See WAGES, Restaurant, Bar and Tavern Wage Protection Act

Safety codes

citation of act, 41-1708

definitions, 41-1709

employer's duties, 41-1710, 41-1711

existing structures and equipment, effect on, 41-1732

industrial accident board

code-making power, 41-1727

closing unsafe place of employment, 41-1720

compelling witnesses' appearance, proceeding to, 41-1714

compliance with order, allowance of reasonable time for, 41-1719

duty to establish department of safety, 41-1713

general research powers, 41-1729

hazardous places of employment, periodic inspections of, 41-1725

judicial review, 41-1721

notice of hearing on rules and codes, 41-1716

powers, 41-1713

power to prescribe safety devices and standards, 41-1715

prohibiting use of unsafe apparatus, 41-1718

rehearing before board, 41-1722 to 41-1724

safety orders, 41-1717

variations, grant of, 41-1728

workmen's complaints of safety violations, 41-1726



## INDEX

References are to Title and Section numbers

### **LABOR (Continued)**

#### **Safety codes (Continued)**

- occupational health hazards, 41-1733
- public contractors subject to act, 41-1731
- safety devices, removal or refusal to use prohibited, 41-1712
- violation a misdemeanor, 41-1730

#### **Safety study commission**

- appointment of members, 41-2102
- composition of commission, 41-2103
- employment of secretary and research services, 41-2106
- proposed changes in labor safety laws
  - adoption by legislature required, 41-2105
  - distribution to industry and legislature, 41-2104
- purpose of act, 41-2101
- records, commission required to keep, 41-2108
- reimbursement of commission members, 41-2107
- rules of procedure, adoption by commission, 41-2108
- scope of work, 41-2102

#### **Vocational rehabilitation**

##### **division, 41-801 to 41-805**

- workmen's compensation recipients, 92-1401 to 92-1404, 92-1406—See WORKMEN'S COMPENSATION, Rehabilitation of injured workmen

#### **Wages—See WAGES**

#### **Winter work programs, 41-1901 to 41-1907—See WINTER WORK PROGRAMS**

### **LABORATORY COMMISSION**

#### **Commission abolished, 82-3322**

### **LACHES**

#### **Affirmative defense, M. R. Civ. P., Rule 8(c)**

### **LANDLORD AND TENANT**

#### **Principal and income act, 67-1901 to 67-1916—See PRINCIPAL AND INCOME ACT**

### **LARCENY**

#### **Possession of stolen livestock as evidence of larceny, 94-2704.1**

#### **Venue of prosecutions, 95-408**

### **LAW ENFORCEMENT ACADEMY**

#### **See COLLEGES AND UNIVERSITIES, Law enforcement academy, 75-5201 to 75-5208**

### **LAW ENFORCEMENT TELETYPEWRITER COMMUNICATIONS**

- Assessments for operational charges, 82-3903
- Committee, members, terms, vacancies, meetings, compensation, duties, 82-3902
- Establishment of system by attorney general, 82-3901
- Federal agencies, co-operation with, 82-3905
- Local law enforcement agencies, participation in system, 82-3904
- Powers of attorney general, 82-3903
- Report of attorney general, 82-3906
- State agencies included, 82-3901

### **LEGISLATIVE AUDIT ACT**

#### **Audit charge against earmarked money, 79-2313**

#### **Audit committee**

- appointment and terms of members, 79-2303
- expenses for attending meetings, 79-2304
- meetings, 79-2304
- officers, 79-2303

#### **Citation of act, 79-2301**

#### **Definition of terms, 79-2302**

#### **Employees, appointment by auditor, 79-2306**

## INDEX

References are to Title and Section numbers

### LEGISLATIVE AUDIT ACT (Continued)

Examinations of agencies, information required, 79-2312

Legislative auditor

appointment and qualifications, 79-2305

assistance to legislative assembly during sessions, 79-2311

duties, 79-2308

removal, notice and hearing, 79-2307

term of office, 79-2307

Purpose of act, 79-2301

Recommendations of auditor, enforcement powers limited, 79-2310

Standards and objectives of audits of state agencies, 79-2309

### LEGISLATIVE COUNCIL

Commission on interstate cooperation

council constitutes, 82-2112

council of state governments declared joint governmental agency, 82-2113

delegations and committees, 82-2112

function, 82-2112

### LEGISLATIVE PROCEEDINGS—DISSEMINATION

Fee for complete set of legislative proceedings, 43-902

Funds, accounting and use of, 43-902

Index to session laws, assistance in preparation, 44-412

"One complete set" defined, 43-901

"Person" defined, 43-901

Press, radio and television, excepted from act, 43-903

"Proceedings of the legislature" defined, 43-901

Public officials, exemption from act, 43-904

Single copies of matters, fee, 43-902

Status sheets, single copies, fee, 43-902

### LEGISLATURE

Apportionment, VI, 2 and 3

representative apportionment, 43-106.2

senatorial apportionment, 43-106.1

Arrest, members privileged from arrest, 95-616

Adopt committee, appointment of members, 79-2303—See LEGISLATIVE AUDIT ACT

Compensation of members, 43-310

Emergency session of state senate for purpose of election of president pro tempore to assume governorship in event of enemy attack, 82-1309

Expense allowances for members, 43-310

Fiscal notes in legislative bills

background information to be made available to legislators, 43-1006

bills requiring note, 43-1001

budget director and affected agencies to prepare note, 43-1002

comment on merits of bill prohibited, 43-1004

committee reports to include note, 43-1001

committee request for note, 43-1005

contents of notes, 43-1004

house request for note on second reading, 43-1005

presiding officer to determine need for note on introduction of bill, 43-1001

reference of completed note to committee, 43-1003

reproduction and distribution of note, 43-1003

time allowed for preparation of note, 43-1002

Legislative Fiscal Review Committee

compensation of committee members, 43-1106

composition, 43-1101

duties, 43-1102

fiscal analyst and other staff, 43-1108

investigation of costs of government, 43-1104

organization, procedure and records, 43-1107

powers, 43-1103

subpoena and related investigative powers, 43-1105

## INDEX

References are to Title and Section numbers

### LEGISLATURE (Continued)

Lobbying—See LOBBYING

Mileage allowances to members for travel in own vehicles, 59-801  
liability for approval of excessive amounts, 59-802

Organization

pre-session caucus, 43-218

rosters prepared from election records by secretary of state, 43-206.1

Per diem of members, 43-310

Post-enemy-attack, continuity in government, V, 46; 82-3801 to 82-3809—See WAR,  
Continuity in government

Publication of proceedings

definitions, 43-901

fees for copies, 43-902

free copies, who receives, 43-903

public officials exempt, 43-904

Vacancies in, how filled

county commissioners, appointment by, 43-215

alternate method on failure to receive majority vote, 43-216

"vacancy" defined, 43-217

### LETTERS OF CREDIT

Advice of credit by another bank, obligations assumed by advising bank, 87A-5-107

Anticipatory repudiation by issuer, rights of beneficiary after, 87A-5-115

Assignment of right to draw under letter, effect, 87A-5-116

Authenticity of third-party documents presumed, 87A-1-202

Banks' power to issue letters, 5-1001

Cancellation of credit, liability of issuer, 87A-5-115

Citation of Uniform Commercial Code chapter, 87A-5-101

Confirmation of credit by another bank, obligation assumed by confirming bank,  
87A-5-107

Consideration not required to establish credit, 87A-5-105

Contract underlying credit, issuer not responsible for performance, 87A-5-109

Course of dealing between parties, 87A-1-205

Definition of terms, 87A-5-103

general definitions in Uniform Commercial Code, 87A-1-201

index of definitions, 87A-5-103

Dishonor of draft or demand for payment

time allowed for, 87A-5-112

wrongful dishonor, liability of issuer, 87A-5-115

Documentary draft credit, application of chapter to, 87A-5-102

Documents related to credit

adequacy of document governed by chapter on letters of credit, 87A-7-509

examination of documents by issuer, 87A-5-109

insolvency of issuer or bank, rights of parties, 87A-5-117

noncomplying document in fact, payment by issuer of letter on, 87A-5-114

relinquishment by person presenting demand for payment, 87A-5-110

wrongful dishonor of draft or demand for payment, rights of person entitled to  
honor after, 87A-5-115

Erroneous advice of credit, liability of original issuer, 87A-5-107

Formal requirements for credit, 87A-5-104

Good faith required, 87A-1-203, 87A-5-109

Honor of draft or demand for payment, duty and privilege of issuer, 87A-5-114

Indemnity agreement to obtain honor, negotiation or reimbursement, 87A-5-113

Insolvency of issuer or advising or confirming bank, effect, 87A-5-117

Issuer's obligation to his customer, 87A-5-109

Modification of credit, when permitted and effect, 87A-5-106

Notation credit, obligation of party paying on, 87A-5-108

Order of payment of competing drafts or demands, 87A-5-108

Partial use of credit authorized, 87A-5-110

Phrasing of credit, no particular form required, 87A-5-104

Reimbursement of issuer after payment of draft or demand, 87A-5-114

Repudiation of credit by issuer, liability, 87A-5-115

Reservation of rights by party while performing or accepting performance, 87A-1-207

Revocation of credit, when permitted and effect, 87A-5-106

Sales contract requiring furnishing of letter of credit, 87A-2-325



## INDEX

References are to Title and Section numbers

### LETTERS OF CREDIT (Continued)

- Scope of Uniform Commercial Code chapter, 87A-5-102
- Security interest in letter perfected by possession of secured party, 87A-9-305
- Short title of Uniform Commercial Code chapter, 87A-5-101
- Telegraphic letter, sufficiency, 87A-5-104
- Time allowed for honor or rejection of draft or demand for payment, 87A-1-204, 87A-5-112
- Time of establishment of credit, 87A-5-106
- Transfer of right to draw under credit, 87A-5-116
- Transmission and translation risk borne by customer, 87A-5-107
- Usage of trade, application, 87A-1-205, 87A-5-109
- Warranties on transfer or presentment of draft or demand for payment, 87A-5-111

### LIBEL

- Notice to publisher or broadcaster and opportunity to correct, 64-207.1

### LIBRARIES

- Free public libraries
  - board of trustees, appointment, 44-221
    - compensation, 44-221
    - composition of board, 44-221
    - powers and duties, 44-222
    - term of office, 44-221
    - vacancies, 44-221
  - chief librarian, appointment by board, 44-223
  - "city" defined, 44-227
  - continued existence of all public libraries, 44-228
  - establishment of library by resolution, petition or election, 44-219
  - exemption from county tax of city or town with own library, 44-226
  - financing public library by city or county tax levy or bonds, 44-220
  - merging of boards, institutions and agencies in providing library services, 44-225
  - personnel, appointment and compensation, 44-223
  - purpose of act, 44-218
  - use of library, 44-224
- Historical and miscellaneous library
  - antique automobile collection, disposition of admission fees, 44-529
  - independent of other libraries, 44-518
- Interstate library compact
  - administrator, executive officer of state library commission, 44-602
  - text of compact, 44-601
- Joint county or regional library, participation of other governmental units, 44-213
- State law library
  - accounts, approval by board of trustees, 44-410
  - construction of supreme court and law library building
    - acquisition of land, 78-1203
    - architects and engineers, employment authorized, 78-1202
    - bonds, indentures and notes, 78-1205 to 78-1208
    - borrowing authorized, 78-1201, 78-1204
    - budget act inapplicable, 78-1209
  - session laws index, assistance in preparation, 44-412
- State library commission created, composition and terms of office, 44-127
  - powers of commission, 44-131
- State publications distribution center
  - creation of center, 44-133
  - definition of terms, 44-132
  - depository contracts, eligibility and standards, 44-135
  - exempt state agencies and officers, 44-139
  - general public distribution prohibited, 44-138
  - inter-library loan of state agency publications, 44-134
  - lists of available publications, distribution by center, 44-136
  - regulations, made by state library commission, 44-133
  - sale of state agency publications, 44-134
  - state agency lists of current publications furnished to center, 44-137
  - state agency publications deposited with library, 44-134

## INDEX

References are to Title and Section numbers

### LICENSES

Affirmative defense, M. R. Civ. P., Rule 8(c)  
County licenses, disposition of proceeds, 84-2708  
Dog licensing, 16-4601 to 16-4615—See DOGS  
Rules of civil procedure, application to special proceedings, M. R. Civ. P., Rule 8(a), Table A

### LIENS

After-acquired property, lien on, 45-109  
Agisters' lien  
    possession of property, right of lien holder to take, 45-1107  
    priority, 45-1106  
Artisan's lien  
    possession of property, right of lien holder to take, 45-1107  
    priority, 45-1106  
Bulk Transfer chapter inapplicable to lien foreclosure, 87A-6-103  
Compensation for expense, lien holder not entitled to, 45-116  
Criminal offenses, judgment to pay fine constitutes lien, 95-2208  
Definition of term, 19-103  
Factor's lien, 87A-9-101 to 87A-9-507—See SECURED TRANSACTIONS  
Farm laborers' lien, duty to acknowledge and discharge on satisfaction, 45-911  
Federal tax lien, 45-1501 to 45-1507—See TAXATION, Federal tax lien  
Forfeiture of property subject to lien, contracts for void, 45-112  
Future property, lien on authorized, 45-109  
Hail insurance liens, duty to acknowledge and discharge on satisfaction, 45-707  
Income tax lien, release or discharge of property from, 84-4958  
Mechanic's lien excluded from Uniform Commercial Code chapter, 87A-9-104  
Redemption from lien  
    restraining contracts void, 45-112  
    time when property may be redeemed, 45-301  
Restoration of property to owner extinguishing lien, exceptions, 45-308  
Seed liens  
    filing and retention of records, 16-2922  
        destruction of records, when allowed, 16-2923  
    satisfaction of lien, duty to acknowledge, 45-704  
Spraying lien on crops, acknowledgment of satisfaction and discharge, 45-1410  
Threshermen's lien  
    filing and retention of records, 16-2922  
        destruction of records, when allowed, 16-2923  
    satisfaction of lien, duty to acknowledge and discharge, 45-809  
Unit ownership property, attachment and release of liens against, 67-2324  
    blanket liens released on conveyance of unit, 67-2323  
    common expenses, lien against individual units for, 67-2326  
        foreclosure of lien, 67-2327  
        purchaser at foreclosure not liable for expenses, 67-2329  
        rent paid by unit owner after foreclosure, 67-2328  
    transfer of liens on removal of property from act, 67-2335  
        consent of lien holders required for removal, 67-2332

### LIMITATION OF ACTIONS

Affirmative defense in civil proceedings, M. R. Civ. P., Rule 8(c)  
Annulment of marriage, action for, 48-203  
Bulk transfers, actions to invalidate, 87A-6-111  
Commercial paper, time of accrual of action, 87A-3-122  
Probate contest, 91-1107  
Sale of goods contract, actions arising out of, 87A-2-725  
Subdivided lands, accrual of cause of action arising from sale or lease outside state, 67-2115  
Support obligations of father of illegitimate child, 93-2901-3  
Tax overpayment, time for filing claim for refund, 84-726  
Trust indenture foreclosure proceedings, 52-407

## INDEX

References are to Title and Section numbers

### LIQUEFIED PETROLEUM PRODUCTS

See PETROLEUM PRODUCTS, 60-223 to 60-233

### LIVESTOCK

#### Commission

- expenses, audit and payment, 46-105
- inspectors and detectives, control and payment, 46-704
- rule-making power, 46-802

Dead animals, unlawful disposition, penalty for violations, 69-4518, 69-4519

#### Estrays

- definition of "estrays," 46-1005
- proceeds of sale, disposition, 46-1006
- publication of description of estrays sold, 46-1006

#### Hides

- buyers and dealers
  - acting without license, penalty, 46-1107.1
  - fees for licenses, disposition, 46-1107
  - revocation of license for violations of act, 46-1107.1
- certificate from buyer of hide required, 46-1101.2
- falsification of certificate, penalty, 46-1102
- definition of terms, 46-1101.1
- identification tag to be affixed, 46-1101.2
  - penalty for failure to affix tag, 46-1102
- unknown ownership, seizure and sale of hides, 46-1114

Highways through open range, fencing along, 32-2426, 32-2427

"open range" defined, 32-2426

#### Inspection before removal from county

- fees for inspection and permit, 46-804
- penalties for violation of act, 46-806
- seizure, retention, and sale of suspect animals, 46-803
- sheep removal permits
  - fee for issuance of permit, 46-811
  - form of permit, 46-811
  - misdemeanor to remove sheep without permit after order, 46-810
  - petition of sheep raisers requesting permit order, 46-809
  - publication of notice, 46-812
  - removal of permit requirement, 46-813

#### Inspection before removal from state, violation, 46-808

- penalty for removal without required inspection, 46-808

#### Markets

- license fee, deposit and use, 46-911
- receipt for livestock consigned for sale, 46-918.1
- sales of stray stock, disposition of proceeds, 46-904

Marks and brands, fees for recording, 46-609

Obliterated marks and brands, compensation for animals killed, 46-707

#### Protective districts

- intercounty districts
  - declarations by county commissioners to form district, 46-2801
  - discontinuance of district, 46-2805
  - formation of districts authorized, 46-2801
  - petitions for formation of district, 46-2801
  - protective committee
    - powers and duties of committee, 46-2803
    - selection of members, 46-2802
  - removal of area from district, 46-2805
  - tax levy for special deputy fund, 46-2804
- one-county districts
  - declaration by county commissioners to form district, 46-2806
  - discontinuance of district, 46-2810
  - formation of districts authorized, 46-2806
  - petition for formation of district, 46-2806



## INDEX

References are to Title and Section numbers

### LIVESTOCK (Continued)

- Protective districts (Continued)
  - one-county districts (Continued)
    - protective committee
      - powers and duties of committee, 46-2808
      - selection of members, 46-2807
    - tax levy for special deputy fund, 46-2809
- Range livestock, method of taking possession by mortgagee or assignee, 93-4344
  - filing of papers by county clerk, 93-4346
- Range construction areas, running at large prohibited, 32-319
  - impounding of animals at large, 32-320
  - penalty for violation, 32-321
- Secured transactions, application of loan law to, 87A-9-203
- Security agreements concerning livestock, filing with recorder of marks and brands, 52-319
  - collection of debt, officers not responsible for, 52-323
  - contents of notices, 52-320
  - fees chargeable, disposition, 52-322
  - satisfaction of agreement, duty to file, 52-321
- Stolen livestock
  - forfeiture of vehicles used in transporting, 94-35-204
  - possession as evidence of larceny, 94-2704.1
- Taxation—See TAXATION, Livestock
- Trespassing stock
  - forest reserves, land in or adjoining to be marked, 46-1411
  - claim for damage not allowed in absence of marking, 46-1413

### LOANS

- Consumer loan act, 47-201 to 47-228—See CONSUMER LOAN ACT
- Interest, legal rate, 47-124
- Minors, capacity to borrow for education, 64-106
- Real estate loans by banks, limitation on, 5-506
- Secured Transactions chapter, laws unaffected by, 87A-9-201

### LOBBYING

- Briefs or statements, depositing copies with secretary of state, when, 43-806
- Docket
  - appearance of name on docket before practice as a lobbyist, 43-806
  - definition, 43-802
  - name of lobbyist to be entered on, 43-804
  - preparation and keeping by secretary of state, 43-805
  - public record, inspection, 43-805
- License of lobbyist
  - application, 43-803
  - eligibility for, 43-803
  - expiration, 43-803
  - fee, 43-803
  - required, 43-806
  - suspension or revocation of license, 43-803
- "Lobbying" defined, 43-802
- Lobbying privileges, suspension, when, 43-803
- "Lobbyist" defined, 43-802
- "Pecuniary interest" defined, 43-802
- Persons not required to be licensed or registered, 43-807
- Principal
  - definition, 43-802
  - entering name of lobbyist on docket, duty, 43-804
- Purpose of act, 43-801
- Secretary of state
  - preparation and keeping of docket, 43-805
  - weekly report to legislature, 43-805
- "Unprofessional conduct" defined, 43-802
- Violations of act, penalty, 43-808
- Written authorization to act, filing by lobbyist, 43-805

## INDEX

References are to Title and Section numbers

### LONG-TERM CARE FACILITIES

- Advisory council on hospitals and long-term care facilities, composition and appointment, 69-5214
  - meetings of council, 69-5215
  - term of members, 69-5215
- Alteration of facilities, approval of state board required, 69-5212
- Confidential nature of information received by state department, 69-5218
- Freedom of choice of physician protected, 69-5217
- Injunction for protection of health and welfare, 69-5220
- License required for operation of facility, 69-5203
  - application for license, procedure, 69-5205
  - definition of terms, 69-5201
  - denial of license, grounds, 69-5207
    - judicial review of denial of license, 69-5211
    - procedure for denial, 69-5210
  - federal facilities exempt from requirement, 69-5202
  - fees for license, 69-5204
  - inspection of facility and issuance of license, 69-5206
  - records and reports required of facilities, 69-5219
  - revocation or refusal to renew license, grounds, 69-5208
    - judicial review of revocation or refusal, 69-5211
    - procedure for revocation or refusal, 69-5210
  - rules and standards for facilities, scope and publication by state board, 69-5213, 69-5216
- Penalty for violations of licensing chapter, 69-5221

## M

### MALPRACTICE

- Emergency care at scene of accident, restriction on liability for, 17-410

### MANDAMUS

- Rules of civil procedure, application to proceedings, M. R. Civ. P., Rule 81(a), Table A
- Supreme court proceedings, M. R. App. Civ. P.—See SUPREME COURT, Original proceedings in supreme court

### MARRIAGE

- Age when marriage permitted, 48-143
- Annulment of marriage, action for, 48-203
  - child custody and support, orders concerning, 48-207
  - conciliation petition filed, stay of proceedings after, 36-204
  - legitimacy of children unaffected by judgment, 48-207
  - minority as ground for annulment, 48-202
  - registrar of vital statistics, report to, 69-4433
    - judicial information included in report, 69-4434
  - time within which action to be brought, 48-203
- Breach of promise
  - acts within state not to give rise to cause of action, 17-1203
  - cause of action abolished, 17-1202
  - litigation and threat of litigation prohibited, 17-1204
  - penalty for bringing action, 17-1206
  - settlements and compromises void, 17-1205
- Capacity to marry, 48-143
- Certificate of marriage, report to registrar of vital statistics, 69-4432
- Conciliation of controversies, 36-201 to 36-205—See HUSBAND AND WIFE, Conciliation of controversies
- Consent of parent or guardian, when required, 48-143
- Declaration of marriage without solemnization
  - drafting of declaration, persons authorized, 48-130.1
  - penalty for violation of act, 48-130.2
- Foreign marriages, recognition in this state, 48-150
- License to marry
  - applicant under influence of liquor or drug, license not to be issued, 48-147
  - application for license, form, 48-144

## INDEX

References are to Title and Section numbers

### MARRIAGE (Continued)

#### License to marry (Continued)

- consent of parent or guardian, when required, 48-143
- county in which license must be obtained, 48-146
- dispensation to issue license before end of waiting period, 48-118.1
- issuance of license, 48-149
- nonresident applicants, place of issuance of license, 48-146
- objections to issuance of license, filing and hearing on, 48-149
- policy of state, applicants advised concerning, 48-145
- posting of notice of application for license, 48-149
- required for marriage, 48-146
- support obligation, license not issued to persons delinquent, 48-148
- waiting period before issuance of license, 48-118.1

Married minors' consent to medical or surgical care, 69-6101 to 69-6105—See CHIL-DREN AND MINORS

#### Policy of state concerning marriage, 48-142

- advice to license applicants of policy, 48-145

#### Proof of age before issuance of license, 48-134

#### Proof of solemnization of marriage

- acknowledgment and recording of declaration of marriage, 48-132
- contents of written declaration, 48-131
- method of proof when no record exists, 48-131
- official record of marriage, 48-132

### MASSEURS

#### Definitions, 66-2902

#### Exemptions, 66-2914

#### Licenses required for practice of massage, 66-2905

- application for license, 66-2906
- examination for licenses, 66-2907
  - waiver of examination for masseurs practicing before passage of law, 66-2905
- fees for licenses, 66-2906
  - disposition of funds, 66-2910
  - receipts and disbursements out of fund, 66-2910
- foreign practitioners, admission to practice, 66-2912
- refusal of license, 66-2908
- renewal of license, 66-2909
- revocation of license, 66-2908
- temporary permits to license applicants, 66-2905

#### Penalty for violation of act, 66-2913

#### Purpose of regulatory act, 66-2901

#### State board of massage examiners, qualifications and appointment, 66-2903

- bond of treasurer, 66-2911
- dismissal and replacement of board members, 66-2911
- meetings, 66-2904
- organization of board, 66-2904
- per diem for board members, 66-2910
- powers and duties, 66-2904

### MASTERS

Appointment and compensation by district court, M. R. Civ. P., Rule 53(a)

Findings of master, adoption by court, M. R. Civ. P., Rule 52(a)

Powers of master, M. R. Civ. P., Rule 53(c)

Pre-trial conference, consideration of reference to master, M. R. Civ. P., Rule 16

Proceedings before masters, M. R. Civ. P., Rule 53(d)

Reference to master, M. R. Civ. P., Rule 53(b)

Report of master, M. R. Civ. P., Rule 53(e)

Statement of accounts submitted to master, M. R. Civ. P., Rule 53(d)

Witnesses before masters, M. R. Civ. P., Rule 53(d)

### MATTRESSES

Shoddy control, 69-4701 to 69-4707—See SHODDY

### MAUSOLEUMS AND COLUMBARIUMS

Limitation of action against mausoleum-columbarium authority, 9-604

Mortician exempt in damages for remains delivered to authority, 9-604



## INDEX

References are to Title and Section numbers

### MEAT

Markets, 27-611 to 27-625—See FOOD AND DRUGS, Food service establishments

### METROPOLITAN SANITARY AND STORM SEWERS

Boundary changes in districts, 16-4414

Distance from which pollution is presumed, 16-4415

Operation and maintenance

    budget

        filed with county clerk, 16-4416.2

        laws governing, 16-4416.3

        public hearing on levy, notice, 16-4416.1

        records of collections and expenditures, 16-4416.4

Rates, charges and rentals, establishment, 16-4416

Reserve fund, establishment, maintenance and use, 16-4417

Validation of previous proceedings, 16-4418

### MILITIA AND MILITARY

Adjutant general, qualifications and appointment, 77-117

    biennial report to governor, 77-120

    duties, 77-120

    salary, 77-117, 77-120

Armories

    agreements with federal government, assent to, 77-417

    gifts and donations, acceptance, 77-419

    National Defense Facilities Act, acceptance, 77-417

    physical plant fund abolished, 79-416

    title to property acquired, 77-419

Arrest, members privileged from arrest, 95-616

Assistant adjutant general, 77-117

Federal installations and facilities donated, acceptance by board of examiners, 81-1101.1

National guard

    claims against guard appropriation, method of presenting and payment, 77-151

    employees members of public employees' retirement system, 68-1316

    vehicles of guardsmen, distinctive plates authorized, 53-106.7

Post-attack resource management, 77-1501 to 77-1508—See WAR, Resource management

Post-enemy-attack continuity in government, V, 46; 82-3801 to 82-3809—See WAR, Continuity in government

Residence in Montana, establishment for university tuition and fees, 75-506.4

### MILK CONTROL BOARD

    See DAIRIES AND DAIRY PRODUCTS

### MINES AND GEOLOGY, STATE

State geologist, 75-606

### MINES AND MINING

Dredge mining

    preservation of lands

        administration of act by state board of health, 50-1104

        applicability of act, 50-1105

        bond, discharge or forfeiture of, 50-1112

        definition, 50-1102

        exclusions, 50-1103

        misdemeanors, 50-1113

        penalty provisions, nature of, 50-1113

        permit necessary, 50-1105

            application and approval, 50-1106

            permit limited and nontransferable, 50-1107

            surety bond or cash deposit, 50-1107

        policy statement, 50-1101

        protest of violations, 50-1113

        reclamation of disturbed land, 50-1108

        settling ponds, 50-1109

        state board of health

            inspection, 50-1110

        violation of act, termination of permit, 50-1111

## INDEX

References are to Title and Section numbers

### **MINES AND MINING (Continued)**

- Minimum standards for roof support, 50-474
  - daily inspection by mine foreman, 50-501
  - violation of act, penalty, 50-475
- Real estate brokers' act inapplicable to dealings in mineral interest, 66-1926
- Right of way to mines and mining claims
  - alternate facilities to be constructed when roads and alleys condemned for open pit mining, 50-814
  - residential property near open pit mine
    - agreement to purchase prerequisite to condemnation of right of way, 50-813
    - measure of compensation on condemnation, 50-815
    - notice to owners of intent to condemn, 50-816
- Rules of civil procedure, application to special proceedings, M. R. Civ. P., Rule 81(a), Table A
- Safety standards for roof supports in coal mines, 50-474
- Strip coal mining
  - license tax provisions, 84-1302 to 84-1304
  - reclamation of lands
    - administration of act, 50-1015
    - bonds and other security posted by operator, 50-1011
      - forfeiture proceedings, 50-1013
    - bureau of mines and geology
      - record of hearing, 50-1014
      - review, 50-1014
      - rules and regulations, 50-1014
    - conservation agencies, co-operation with bureau of mines, 50-1003
    - contracts with mine operators for reclamation purposes, 50-1002
      - credit on taxes, 50-1004
      - inspection of mines, 50-1004
      - reports of state board of equalization, 50-1004
      - suits by and against bureau of mines on contracts, 50-1002
    - definitions, 50-1006
    - federal agencies, co-operation with, 50-1017
    - fees and forfeitures, deposit in general fund, 50-1012
    - inspections, 50-1010
    - operation without permit, misdemeanor penalty and injunctive procedures, 50-1016
    - policy declaration, 50-1005
    - public policy stated, 50-1001
    - surface coal mining, contract for reclamation or permit required for, 50-1007
      - application, 50-1008
      - restrictions under permit, 50-1009

### **MISREPRESENTATION**

Uniform Commercial Code supplemented by general principles of law, 87A-1-103

### **MISTAKE**

Uniform Commercial Code supplemented by general principles of law, 87A-1-103

### **MOBILE HOMES**

Fees in addition to registration and license fees, 32-3305

Taxation, 84-6601 to 84-6607—See TAXATION, Mobile homes

### **MONTANA RETAIL INSTALLMENT SALES ACT**

Text of act, 74-601 to 74-612—See INSTALLMENT SALES ACT

### **MONTANA TRADE COMMISSION**

Review of orders, application of rules of civil procedure to, M. R. Civ. P., Rule 81(a), Table A

### **MORTGAGES**

Assignment of mortgage, recording and filing, 52-114

Chattel mortgages, 87A-9-101 to 87A-9-507—See SECURED TRANSACTIONS

Definition of term, 19-103

## INDEX

References are to Title and Section numbers

### MORTGAGES (Continued)

#### Foreclosure

- attorney fee to be allowed by court, 93-8613
- deficiency judgment, docketing, 93-6001
- parties to foreclosure action, 93-6001
- power of sale contained in mortgage, alternatives available, 93-6004
  - advertising required for sale under power, 93-6005
  - attorney fees allowed to mortgagee, 93-6007
  - redemption of property sold under power, 93-6006
- proceeds of sale, application, 93-6001
- sale of property directed by court, 93-6001
- Negotiability of note secured by mortgage, 93-6010
- Real and personal property, mortgages covering both, 52-212
- Small tract financing act, 52-401 to 52-417—See TRUST INDENTURES
- Subordination of mortgage agreement, recording, 52-116
- Uniform Commercial Code, conflicts with general mortgage law, 52-117
- Unit ownership property, attachment and release of mortgages against, 67-2324
  - blanket mortgages, release on conveyance of units, 67-2323
  - individual units, encumbering permitted, 67-2304
- Validation of defectively executed instruments, 73-207 to 73-209
- Waiver of mortgage in favor of subsequent interest, recording, 52-116

### MORTICIANS AND FUNERAL DIRECTORS

- Autopsies ordered by coroner, liability of mortuary limited, 95-813
- Cremated remains delivered to mausoleum-columbarium authority, exemption from liability on, 9-604
- Definition of terms, 66-2701
- Fees payable to state board of morticians
  - annual license fee of morticians, 66-2711
  - deposit and use of fees, 66-2706
  - examination fee for morticians, 66-2709
  - funeral directing annual fee, 66-2707
  - intern mortician's license fee, 66-2710
  - mortuary license, 66-2713
- Inspection of mortuary, 66-2713
- Insurers, prohibited relations with, 40-3521
- Licenses
  - annual renewal of mortician's license, 66-2711
  - examination of applicants for mortician's license, 66-2709
  - funeral director's license issued to previous licensees, 66-2707
  - intern mortician's license, 66-2710
  - mortuary license, 66-2713
  - previously licensed embalmers, licensing as mortician, 66-2711
  - qualifications for mortician's license, 66-2708
  - reciprocal licensing without examination, 66-2712
  - required for practice of embalming or mortuary science, 66-2708
  - revocation or suspension of license
    - appeal to district court from decision of board, 66-2716
    - grounds for revoking or suspending funeral director's license, 66-2714
    - hearing and notice on suspension or revocation, 66-2715
    - mortuary license, grounds for suspension or revocation, 66-2713
- Rules and regulations, adoption by board, 66-2704
- Sanitary standards for mortuary, 66-2713
- State board of morticians
  - appointment of members, 66-2702
  - compensation of members, 66-2703
  - employees of board, 66-2705
  - meetings of board, 66-2704
  - officers of board, 66-2703
  - quorum of board, 66-2704
  - term of office of members, 66-2702
- Violation of act as misdemeanor, 66-2717

### MOTELS

See HOTELS AND MOTELS



## INDEX

References are to Title and Section numbers

### MOTIONS

- Ambiguous pleadings, motion for more definite statement, M. R. Civ. P., Rule 12(e)
- Appearance, filing of motion by defendant constituting, 93-8505
- Application for order to be by motion, M. R. Civ. P., Rule 7(b)
- Consolidation of defenses required, M. R. Civ. P., Rule 12(g)
- Criminal cases, 95-1701 to 95-1710—See CRIMINAL PROCEDURE, Pretrial motions
  - appeals, requirements for motions, 95-2415
    - filing with judge, 95-2413
  - new trial, motion for, 95-2101
    - post-conviction hearing, time for motion, 95-2604
- Defenses permitted by motion, M. R. Civ. P., Rule 12(b)
- Directed verdicts, motion for, M. R. Civ. P., Rule 50
- Evidence presented on hearing of motions, M. R. Civ. P., Rule 43(e)
- Failure to state claim raised by motion, M. R. Civ. P., Rule 12(b)
- Filing with court required, M. R. Civ. P., Rule 5(d)
- Findings of fact unnecessary in ruling on motion, M. R. Civ. P., Rule 52(a)
- Form of motion prescribed, M. R. Civ. P., Rule 7(b)
- Forms suggested by rules, M. R. Civ. P., Appendix of Forms, Forms 15, 19, 20
- Hearing and determination before trial, M. R. Civ. P., Rule 12(d)
- Insufficiency of process raised by motion, M. R. Civ. P., Rule 12(b)
- Judgment notwithstanding the verdict, motion for, M. R. Civ. P., Rules 50(b)-(d)
  - conditional rulings on grant of motion, M. R. Civ. P., Rule 50(c)
  - denial of motion, M. R. Civ. P., Rule 50(d)
- Judgments on pleadings, motion for, M. R. Civ. P., Rule 12(c)
- Jurisdictional defenses raised by motion, M. R. Civ. P., Rule 12(b)
- Mistaken judgment or order, grounds and procedure for relief from, M. R. Civ. P., Rule 60
- New trial, motion for, M. R. Civ. P., Rule 59
- Parties, defects raised by motion, M. R. Civ. P., Rule 12(b)
- Relief from judgment or order, motions for, M. R. Civ. P., Rules 60(a), (b)
  - time for hearing and determining motions, M. R. Civ. P., Rule 60(c)
- Service on parties, when required, M. R. Civ. P., Rule 5(a)
- Striking pleadings or matter therein, motion for, M. R. Civ. P., Rule 12(f)
- Summary judgment, motion for, M. R. Civ. P., Rule 56
- Time allowed for hearing of motions, M. R. Civ. P., Rule 6(d)
- Time allowed for pleading after ruling on motions, M. R. Civ. P., Rule 12(a)
- Waiver of defenses by failure to move, M. R. Civ. P., Rule 12(h)

### MOTORBOATS

#### Accidents

- accident report form, 69-3512
- duty of operators to render aid, 69-3512
- investigation by sheriff, 69-3512

#### Boat liveryes

- record of persons hiring, required to be kept, 69-3507
- safety equipment required, 69-3507

#### Boats with operative federal approved numbering system, 69-3504

#### Civil liability of owner, 69-3515

#### Definitions, 69-3502

#### Enforcement of act, 69-3517

#### Garbage, refuse or waste, discharge from boat prohibited, 69-3508.1

- equipment required on boats, 69-3505
- penalty for violation, 69-3508.2

#### Gasoline tax money allocated to park improvement where boating allowed, 32-2601

#### Landowner's restricted liability to gratuitous licensee for boating, 67-808

- definition of recreational purposes, 67-809

#### Legislative policy, 69-3501

#### Liability of owner for negligence, 69-3515

#### Numbering

- application for number, 69-3504
- change of address, 69-3504
- decals, 69-3504.1
- exemptions from, 69-3506
- fee for application, 69-3504
- manufacturers or dealers, 69-3504

## INDEX

References are to Title and Section numbers

### MOTORBOATS (Continued)

#### Numbering (Continued)

- operation of unnumbered motorboats or vessels prohibited, 69-3503
- painting or attaching of number to boat, 69-3504
- period of time number to remain in effect, 69-3504
- transfer of ownership of boat, 69-3504

#### Operating, prohibited actions, 69-3508

#### Operation of unnumbered motorboats or vessels prohibited, 69-3503

#### Overloading prohibited, 69-3511

#### Overpowering prohibited, 69-3511

#### Penalty for violations of act, 69-3518

#### Prohibited operation, 69-3508

#### Property tax on vessel, proof of payment required, 69-3504

#### Restricted areas, 69-3510

#### Right-of-way, 69-3509

#### Rules and regulations, 69-3516

#### Safety equipment required, enumeration, 69-3505

#### Toilet facilities on boats, specifications, 69-3505

#### Transfer of ownership, 69-3504

#### Transmittal of information, 69-3513

#### Violations of act, penalty, 69-3518

#### Water-skis or surfboards, hours during which operation prohibited, 69-3514

### MOTOR CARRIERS

#### Acts deemed prima facie indication of status as motor carrier, 8-121

#### Board of railroad commissioners, regulatory powers, 8-103

#### Certificate of convenience and necessity

- class A carriers, 8-108

- class B carriers, 8-109

- class C carriers, 8-110

#### Definition of terms, 8-101

#### Field inspectors, employment and powers, 8-103

#### Municipal taxes and fees, restriction on, 32-3206

#### Penalty for violations of act, 8-119

#### Rate regulation

- board's duty to fix rate, 8-104.1

- changes in schedule, approval by board required, 8-104.2

  - procedure for approval, 8-104.5

- deviation from schedules prohibited, 8-104.3

- differences between classes of carriers to be recognized, 8-103

- discrimination prohibited, 8-104.4

- filing of schedules with board, 8-104.2

- investigation of complaints, 8-104.4

- preferences prohibited, 8-104.4

- recovery of excess charges, 8-104.6

- suspension of schedules by board, 8-104.5

#### Securities, when exempt from securities act, 15-2013

#### Supervisor of motor carriers, appointment, qualifications and duties, 8-103

### MOTOR VEHICLES

#### Abandoned vehicles

- notice to owner of removal, 53-903

- penalty for violation of act, 53-909

- prohibition against leaving vehicles on highways or public property, 53-901

- reclaiming vehicles removed by officers, 53-904

- removal of vehicles by law enforcement agencies, 53-902

- sale of vehicle if not reclaimed, 53-905

  - certificate of ownership, issuance to buyer, 53-907

  - certificate of sale, issuance and contents, 53-906

  - proceeds of sale, disposition, 53-908

  - return of sale by sheriff, 53-908

#### Arrest bond certificates issued by automobile club or insurance company, 95-1121 to 95-1123

#### Brakes required on vehicles, 32-21-143.1

- hydraulic brake fluid, standards and regulation, 32-21-143.4

- maintenance and adjustment of brakes required, 32-21-143.3

- performance required of brakes, 32-21-143.2

## INDEX

References are to Title and Section numbers

### MOTOR VEHICLES (Continued)

#### Dealers

- amount of fees payable for plates, 53-122
  - application for license, contents, filing and verification, 53-118
  - bond required of dealer, 53-118
  - building or lot required of dealer, 53-118
  - definition of dealer, 53-133
  - demonstration permits for trucks and trailers, 53-118.1 to 53-118.5—See Demonstration of trucks and trailers, below
  - investigation of license applications, 53-118
  - penalty for engaging in business without license, 53-118
  - plates assigned to dealers, description and use, 53-118
  - records of purchases and sales required of dealers, 53-118
  - used cars, certificate as to previous ownership to be delivered, 53-133
- #### Demonstration of trucks and trailers, permit required, 53-118.1
- dealer's plate, display required, 53-118.1
  - duration of permit, 53-118.3
  - fee required for permit, 53-118.2
    - disposition of fees, 53-118.5
  - form of permit and application, 53-118.2
  - lease of vehicle under permit prohibited, 53-118.3
  - number of permits authorized on each application, 53-118.2
  - operation of vehicle under permit, 53-118.3
  - violation of provisions as misdemeanor, 53-118.4

#### Drive-away and tow-away transporters

- annual permit fee payable, 32-3401
- carrier fees additional to transporter fees, 32-3404
- disposition of fees collected, 32-3403
- exemption from payment of transporter fees, 32-3406
- plates and devices issued to transporters, 32-3401
- trip fees payable by transporters, 32-3402
- truck and trailer fees, exemption from payment, 32-3405

#### Emergency vehicles, audible and visible signals on, 32-21-132

#### Equipment required on commercial tow cars, 32-21-161

- penalty for violation, 32-21-162

#### Equipment Safety Compact ratified, text, 32-21-166

- accounts of safety commission, inspection by state examiner, 32-21-174
- budget of safety commission, 32-21-173
- commissioner from state to serve on safety commission, designation, 32-21-169
- co-operation of governmental agencies with safety commission, 32-21-171
- documents of commission to be filed with highway patrol board, 32-21-172
- governor is executive head for purposes of compact, 32-21-175
- legislative approval required for commission rules and regulations, 32-21-168
- legislative findings on equipment safety, 32-21-167
- notices to be given to highway patrol supervisor, 32-21-172
- retirement agreements for commission employees, 32-21-170
- statutory requirements continued in force, 32-21-168

#### Fees payable in addition to registration and license fees

- administrative costs retained by county treasurer, 32-3204
- alternative additional fees on truck-trailer combinations, 32-3302.1
- buses, amounts payable, 32-3307
- credit of fees to highway commission, 32-3205
- expiration date of fees, 32-3202
- farm and ranch vehicles, amounts payable, 32-3306
- foreign registered vehicles, amount of fees payable, 32-3312
  - temporary permits for operation of foreign vehicles, 32-3313
  - time for payment of fees by nonresidents, 32-3314
- half year fee payable after July 1, 32-3201
- marking of vehicles required, 32-3311
- municipal fees, restriction on, 32-3206
- penalty for operation without payment of fees, 32-3316
  - exceeding weight for which registered, unloading and reloading required, 32-3317
- quarterly payment of fees, when permitted, 32-3308
- failure to make quarterly payment, misdemeanor, impoundment of vehicle, 32-3309



## INDEX

References are to Title and Section numbers

### MOTOR VEHICLES (Continued)

#### Fees payable in addition to registration and license fees (Continued)

- remittance by county treasurer to state treasurer, 32-3204
- replacement vehicle, transfer of certificate, registration or license to, 32-3203
- sales tax on new passenger vehicles, 32-3315
- soil conservation and land leveling vehicles, special rate, 32-3306
- three-unit combination fee in lieu of other fees, 32-3310
- time for payment of fees, 32-3201
- trailers and semitrailers
  - amount payable as fees, 32-3302
  - co-operative association vehicles exempt, 32-3306
  - farm and ranch trailers, percentage payable, 32-3306
  - gross weight over 42,000 pounds, additional amounts payable, 32-3303
  - house trailers, amount of fee, 32-3305
  - livestock trailers, percentage payable, 32-3304
  - log trailers, percentage payable, 32-3304
  - low-boy trailers, percentage payable, 32-3304
  - pole trailers, percentage payable, 32-3304

#### Fees

- transfer of certificate, registration or license, 32-3203

#### trucks and truck-tractors

- amount of fees payable, 32-3301
- concrete trucks, percentage payable, 32-3304.1
- co-operative association vehicles exempt, 32-3306
- farm and ranch trucks, percentage payable, 32-3306
- gross weight over 42,000 pounds, additional amounts payable, 32-3303
- livestock trucks, percentage payable, 32-3304
- log trucks, percentage payable, 32-3304
- low-boy trailers, trucks used to haul, 32-3304

#### Fenders required on vehicles, 32-21-149.1

#### Guaranteed arrest bond certificates issued by automobile club or insurance company, 95-1121 to 95-1123

#### Identification numbers, alteration a misdemeanor, 53-139.1

#### Insurance

- reimbursement for total loss of vehicle to be based on actual replacement value, 40-4404
- uninsured motorist coverage added unless rejected, 40-4403

#### License plates

- collector's vehicles, 53-106.1
- dealers' plates, 53-118
- fees payable, disposition and use, 53-106, 53-122
- foreign commercial vehicles, Montana plates required, 53-129
- national guard plates authorized, 53-106.7
- proportionally registered vehicles, plates or stickers issued for, 53-713
- specifications for plates, 53-106
- transfer to another vehicle, 53-146
- transfer to replacement vehicle, 53-106

#### Lien records, microfilming of expired, 53-101

#### Liens on vehicles, filing and foreclosure, 53-110

#### Livestock, collision with, negligence not presumed, 32-1020

#### Municipal power to tax and regulate vehicle yards, 11-918

#### Operation across public roads and highways not considered operation on roads, when, 32-2124.1

#### Owned by state, 53-511 to 53-513—See STATE-OWNED MOTOR VEHICLES

#### Parking facilities, municipal power to acquire and construct, 11-986

#### Ports of entry and checking stations, establishment by highway commission authorized, 32-2419

- co-operation of highway commission with other agencies required, 32-2421
- major highways entering state, checking stations required, 32-2420

#### Radar arrests

- admissibility in evidence, 32-2150.1
- arrest without warrant authorized, 32-2150.2
- erection of signs as prerequisite to arrests, 32-2150.3
- posting of signs in municipalities, 32-2150.3
- use of radar authorized, 32-2150.1

## INDEX

References are to Title and Section numbers

### **MOTOR VEHICLES (Continued)**

#### **Reciprocal privileges of interstate fleets**

- agreements with other states authorized, 53-705
  - filing and availability of agreements, 53-722
- base state registration reciprocity, 53-706
- cancellation of reciprocity benefits, grounds for, 53-721
- continuation in force of previously effective agreements, 53-723
- definition of terms, 53-702
- exemptions and benefits of agreements with other states, 53-706
- extent of reciprocity, determination by reciprocity board, 53-708
- identification plates or stickers, issuance, 53-713
- leased vehicles, application to, 53-709
- policy of state declared, 53-701
- proportional registration
  - additional vehicles, registration, 53-715
  - agreements with other states, implementation by reciprocity board, 53-707
  - alternative methods of registration, 53-711
  - application for proportional registration, 53-712
    - cost of vehicle to be included in application, 84-729
  - denial in absence of reciprocity, 53-718
  - effect of registration, 53-713
  - fees for registration, computation, 53-712
  - general registration laws inapplicable, 53-720
  - identification plates or stickers, issuance, 53-713
  - joint audits of fleet owner's records, 53-719
  - new fleets, determination of fees payable, 53-717
  - other jurisdiction, registration of part of fleet in required, 53-714
  - records, preservation and availability, 53-719
  - taxation of proportionally registered fleets
    - apportionment on basis of in-state miles traveled, 84-727
    - assessment for property tax by state board, 84-727
    - collection of tax by state board, 84-730
    - cost of vehicle included in application for registration, 84-729
    - deposit and distribution of taxes, 84-731
    - partial year's tax payable, 84-727
    - rate of levy applied, 84-729
    - registration of vehicle, payment of tax condition precedent to, 84-727
    - situs in state of vehicles for purposes of taxation, 84-730
    - value of fleet, method of computation, 84-728
  - withdrawal of vehicles from registration, credits to account, 53-716
- reciprocity board, creation, organization, and meetings, 53-703
  - powers of board, 53-704
- reciprocity extended without agreement, 53-710
- supplemental to other laws, 53-724
- suspension of reciprocity benefits, grounds for, 53-721

#### **Registration**

- collector's vehicles, 53-106.1
- fees payable, disposition and use, 53-106, 53-122
  - city road fund in population centers, amount and segregation, 32-3702
    - use of city road fund, 32-3703
  - city road fund other than in population centers, amount and segregation, 32-3704
    - use of city road fund, 32-3705
  - county motor vehicle fund, fees credited to, 32-3701
    - transfer of amounts remaining after segregation of city fund, 32-3702, 32-3704
    - use of moneys in county road fund, 32-3706
- fleet registration, 53-701 to 53-724—See Reciprocal privileges of interstate fleets, above
- foreign commercial vehicles, registration required, 53-129
- liens and security interests in vehicles, filing and satisfaction, 53-110
- peace officers to enforce law, 53-102
- reregistration following transfer of vehicle during year, 53-115
- suspension under financial responsibility act, 53-422
- tax on vehicles, procedure to insure payment, 53-114
- transferred vehicles, new registration required, 53-147

## INDEX

References are to Title and Section numbers

### MOTOR VEHICLES (Continued)

#### Registration (Continued)

used cars, dealer to deliver certificate as to previous ownership, 53-133

Regulations of licensing and taxing extends only to vehicles operated on public roads, 32-2124.2

Road blocks, arrests at, 95-618

Safety program, 32-4601 to 32-4607—See HIGHWAYS, BRIDGES AND FERRIES, Traffic safety program

Sales tax on new motor vehicles, amount and payment required, 32-3315

#### School buses

annual inspection, 32-21-155.1

flashing red or amber lights on, 32-21-132

use of lights when stopped or preparing to stop, 32-2197

Seat belts required in new vehicles, 32-21-150.1

penalty for violations, 32-21-150.3

specifications for seat belts, 32-21-150.2

Slow moving vehicles, reflectorized emblem required, 32-21-130

#### Snowmobiles

administration of act by registrar of motor vehicles, 53-1008

definition, 53-1001

enforcement of act, 53-1009

operation restrictions, 53-1006

ownership, certificates of, 53-1003

penalties, 53-1011

registration, 53-1002

disposal of proceeds, 53-1010

exemptions, 53-1005

registration periods, 53-1004

rule-making power of fish and game commission, 53-1009

unlawful operation, 53-1007

Speed contests, permission of authorities required, 32-2143.1

drag racing, penalty, 32-2143.2

Taxing of mobile homes, 84-6601 to 84-6607

Taxing of vehicles or fuels extends only to vehicles operated on public roads, 32-2124.2

Tax levy, assessment and registration provisions, 53-114, 84-406, 84-6008

#### Traffic rules and regulations

approach ramp, duty of driver entering or crossing highway from, 32-2173

automatic signals, meaning of signs, 32-2137

controlled access facilities, authority to regulate use, 32-4305

violation of regulations, penalties, 32-4311

county commissioners empowered to restrict traffic on county roads, 32-2802

finest, forfeitures and assessments, disposition, 31-114

operation of vehicles across public roads and highways not considered operation on roads, when, 32-2124.1

penalty assessment for driver education, 31-114

juvenile offenders, assessments levied against, 94-801-2

school safety patrol, drivers required to stop for, 32-2177

sign manual, state highway commission to adopt, 32-2133

signs, state highway commission to place and maintain, 32-2134

speed contests, permission of authorities required, drag racing, penalty, 32-2143.2

traffic lights, meaning of signals, 32-2137

"yield" sign, duty of driver approaching, 32-2174

Traffic safety program, 32-4601 to 32-4607—See HIGHWAYS, BRIDGES AND FERRIES, Traffic safety program

Transit permits for movement of unregistered vehicles, 53-119.1

#### Trucks, tractors and trailers

additional fees payable, 32-3301 to 32-3317—See Fees payable in addition to registration and license fees, above

combination length and weight restrictions, 32-1123

demonstration permits, 53-118.1 to 53-118.5—See Demonstration of trucks and trailers, above

fleet registration, 53-701 to 53-724—See Reciprocal privileges of interstate fleets, above

hailed vehicles exempt from requirements, 53-638.1

owner's name and certificate number to be displayed, 53-801

dealers and manufacturers exempt, 53-802



## INDEX

References are to Title and Section numbers

### **MOTOR VEHICLES (Continued)**

#### **Trucks, tractors and trailers (Continued)**

- owner's name and certificate number to be displayed (Continued)
    - penalty for violations, 53-803
  - special mobile equipment defined, 53-642
    - assessment of taxes, time of, 84-406
    - identification plate required, annual fee, 32-3707
  - weight violations, disposition of fines and penalty assessments, 32-1131
- #### **Unlawful operation by child under 18**
- concurrent jurisdiction of district and inferior courts, 32-21-163
  - court learning of unlawful operation, proceedings, 32-21-165
  - impounding the vehicle, when, 32-21-163
  - penalty, 32-21-163
  - summoning of child, 32-21-164

### **MOUNTAIN VIEW SCHOOL**

See STATE INSTITUTIONS, Juvenile facilities, 80-2202 et seq.

### **MUNICIPAL COURTS**

Criminal jurisdiction, 95-303

### **MUSEUMS**

Historical independent of other institutions, 44-518

## **N**

### **NARCOTIC DRUGS**

#### **Dangerous Drug Act**

- criminal provisions
  - altering labels on dangerous drugs, 54-135
    - penalty, 54-136
  - fraudulently obtaining dangerous drugs, 54-134
    - penalty, 54-136
  - jurisdiction of prosecutions, exclusive district court, 54-138
  - possession of dangerous drugs, 54-133
  - rehabilitative treatment, 54-137
  - sale of dangerous drugs, 54-132
- definitions, 54-129
- exceptions, 54-131
- justices' courts, no jurisdiction, 95-302
- registration and licensing, 54-130
  - violation a misdemeanor, 54-130
- state board of pharmacy, authority of, 54-130
  - dangerous drug designation, 54-130

### **NEGLIGENCE**

Emergency care rendered at scene of accident, restriction on liability for, 17-410

### **NEGOTIABLE INSTRUMENTS**

See COMMERCIAL PAPER, 87A-3-101 to 87A-3-805

### **NEWSPAPERS**

Investment advice exempt from securities act, 15-2004

### **NEW TRIAL**

- Criminal cases, motion for, 95-2101
  - appeal, authority to order new trial, 95-2426
  - bail, provisions for, 95-1119
- Grounds and procedure, M. R. Civ. P., Rule 59
- Stay of proceedings to enforce judgment pending motion for new trial, M. R. Civ. P., Rule 62(b)

### **NONPROFIT CORPORATION ACT**

#### **Actions by and against corporations**

- involuntary dissolution, commencement of action, 15-2353
- survival of remedy after dissolution, 15-2362

Amendment of articles of incorporation—See Articles of incorporation, amendments, below

## INDEX

References are to Title and Section numbers

### NONPROFIT CORPORATION ACT (Continued)

- Annual reports of domestic and foreign corporations, 15-2381
  - failure to file, penalty, 15-2385
  - filing of report, 15-2382
    - fee for filing, 15-2383
- Appeal from ruling or decision of secretary of state, 15-2388
- Applicability of Religious Corporation Sole Act, 15-2402
- Application of act, 15-2303
- Articles of dissolution—See Dissolution, articles of dissolution, below
- Articles of incorporation
  - amendments
    - disapproval by secretary of state, appeal to district court, 15-2388
    - merger or consolidation of corporations, 15-2342
    - procedure to amend, 15-2334
    - right to amend, 15-2333
  - articles of amendment
    - certificate of amendment, issuance by secretary of state, 15-2336
      - effect of certificate, 15-2236
      - fee for issuing, 15-2383
    - execution by corporation, 15-2335
    - fee for filing, 15-2383
    - form and contents, 15-2335
  - disapproval by secretary of state, appeal to district court, 15-2388
  - fee for filing, 15-2383
  - filing of articles, 15-2330
  - foreign corporation, amendment to articles, filing, 15-2373
  - form and contents, 15-2329
  - greater voting requirements, effect, 15-2391
  - restated articles of incorporation, 15-2337
    - certificate of restatement, issuance
      - effect, 15-2337
      - fee, 15-2383
    - filing, fee, 15-2337, 15-2383
  - waiver of notice requirements, 15-2392
- Books and records, 15-2325
- Bylaws
  - adoption by board of directors, contents, 15-2312
  - power to alter, amend or repeal, 15-2312
  - definition, 15-2302
- Certificate of incorporation
  - fee for issuing, 15-2383
  - issuance by secretary of state, 15-2330
    - effect of issuance, 15-2331
- Committees of board of directors, appointment and powers, 15-2321
- Consolidation—See Merger or consolidation, below
- Definitions, 15-2302
- Directors
  - bylaws, adoption, modification, 15-2312
  - committees, appointment and powers, 15-2321
  - consent to action taken without a meeting, 15-2393
  - election, 15-2318
  - false statements in documents, penalty, 15-2386
  - liquidation of assets and business of corporation, grounds for action, 15-2354
  - loans from corporation prohibited, 15-2327
  - management of corporation, 15-2317
  - meetings, place and notice, 15-2322
    - consent to action without a meeting, 15-2393
    - waiver of notice, 15-2322, 15-2392
  - nonliability for corporate obligations, 15-2311
  - number, 15-2318
    - listing in articles of incorporation, 15-2329
  - officers of corporation as ex officio members of board, 15-2323
  - organization meeting, 15-2332
  - qualifications, 15-2317
  - quorum, 15-2320
  - removal from office, 15-2318
  - survival of remedy after dissolution, 15-2362

## INDEX

References are to Title and Section numbers

### NONPROFIT CORPORATION ACT (Continued)

#### Directors (Continued)

- term of office, 15-2318
- vacancies, filling of, 15-2319

#### Dissolution

- appeal from disapproval by secretary of state, 15-2388
- articles of dissolution, 15-2349
  - execution, form and contents, 15-2349
  - fee for filing, 15-2383
  - filing with secretary of state, 15-2350
- attorney general, notice from secretary of state as to corporations subject to involuntary dissolution, 15-2352
  - commencement of action and procedure, 15-2352
- involuntary dissolution
  - grounds for, 15-2351
  - liquidation—See Liquidation, below
  - notice to attorney general by secretary of state of corporations subject to, 15-2352
  - venue and process, 15-2353
- survival of remedy after dissolution, 15-2362
- voluntary dissolution, 15-2345
  - articles of dissolution, filing, 15-2349, 15-2350
  - assets due unknown persons, deposit with state treasurer, 15-2361
  - certificate of dissolution, 15-2350
  - distribution of assets, 15-2346
    - plan of distribution, 15-2347
  - revocation of voluntary proceedings, 15-2348

#### Dividends prohibited, 15-2326

#### Enforcement by secretary of state, 15-2387

#### Evidence, certificates and certified copies issued by secretary of state to be received, 15-2389

#### Fees

- certified copies, 15-2384
- filing documents and issuing certificates, 15-2383, 15-2384

#### Foreign corporations

- actions by and against corporations, 15-2364
  - failure to obtain certificate of authority, effect of, 15-2380
  - service of process, 15-2372
- admission of foreign corporation, 15-2363
- annual report required, contents, 15-2381
  - failure to file, penalty, 15-2385
  - filing of report, 15-2382
    - fee, 15-2383
- application of act, 15-2303
- articles of incorporation, amendment, filing, 15-2373
  - filing fee, 15-2383
- certificate of authority
  - amended certificate, requirements for securing, procedure, 15-2375
    - application fee, 15-2383
  - application, contents, execution, 15-2367
    - filing of application, 15-2368
  - failure to obtain certificate, effect, 15-2380
  - fee for issuing, 15-2383
  - issuance of certificate, effect, 15-2368, 15-2369
  - limitations on issuance, 15-2363
  - required to transact business in state, 15-2363
  - revocation of certificate of authority
    - appeal from secretary of state, 15-2388
    - grounds, 15-2378
    - issuance of certificate of revocation, 15-2379
- definition, 15-2302
- merger of foreign corporation authorized to do business in state, 15-2374
  - articles of merger, fee for filing, 15-2383
- merger or consolidation with domestic corporations, 15-2343
- name of corporation
  - change of name, 15-2366
  - reservation of right to exclusive use, 15-2309
  - restrictions on contents of name, 15-2365



## INDEX

References are to Title and Section numbers

### NONPROFIT CORPORATION ACT (Continued)

#### Foreign corporations (Continued)

- powers of foreign corporation, 15-2364
- registered agent required, 15-2370
  - change of registered agent, 15-2371
- registered office required, 15-2370
  - change of registered office, 15-2371
- service of process on foreign corporation, 15-2372
- withdrawal of foreign corporation
  - application for withdrawal, contents, 15-2376
    - filing fee, 15-2383
  - filing of application, 15-2377
  - certificate of withdrawal, requirements for, issuance, 15-2376, 15-2377

#### Health service corporations, 15-2304

#### Incorporation

- articles of incorporation—See Articles of incorporation, above
- certificate of incorporation, 15-2330, 15-2331

#### Incorporators, 15-2328

- listing in articles of incorporation, 15-2329
- organization meeting, calling of, 15-2332

#### Invalidity of part of act, effect of, 15-2397

#### Liquidation

- assets due unknown persons, deposit with state treasurer, 15-2361
- creditors, grounds for action for liquidation, 15-2354
  - filing of claims and notice, 15-2357
- decree of dissolution
  - effect of decree, 15-2359
  - entry of decree by court, 15-2359
  - filing of decree, 15-2360
- directors, grounds for action for liquidation, 15-2354
- discontinuance of proceedings, 15-2358
- grounds for liquidation of assets and business of corporation, 15-2354
- jurisdiction of district courts, 15-2354
- members, grounds for action for liquidation, 15-2354
- procedure
  - liquidation by court, 15-2355
  - voluntary dissolution, 15-2346, 15-2347
- receivers
  - appointment by court, 15-2355
  - authority of receivers, 15-2355
  - compensation, 15-2355
  - expenses, payment from assets or proceeds of sale, 15-2355
  - qualifications, 15-2356

#### Loans to directors and officers prohibited, 15-2327

#### Members

- classes of members, designation, election or appointment, qualifications, 15-2311
- consent to action taken without a meeting, 15-2393
- corporation may have no members, 15-2311
- definition, 15-2302
- liquidation of assets and business of corporation, grounds for action, 15-2354
- meetings
  - annual meeting of members, time and place, 15-2313
  - consent to action taken without a meeting, 15-2393
  - quorum, 15-2316
  - special meetings, 15-2313
  - voting rights of members, 15-2315
    - articles of incorporation to control, 15-2391
  - written notice required, 15-2314
    - waiver, 15-2392
- membership certificates, issuance by corporation, 15-2311
- nonliability for corporate obligations, 15-2311
- organization meeting, 15-2332
- survival of remedy after dissolution, 15-2362

## INDEX

References are to Title and Section numbers

### NONPROFIT CORPORATION ACT (Continued)

- Merger or consolidation
  - appeal from disapproval by secretary of state, 15-2388
  - articles of merger or consolidation
    - execution by each corporation, 15-2341
    - filing in office of secretary of state, 15-2341
    - fee for filing, 15-2383
  - form and contents, 15-2341
  - certificate of consolidation
    - effect of issuance, 15-2342
    - issuance by secretary of state, 15-2341
    - fee, 15-2383
  - certificate of merger
    - effect of issuance, 15-2342
    - issuance by secretary of state, 15-2341
    - fee, 15-2383
  - consolidation, procedure for, 15-2339
  - domestic and foreign corporations, 15-2343
  - foreign corporation authorized to do business in state, filing of articles of merger, 15-2374
  - merger, procedure for, 15-2338
  - new corporation, rights and liabilities, 15-2342
  - plan for merger or consolidation
    - abandonment of plan, 15-2340
    - approval by members, 15-2340
  - separate existence of parties to plan ceases, 15-2342
  - surviving corporation, rights and liabilities, 15-2342
  - reservation of right to exclusive use, 15-2307
    - fee for filing application, 15-2383
    - notice of transfer of reserved name, fee for filing, 15-2383
  - restrictions on contents of name, 15-2307
- Officers, enumeration and general powers, 15-2323
  - appointment or election, 15-2323
  - ex officio members of the board of directors, 15-2323
  - false statements in documents, penalty, 15-2386
  - loans from corporation prohibited, 15-2327
  - nonliability for corporate obligations, 15-2311
  - removal from office, 15-2324
- Organization meetings, notice, 15-2332
- Powers of corporation
  - general powers enumerated, 15-2305
  - ultra vires as a defense, 15-2306
  - unauthorized assumption of corporate powers, 15-2394
- Purposes for which organized, 15-2304
- Receivers—See Liquidation, receivers, above
- Registered agent required, 15-2308
  - change of registered agent, 15-2309
    - statement of change, fee for filing, 15-2383
  - listing in articles of incorporation, 15-2329
  - resignation of agent, 15-2309
- Registered office required, 15-2308
  - change of registered office, 15-2309
    - statement of change, fee for filing, 15-2383
  - listing in articles of incorporation, 15-2329
- Repeal of prior acts, effect of, 15-2396
- Reports
  - annual report—See Annual reports of domestic and foreign corporations, above
  - forms to be prescribed by secretary of state, 15-2390
- Reservation of power to amend, repeal or modify, 15-2395
- Sale, lease, exchange, or mortgage of assets, 15-2344
- Secretary of state
  - appeal from ruling or decision of secretary of state, 15-2388
  - application to reserve corporate name, filing, 15-2307

## INDEX

References are to Title and Section numbers

### NONPROFIT CORPORATION ACT (Continued)

#### Secretary of state (Continued)

- articles of amendment
  - certificate of amendment, issuance, effect, 15-2336
  - filing, 15-2335
- articles of dissolution, filing, certificate, 15-2350
- articles of incorporation, filing, 15-2330
- certificate of incorporation, issuance of, 15-2330, 15-2331
- certified copies, fees for issuing, 15-2384
- change of registered office or registered agent, filing of statement, 15-2309
- evidence, certificates and certified copies issued by secretary of state to be received, 15-2389
- fees for filing documents and issuing certificates, 15-2383, 15-2384
- foreign corporations
  - certificate of authority
    - amendment, procedure, 15-2375
    - issuance, 15-2368, 15-2369
    - revocation, 15-2378, 15-2379
  - merger, filing of articles, 15-2374
  - withdrawal, issuance of certificate, 15-2376, 15-2377
- forms for reports to be prescribed by secretary of state, 15-2390
- involuntary dissolution, notice to attorney general of corporations subject to, 15-2352
- merger or consolidation of corporations
  - articles of merger or consolidation, filing, 15-2341
  - certification, effect of, 15-2341, 15-2342
- power to administer act, 15-2387
- restated articles of incorporation, certification, 15-2337
- Securities act, exempt securities, 15-2013
- Service of process on corporation, 15-2310
  - foreign corporations, 15-2372
- Shares of stock prohibited, 15-2326
- Short title, 15-2301
- Ultra vires as a defense, 15-2306
- Unauthorized assumption of corporate powers, 15-2394
- Waiver of notice requirements, 15-2392

### NOTARIES PUBLIC

Deputy registrars, service as, 23-3003

### NOTES

See COMMERCIAL PAPER, 87A-3-101 to 87A-3-805

### NOTICES

- Certified and registered mail, 19-122
- Radio or television broadcast supplementing notice, 19-201
  - copy of transcript to be retained by broadcasting station, 19-202
  - proof of broadcast, 19-203

### NUISANCES

- Alcoholic beverage bottle clubs constitute, 4-173
- Buildings or land used for prostitution, gambling or narcotic drug transactions, abatement as nuisance, 94-1002
- Sanitary deficiencies in public buildings as nuisance, 69-4118

### NURSES

- Child abuse reports required, 10-901 to 10-905—See CHILDREN AND MINORS,
- Abuse of children
- Employment practices
  - bargaining units, 41-2204 to 41-2207
  - definitions, 41-2202
  - improper employment practices, 41-2203
    - injunctive and other relief, 41-2208
  - purpose of act, 41-2201
  - state board of health
    - determination of composition of bargaining unit, 41-2204, 41-2206, 41-2207
    - institution of proceedings against improper practices, 41-2208
  - strikes, when unlawful, 41-2209



## INDEX

References are to Title and Section numbers

### NURSES (Continued)

- License to practice nursing
  - endorsement without examination of licensee of another state, 66-1228
- fees
  - disposition of fees, 66-1237
  - endorsement without examination, 66-1229
  - practical nurse license, 66-1234
  - renewal fee, 66-1236
- lapse of license by failure to renew, 66-1236
- renewal of license, fee, 66-1236
- Moneys received by board, disposition, 66-1237
- Visiting nurses, employment by local boards, 69-4512

### NURSING HOMES

- Administrators
  - board of examiners, 66-3102, 66-3107 to 66-3109
  - licensure, 66-3103 to 66-3105, 66-3110, 66-3111
    - unlicensed administering a misdemeanor, 66-3112
- Board of examiners, judicial review, 66-3114
- Center for the aged, 80-2501 to 80-2503—See CENTER FOR THE AGED
- County operation of home, 16-1037
  - services provided at county-operated home, 16-1038
- Fire regulations applicable, 69-1802
- Joint county institutions authorized, 16-1040
  - definition of terms, 16-1039
  - terms of contract between counties, 16-1041
- Lease of county property for home, 16-1036
- Long-term care facilities, 69-5201 to 69-5221—See LONG-TERM CARE FACILITIES
- TIES
- Tax exemption when operated not for profit, 84-202

## O

### OBSCENE CONDUCT

- Telephone, harassment by unlawful, penalty, 94-35-221.5, 94-35-221.6

### OCCUPATIONAL DISEASE ACT

- Administration of act, 92-1302
- Aggravation of occupational disease by other disease, 92-1326
- Agreement by employee to waive compensation void, 92-1330
- American experience table of mortality, use, 92-1349
- Appeals under—See Judicial review, below
- Asbestosis included as compensable disease, 92-1304
- Attachment, compensation exempt from, 92-1329
- Attorney general, duties, 92-1343
- Attorney's compensation, 92-1323
- Autopsy, 92-1318
  - expenses, 92-1320
- Benefits
  - burial expenses, 92-1324
  - compensation payable under act same as under workmen's compensation act, 92-1321
- Books, records and payrolls of employers to be open for inspection, 92-1358
- Burial expenses, 92-1324
- Claims
  - filing, 92-1312
  - forms, 92-1346
  - time for presenting, 92-1312
- Collateral attack on orders or decisions of board prohibited, 92-1361
- Common law defenses not available, 92-1339
- Common law right of action prohibited against employer electing to come under act, exceptions, 92-1331
- Compensation
  - amount of benefits and time period, same as workmen's compensation act, 92-1321
  - assignment, limitation, 92-1329
  - date for beginning of payment of compensation under act, 92-1338

## INDEX

References are to Title and Section numbers

### OCCUPATIONAL DISEASE ACT (Continued)

#### Compensation (Continued)

- determination of amount of compensation and time and method of payment, 92-1336
- diminution because of payments under workmen's compensation act, 92-1333
- exceptions, 92-1311
- exemption from attachment, garnishment and execution, 92-1329
- false representation by employee as preventing, when, 92-1342
- liability of employer for, 92-1366
- limitations, 92-1311
- methods for employers to secure compensation to their employees, 92-1334
- partial disability, no compensation for, 92-1322
- payment, 92-1311
- payments due to child under 18 years of age or incompetent, 92-1337
- persons receiving public welfare benefits not entitled to compensation, 92-1332
- vested rights in prohibited, 92-1367
- willful misconduct, self-exposure or disobedience of orders of board as precluding, 92-1328

#### Compensation plans, 92-1334

#### Construction of act, 92-1368

#### Costs and disbursements in proceedings and hearings, 92-1357

#### Death

- autopsy, 92-1318
- expenses, 92-1320
- burial expenses, 92-1324
- disease other than silicosis as cause, report of member of medical committee, 92-1317
- notice of, 92-1313
- silicosis as cause of death, report of pulmonary specialist, 92-1316

#### Deduction from wages of part of premium constitutes misdemeanor, 92-1341

#### Defenses not available to employer, 92-1339

#### Definitions, 92-1303

#### Depositions, power to take, 92-1351

#### Diseases which constitute occupational diseases, enumeration, 92-1304

#### District court, powers concerning enforcement of production of testimony, 92-1355

#### Employees

- agreement to waive compensation or pay premium void, 92-1330
- applicants for employment who upon medical examination are found afflicted with occupational disease, employer not liable, when, 92-1330
- right of employee to reject provisions of act, notice of, posting, 92-1309

#### Employers

- books, records and payrolls to be open to inspection, 92-1358
- compensation plan No. 1, direct payment to employee, 92-1334
- compensation plan No. 2, insuring liability, 92-1334
- compensation plan No. 3, occupational disease compensation account, 92-1334
- deducting from wages part of premium, misdemeanor, 92-1341
- liability for payment of compensation, 92-1366
- liability where person employed by successive employers, exception, 92-1310

#### Evidence, certificate and certified copies as, 92-1356

#### Execution, compensation exempt from, 92-1329

#### Execution of process, fees, 92-1353

#### Expenses, 92-1357

#### False representation by employee as to prior diseases, effect, 92-1342

#### Garnishment, compensation exempt from, 92-1329

#### Hearings after receipt of notice and medical report, 92-1315

#### Hearings and investigations, conduct of, 92-1350

#### Hearings, findings and awards by board, 92-1335

#### Industrial accident board

- administering oath, certifying official acts, issuing subpoenas, etc., power, 92-1354
- administration of act, 92-1302
- claim forms, prescribing, 92-1346
- collateral attack on orders or decisions of prohibited, 92-1361
- determination of amount of compensation and method and time of payment, 92-1336
- hearings, findings and awards by, 92-1335
- issuance of writs and process, power, 92-1353
- jurisdiction to hear disputes and controversies, 92-1359
- members not to receive additional compensation for administering act, 92-1302

## INDEX

References are to Title and Section numbers

### OCCUPATIONAL DISEASE ACT (Continued)

#### Industrial accident board (Continued)

- powers necessary and convenient, authority concerning, 92-1352
- power to administer oath, issue subpoenas, compel attendance of witnesses, etc., 92-1347
- presumption as to legality of rules, orders, findings, etc., 92-1360
- right to sue and be sued, 92-1344
- rules and regulations, adoption, 92-1345
- service of process on, 92-1344
- traveling expenses, 92-1302

#### Information furnished to board confidential, 92-1348

#### Judicial review

- appeal to district court
  - appearance, 92-1364
  - method of taking, 92-1362, 92-1363
  - time for, 92-1362
- appeal to supreme court, 92-1365
- collateral attack upon orders and decisions of board prohibited, 92-1361
- jurisdiction of board to hear disputes and controversies, 92-1359

#### Lump sum settlements

- exception as to amount of attorney's compensation, 92-1323
- prohibition against, 92-1323

#### Medical and hospital expenses, 92-1325

#### Medical examination

- cost, payment, 92-1320
- periodic medical examination, 92-1319
- procedure, 92-1315
- re-examination, 92-1315
- report, 92-1315

#### Medical panel

- appointment, 92-1314
- composition, 92-1314
- medical association, certifying nominees, 92-1314

#### Notice of disability or death, time for giving, 92-1313

#### Notice of employee's right to reject provisions of act, posting of, 92-1309

#### Occupational disease compensation account, 92-1334

#### Occupational diseases

- aggravation by other disease, 92-1326
- arising out of employment, when, 92-1305
- enumeration, 92-1304

#### Partial disability, no compensation for, 92-1322

#### Payments due to child under 18 or to person adjudged incompetent, method of making, 92-1337

#### Periodic medical examinations, 92-1319

#### Persons receiving benefits under public welfare act not entitled to compensation benefits, 92-1332

#### Persons subject to act, 92-1307

#### Preventive measures, 69-4201 to 69-4205—See INDUSTRIAL HYGIENE

#### Radiation sickness, time for filing notice of claim, 92-1311, 92-1313

#### Regular employees, 92-1306

#### Rights to compensation under act exclusive remedy, when, 92-1308

#### Short title, 92-1301

#### Silicosis as cause of death, report of pulmonary specialist, 92-1316

#### Silicosis with complication of tuberculosis, 92-1327

#### Subcontractors, 92-1306

#### Successive employers, 92-1310

#### Violation of act, penalties, 92-1340

#### Willful misconduct, willful self-exposure or disobedience precludes compensation, 92-1328

#### Witnesses before board, fees and mileage, 92-1354

### OIL AND GAS

#### Assessments against operators and producers, disposition of moneys, 60-145

#### Earmarked revenue fund, deposits and use of fund, 60-145

#### Federal lands, royalties used for school equalization aid, 75-3613



## INDEX

References are to Title and Section numbers

### **OIL AND GAS (Continued)**

- Lien on well, priority and filing of statement, 45-1003
- Operation as a unit of one or more pools or parts thereof in a field, 60-131.1 to 60-131.13
  - hearing and orders of conservation commission, 60-131.1 to 60-131.7
- Petroleum field station at Billings, transfer to commission, 60-147
- Real estate brokers' license act inapplicable to dealings in mineral interest, 66-1926
- Report of conservation commission to governor, 60-127
- Review of orders of conservation commission, application of rules of civil procedure, M. R. Civ. P., Rule 81(a), Table A

### **OPERATORS' AND CHAUFFEURS' LICENSES**

- Agents for issuance of licenses, 31-135
- Driver education courses, issuance of license after completion of course, 31-127
- Driving under influence, mandatory suspension or revocation, 31-149
- Expiration date of license, 31-135
- Fee payable for license, 31-135
- Forfeiture of bail on motor vehicle offense, return of license to board, 31-145
  - revocation of license, 31-146
- Interstate compact, text and enactment, 31-163
  - governor designated as executive head, 31-166
  - highway patrol board designated as licensing authority, 31-164
  - judicial review of actions pursuant to compact, 31-169
  - offenses furnishing grounds for suspension or revocation of license, 31-168
  - reimbursement of compact administrator, 31-165
  - report to highway patrol of suspension or revocation of license, 31-167
- Issuance of license, 31-135
- Person holding chauffeur's license not to have operator's license, 31-125
- Photograph to be included in license, 31-135
- Possession of more than one license prohibited, 31-135
- Probationary licenses, issuance, 31-147
- Provisional license, designation and suspension, 31-135
- Revocation or suspension, child under 18 unlawfully operating motor vehicle, 32-21-163
- Surrender of foreign license on licensing in Montana, 31-125
- Testing of applicants for renewal, 31-135

### **OPTOMETRY**

- Attorney general to represent board in supreme court, 66-1315
- Biennial report of board of examiners, 66-1311
- Compensation of examiners, 66-1311
- Corporations for practice, 15-2101 to 15-2116—See PROFESSIONAL SERVICE CORPORATIONS
- Disability insurance, freedom of choosing physician, 40-4108, 40-4109
- Fee for renewal of registration, 66-1307
- Public agencies, acceptance of services of licensed optometrist, 66-1317
- Renewal of registration, 66-1307
- Violations
  - injunction on relation of board of examiners, 66-1302
  - penalty for, 66-1314
  - prosecution of, 66-1315

### **ORDERS**

- Application for order to be by motion, M. R. Civ. P., Rule 7(b)
- Exceptions to orders of court unnecessary, M. R. Civ. P., Rule 46
- Mistaken order, grounds and procedure for relief from, M. R. Civ. P., Rule 60
- Pre-trial conference, order issued after, M. R. Civ. P., Rule 16
- Process used for enforcement for and against persons not parties, M. R. Civ. P., Rule 71
- Service on parties, when required, M. R. Civ. P., Rule 5(a)

### **OSTEOPATHY**

- Compensation of board members, 66-1410
- Corporations for practice, 15-2101 to 15-2116—See PROFESSIONAL SERVICE CORPORATIONS
- Disability insurance, freedom of choosing physician under disability insurance, 40-4108, 40-4109

## INDEX

References are to Title and Section numbers

### OSTEOPATHY (Continued)

Fees received by board, deposit and use, 66-1410  
License, issuance after examination, 66-1405  
Report by board to governor, 66-1410

### OUTDOOR RECREATIONAL RESOURCES

Advisory and planning committee, composition and functions, 62-404  
Fish and game commission as agent to implement federal act, 62-402  
    powers of commission, 62-403  
Purpose of act, 62-401

## P

### PAINTS AND PAINT PRODUCTS

Analysis, 3-1514  
Contents of label, 3-1510  
County attorney, duties, 3-1515  
Enforcement of regulatory act, 3-1513  
Intrastate transactions, application of act, 3-1510  
Labeling requirements, 3-1510  
Laboratory for analysis, 3-1514  
Penalty for violations, 3-1511  
Possession of improperly labeled products as prima facie evidence, 3-1512

### PARDONS

See PROBATION, PAROLE AND CLEMENCY

### PARKING FACILITIES

Off-street parking facilities in cities  
    improvement districts, authority to create, 11-2201  
        assessments and bonds, 11-2214.2  
        bonds, authority of district to issue, 11-2214.1  
        leasing of real property, 11-2214.4  
        payment of assessments, 11-2214.3  
    resolution of intention, publication and adoption, 11-2214.5

### PARKS

#### Counties

    board of park commissioners  
        acceptance of federal aid, 16-4807  
        accounts and records, 16-4801  
        commissioners, qualifications and terms, 16-4801, 16-4804  
        compensation of commissioners, 16-4804  
        execution of contracts, 16-4804  
        failure of commissioner to attend meetings, vacancy in office, 16-4804  
        funds, receipt and disbursement, 16-4803  
        auditing and allowance of claims, 16-4805  
        interest of commissioner in contracts of board prohibited, 16-4804  
        meetings, 16-4801, 16-4804  
        minute book, record of proceedings, 16-4801  
        notice of special meetings, 16-4804  
        officers of the board, duties, 16-4801  
        powers and duties of board, 16-4802  
        quorum for the transaction of business, 16-4804  
        vacancies on board, filling of, 16-4804  
    claims against county, allowance, 16-4805  
    county land donated for park purposes, 16-1131  
    discrimination in employment prohibited, 16-4806  
    federal aid, conditions, 16-4807  
    park fund, separate fund in county treasury, 16-4803  
    restricted liability for expenditures, 16-4803  
Gasoline tax moneys allocated for park improvement, 32-2601  
Open-space land, 62-601 to 62-609  
    acquisition and designation of land, 62-604  
    comprehensive planning, commission authorized, 62-607  
    conversion or diversion of open-space land, 62-605  
    powers of public bodies, 62-606

## INDEX

References are to Title and Section numbers

### **PARKS (Continued)**

Outdoor recreational resources, development, 62-401 to 62-404—See **OUTDOOR RECREATIONAL RESOURCES**

#### **State parks**

- fees and charges, disposition and use, 62-305
- fish and game commission vested with control, 62-301
  - powers and duties enumerated, 62-304
- injury to park property, penalty, 62-314
- scientific and recreational park, establishment authorized, 62-310
  - rules and regulations, 62-311
- violation of rules and regulations, penalty, 62-314

### **PARTIES**

- Administrators need not join beneficiaries as parties, M. R. Civ. P., Rule 17(a)
- Assignee of claim as plaintiff, defenses available against, 93-2802
- Capacity to sue or be sued determined by statute, M. R. Civ. P., Rule 17(b)
- Class actions, M. R. Civ. P., Rule 23(a)
- Counterclaim requiring addition of parties, M. R. Civ. P., Rule 13(h)
- Cross-claim requiring addition of parties, M. R. Civ. P., Rule 13(h)
- Death of party, substitution of representative, M. R. Civ. P., Rule 25(a)
- Executor need not join beneficiaries as parties, M. R. Civ. P., Rule 17(a)
- Guardians need not join wards as parties, M. R. Civ. P., Rule 17(a)
- Incompetent persons, representation in actions, M. R. Civ. P., Rule 17(c)
  - substitution of guardian in pending action, M. R. Civ. P., Rule 25(b)
- Interpleader by joinder or substitution, M. R. Civ. P., Rule 22
- Interrogatories to parties, M. R. Civ. P., Rule 33
- Intervention, M. R. Civ. P., Rule 24
- Joinder of parties
  - form for allegation of reason for omission of necessary party, M. R. Civ. P., Appendix of Forms, Form 22
- interpleader, M. R. Civ. P., Rule 22(a)
- misjoinder, effect and correction, M. R. Civ. P., Rule 21
- nonjoinder, effect and correction, M. R. Civ. P., Rule 21
- permissive joinder, M. R. Civ. P., Rule 20(a)
- required joinder, effect of failure to join, M. R. Civ. P., Rule 19
- separation of trials, M. R. Civ. P., Rule 20(b)
- Minors, representation in actions, M. R. Civ. P., Rule 17(c)
- Mortgage foreclosure, necessary parties to, 93-6001
- Motion on failure to join indispensable party, M. R. Civ. P., Rule 12(b)
- Part of defendants served, proceeding against, M. R. Civ. P., Rule 4 D(10)
- Physical and mental examinations, compelling submission, M. R. Civ. P., Rule 35
- Public officers, substitution of successor, M. R. Civ. P., Rule 25(d)
- Real party in interest, action to be prosecuted in name of, M. R. Civ. P., Rule 17(a)
- State bringing action for use or benefit of another, M. R. Civ. P., Rule 17(a)
- Substitution of parties, M. R. Civ. P., Rule 25
  - interpleader, substitution by, M. R. Civ. P., Rule 22(b)
- Third-party practice, M. R. Civ. P., Rule 14
- Transfer of interest, substitution of successor, M. R. Civ. P., Rule 25(c)
- Trustee need not join beneficiaries as parties, M. R. Civ. P., Rule 17(a)
- Unauthorized insurers, actions by prohibited, 40-3402

### **PARTITION**

#### **Personal property**

- county in which action to be brought, 93-6301.1
- partition or sale authorized, 93-6301.1
- procedure, 93-6301.2

Rules of civil procedure, application to proceedings, M. R. Civ. P., Rule 81(a), Table A

### **PARTNERSHIPS**

- Execution against partnership interest, 93-5811
- Service of process on partnerships, M. R. Civ. P., Rule 4 D(2)

### **PAWNBROKERS AND JUNK DEALERS**

- Secured transactions, application of law to, 87A-9-203



## INDEX

References are to Title and Section numbers

### PAYMENT

Affirmative defense, M. R. Civ. P., Rule 8(c)

### PEACE OFFICERS

Arrests, 95-608—See ARRESTS, Peace officer

Criminal investigator, position within office of attorney general, 82-414 to 82-420—See CRIMINAL INVESTIGATOR

Definition, Code of Criminal Procedure, 95-210

Fish and game laws, enforcement by officers, 26-114

Law enforcement academy, 75-5201 to 75-5208—See COLLEGES AND UNIVERSITIES, Law enforcement academy

Qualifications of, 16-3705

Reports of accidents investigated, 32-1208

Roadblocks, arrests at, 95-618

Teletypewriter communications system, 82-3901 to 82-3906—See LAW ENFORCEMENT TELETYPEWRITER COMMUNICATIONS

### PERISHABLE PROPERTY

Carrier may sell, when, 8-819

### PETROLEUM PRODUCTS

Adulterated or misbranded products, sale prohibited, 60-205

Calibration of tanks and measuring devices, 60-229

liquefied petroleum dispensing devices, 60-230

temperature correction required, 60-231

penalty for violations of act, 60-233

rules and regulations of state sealer, 60-232

standards promulgated by state sealer, 60-232

“Commissioner” defined, 60-203.1

Dealer’s license required to do business, 60-224

application for license, 60-224

definition of terms, 60-223

delinquent renewal fee, 60-228

expiration and renewal of licenses, 60-228

meter license fees, 60-227

penalty for unlicensed operation, 60-233

place of business license fee, 60-225

pump license fees, 60-226

rules and regulations for enforcement, 60-232

sealing of equipment where fee not paid, 60-228

seizure and confiscation of property of unlicensed dealer, 60-224

tank license fees, 60-228

Enforcement of chapter by commissioner of agriculture, 60-203.2

Inspections and tests by commissioner, 60-211

obstruction of entry or inspection prohibited, 60-217

samples furnished by dealers, 60-212

samples furnished by users, 60-217

Rules and regulations for interpretation of chapter, 60-203.2

state sealer to regulate dealers, tanks and measuring devices, 60-232

Standards of quality, strength and purity, determination and promulgation by commissioner, 60-203.3

Substandard products, sale prohibited, 60-205

### PHARMACIES

Alcoholic beverages, possession and sale by druggist, 4-134

Labeling of prescriptions, 66-1523

State board of pharmacy

biennial report to governor, 66-1504

designation of dangerous drugs, 66-1504.1

fees and fines received by board, deposit and use, 66-1527

review of orders, application of rules of civil procedure, M. R. Civ. P., Rule 81(a)

Table A

### PHOTOGRAPHY

License fund abolished, 79-416

## INDEX

References are to Title and Section numbers

### PHYSICAL THERAPY

- Application for examination, contents and filing, 66-2503
- Certificate, issuance to licensed therapist, 66-2507
- Citation of practice act, 66-2517
- Definition of terms used in practice act, 66-2501
- Examination of applicants for license
  - application for examination, 66-2503
  - conduct of examination, 66-2506
  - fee for examination, 66-2503
  - repeat examination after failure to pass, 66-2503
  - scope of examination, 66-2506
- Exemption from practice act for other professions, 66-2513
- Expiration and extension of licenses, 66-2508
- Investigation and report of violations, 66-2515
- Licensed therapist from other states, licensing, 66-2505
- List of licensed therapists, publication and distribution, 66-2514
- Oath or fraudulent representation to obtain license, misdemeanor, 66-2512
- Penalties for violations, 66-2516
- Practice of medical profession by therapist not authorized, 66-2513
- Previously practicing therapists, licensing, 66-2504
- Qualifications of licensees to practice, 66-2502
- Refusal to issue or renew license, grounds, 66-2509
- Register of licensed persons kept by board, 66-2514
- Rules to carry practice act into effect, adoption by board, 66-2514
- Temporary licenses, issuance and duration, 66-2510
- Unauthorized representation as licensed therapist, misdemeanor, 66-2511

### PHYSICIANS AND SURGEONS

- Alcoholic beverages, prescription and administration by physician, 4-136
- Appeal from board, application of rules of civil procedure, M. R. Civ. P., Rule 81(a), Table A
- Autopsies ordered by coroner, liability of physician limited, 95-813
- Child abuse reports, 10-901 to 10-905—See CHILDREN AND MINORS, Abuse of children
- Consent by minors to medical or surgical care, 69-6101 to 69-6105—See CHILDREN AND MINORS
- Corporations for practice, 15-2101 to 15-2116—See PROFESSIONAL SERVICE CORPORATIONS
- Disability insurance, freedom of choosing physician, 40-4108, 40-4109
- Emergency care at scene of accident, restriction on liability for, 17-410
- Medical Practice Act
  - board of medical examiners, 66-1013 to 66-1020
  - certificates, 66-1021 to 66-1024
  - disciplinary proceedings, 66-1038 to 66-1040
  - licensure
    - application, 66-1032
    - examination, 66-1033
    - fee, 66-1031
    - issuance, validation and refusal of licenses, 66-1034 to 66-1036
    - qualifications, 66-1025 to 66-1027
  - practice of medicine defined, exemption, 66-1012
  - unlawful practice a misdemeanor, 66-1041
  - unprofessional conduct, 66-1037
- Occupational disease reports, contents and filing, 69-4204
- Optometry regulatory act not applicable to, 66-1316
- Venereal disease report required, 69-4604
  - exposure of other persons to be reported, 69-4607

### PINE HILLS SCHOOL

See STATE INSTITUTIONS, Juvenile facilities, 80-2202 et seq.

### PIPELINES

- Attorney general to enforce provisions of act, 8-202
- Common carriers defined, 8-201
- Connections and interchange facilities, power of board to require, 8-205

## INDEX

References are to Title and Section numbers

### PIPELINES (Continued)

- Discrimination prohibited, 8-207, 8-210
- Financing statements of utility, contents and place of filing, 87A-9-302.2
  - definition of terms, 87A-9-302.1
  - Uniform Commercial Code, application, 87A-9-302.3
- Investigatory powers of board, 8-206
- Irrigation and drainage pipelines, taxability, 84-206
- Lien on pipeline, priority and filing of statement, 45-1003
- Public utility, status of pipelines as, 8-202
- Rate regulation
  - discrimination prohibited, 8-207
  - hearings and complaints, 8-204
  - publication of tariffs, 8-206
- Records of carriers, investigation by board, 8-206
- Reports required of carriers, 8-206

### PLANNING AND ECONOMIC DEVELOPMENT

- Administrators of sections of department, appointment of personnel, 82-3707
- Citation of act, 82-3701
- Commission, 82-3703
  - expenses of members, 82-3703
  - members of commission, 82-3703
  - terms of members, 82-3703
  - vice-chairman, secretary, and other officers, 82-3703
- Contracts and agreements for projects and programs, 82-3706
- Co-operation with other agencies, 82-3706
- Department of planning and economic development, 82-3703
  - executive head of department, appointment, compensation, 82-3704
  - functions of department, 82-3705
- Necessity and public policy, declaration of, 82-3702
- Planning board abolished, transfer of records, property and moneys, 82-3709

### PLANNING AND ZONING

- Act not to prevent recovery and use of mineral, forest or agricultural resources, 11-3853
- Appropriations for expenses of planning board, 11-3825
- City-county board
  - advisory function, 11-3801
  - apportionment of expenses between governmental units, 11-3825
  - budget of board, 11-3824
  - composition of board, 11-3810
  - jurisdictional area, definition and establishment, 11-3830
    - projects outside area, power to plan, 11-3830.1
    - zoning districts within jurisdictional area, 16-4703
  - powers of board, 11-3824
  - property, power to accept, hold and use, 11-3827
  - purpose of creation, 11-3801
  - qualifications of citizen members, 11-3812
  - quorum of board, 11-3818
  - recommendations to county commissioners, 16-4702
  - removal of citizen member from office, 11-3813
  - reports of board, 11-3824
  - terms of office of members, 11-3810
  - travel expenses to attend regional or national conferences, 11-3820
  - zoning commission, board functioning as, 11-3828
    - county zoning commission, acting as, 16-4702
- City planning board
  - advisory function, 11-3801
  - composition, 11-3804
  - property, power to accept, hold and use, 11-3827
  - purpose of creation, 11-3801
  - qualifications of citizen members, 11-3808
- County zoning districts
  - actions to enforce zoning regulations, 16-4707
  - adoption of resolution creating district and establishing regulations, 16-4705



## INDEX

References are to Title and Section numbers

### PLANNING AND ZONING (Continued)

#### County zoning districts (Continued)

- board of adjustment, establishment, powers, and procedure, 16-4706
- comprehensive development plan to be used, 16-4704
- continuation of nonconforming uses, 16-4709
- enforcing officers, appointment and powers, 16-4708
- establishment of districts authorized, 16-4703
- factors considered in making regulation, 16-4704
- hearings on proposed district and regulations, 16-4705
- judicial review of actions by board of adjustment, 16-4706
- natural resources to be protected, 16-4710
- permits for location or conformance, issuance and fees, 16-4708
- power of commissioners to adopt regulation, 16-4701
- procedure for adoption of regulations and boundaries, 16-4705
- property, power of board to accept, hold and use, 11-3827
- publication of intention to create district, 16-4705
- purpose of act, 16-4701
- recommendations by city-county planning board, 16-4702
- resolution of intention to create district, 16-4705
- uniformity of regulation within district, 16-4703
- uses regulated within district, 16-4703
- violations of act or resolution, penalty, 16-4707

Definition of terms in planning board law, 11-3803

Industrial development projects, 11-4101 to 11-4110—See INDUSTRIAL DEVELOPMENT

#### Master plan

- adoption of plan by governing bodies, 11-3840
- adoption of plan by planning board, 11-3834
- contents of plan, 11-3831
- definition, 11-3803
- governing bodies' action on plan, 11-3840
- hearing prior to adoption of plan, 11-3833
- policies to be embodied in plan, 11-3828

Open-space land, 62-601 to 62-609—See PARKS

#### Ordinances and resolutions

- recommendations of planning board to governing bodies, 11-3834
- subdivision plats, requiring conformity to master plan, 11-3842
- validation of prior actions, 11-3855

Planning districts, creation by county commissioners authorized, 11-3825

#### Subdivision plats

- application for approval for plat, 11-3843
- conformity to master plan, ordinance requiring, 11-3842
- factors considered by planning board in acting on application, 11-3844
- fees payable with application, 11-3847
- filing and recording of plat ineffective unless approved by city council, 11-3848
- hearing by planning board, 11-3843
- judicial review of city council action, 11-3851
- procedural regulations of planning board, 11-3845
- recommendations of planning board for approval or disapproval, 11-3846

Submission of urban renewal plan to commission, 11-3906

Tax levy for planning board purposes, 11-3825

Validation of prior ordinances, rules and regulations, 11-3855

### PLANNING BOARD, STATE

State planning board abolished, transfer of records, property and moneys to planning and economic development commission, 82-3709

### PLEADINGS

Accord and satisfaction as affirmative defense, M. R. Civ. P., Rule 8(c)

Adoption by reference, M. R. Civ. P., Rule 10(c)

Affirmative defenses, setting forth in pleadings, M. R. Civ. P., Rule 8(c)

Alternative pleadings permitted, M. R. Civ. P., Rule 8(e)

Ambiguity, motion for more definite statement, M. R. Civ. P., Rule 12(e)

Amendments of pleadings, M. R. Civ. P., Rule 15

## INDEX

References are to Title and Section numbers

### PLEADINGS (Continued)

- Appearance, filing of answer constituting, 93-8505
- Arbitration and award as affirmative defense, M. R. Civ. P., Rule 8(c)
- Assumption of risk as affirmative defense, M. R. Civ. P., Rule 8(c)
- Capacity to sue or be sued, absence raised by negative pleadings, M. R. Civ. P., Rule 9(a)
- Caption, content, M. R. Civ. P., Rule 10(a)
- Claims for relief, contents, M. R. Civ. P., Rule 8(a)
- Conciseness required, M. R. Civ. P., Rule 8(e)
- Conditions precedent, general averment of performance permitted, M. R. Civ. P., Rule 9(c)
- Consideration, failure as affirmative defense, M. R. Civ. P., Rule 8(c)
- Contributory negligence as affirmative defense, M. R. Civ. P., Rule 8(c)
- Counterclaims, M. R. Civ. P., Rule 13(a) to (f)
- Criminal cases—See CRIMINAL PROCEDURE
  - arraignment of defendant, 95-1601 to 95-1608
  - charging an offense, 95-1501 to 95-1506
  - guilty plea, when accepted, 95-1902
  - justices' courts and police courts, 95-2004
  - pretrial motions, 95-1701 to 95-1710
- Cross-claims, M. R. Civ. P., Rule 13(g)
- Damages, specific statement of special damage required, M. R. Civ. P., Rule 9(g)
- Defenses, form of stating, M. R. Civ. P., Rule 8(c)
- Defenses required to be made by responsive pleadings, M. R. Civ. P., Rule 12(b)
- Demurrers abolished in civil proceedings, M. R. Civ. P., Rule 7(c)
- Denials, form of stating, M. R. Civ. P., Rule 8(b)
- Directness required, M. R. Civ. P., Rule 8(e)
- Discharge in bankruptcy as affirmative defense, M. R. Civ. P., Rule 8(c)
- Duress as affirmative defense, M. R. Civ. P., Rule 8(c)
- Enumeration of pleadings allowed in civil cases, M. R. Civ. P., Rule 7(a)
- Estoppel as affirmative defense, M. R. Civ. P., Rule 8(c)
- Exceptions for insufficiency abolished in civil proceedings, M. R. Civ. P., Rule 7(c)
- Exhibits as parts of pleading, M. R. Civ. P., Rule 10(c)
- Failure to deny, effect, M. R. Civ. P., Rule 8(d)
- Fellow servant rule as affirmative defense, M. R. Civ. P., Rule 8(c)
- Filing with court required, M. R. Civ. P., Rule 5(d)
- Form of pleading, M. R. Civ. P., Rule 10
- Forms suggested by rules, M. R. Civ. P., Appendix of Forms, Forms 2 to 14, 16, 17
- Fraud as affirmative defense, M. R. Civ. P., Rule 8(c)
  - circumstances to be stated with particularity, M. R. Civ. P., Rule 9(b)
- General denial permitted, M. R. Civ. P., Rule 8(b)
- Illegality as affirmative defense, M. R. Civ. P., Rule 8(c)
- Inconsistent pleadings permitted, M. R. Civ. P., Rule 8(e)
- Intent, general averment permitted, M. R. Civ. P., Rule 9(b)
- Judgment on pleadings, motion for, M. R. Civ. P., Rule 12(c)
- Judgments, manner of pleading, M. R. Civ. P., Rule 9(e)
- Justices' courts, 93-6802.1, 93-6802.2
- Knowledge, general averment permitted, M. R. Civ. P., Rule 9(b)
- Laches as affirmative defense, M. R. Civ. P., Rule 8(c)
- License as affirmative defense, M. R. Civ. P., Rule 8(c)
- Malice, general averment permitted, M. R. Civ. P., Rule 9(b)
- Mistake as defense, circumstances to be stated with particularity, M. R. Civ. P., Rule 9(b)
- Names of parties, when included, M. R. Civ. P., Rule 10(a)
- Official documents or acts, averment as to compliance with law, M. R. Civ. P., Rule 9(d)
- Ordinances, manner of pleading, M. R. Civ. P., Rule 9(d)
- Paragraphing and numbering, M. R. Civ. P., Rule 10(b)
- Payment as affirmative defense, M. R. Civ. P., Rule 8(c)
- Place, materiality of averments as to, M. R. Civ. P., Rule 9(f)
- Pre-trial conference, consideration in, M. R. Civ. P., Rule 16
- Regulations, manner of pleading, M. R. Civ. P., Rule 9(d)
- Release as affirmative defense, M. R. Civ. P., Rule 8(c)
- Res judicata as affirmative defense, M. R. Civ. P., Rule 8(c)
- Separation of claims and defenses, M. R. Civ. P., Rule 10(b)

## INDEX

References are to Title and Section numbers

### PLEADINGS (Continued)

- Service on parties, when required, M. R. Civ. P., Rule 5(a)
- Signature by attorney, M. R. Civ. P., Rule 11
- Special damage, specific statement of items required, M. R. Civ. P., Rule 9(g)
- Statute of frauds as affirmative defense, M. R. Civ. P., Rule 8(c)
- Statute of limitations as affirmative defense, M. R. Civ. P., Rule 8(c)
- Statutes, manner of pleading, M. R. Civ. P., Rule 9(d)
- Striking pleadings or matter therein, motion for, M. R. Civ. P., Rule 12(f)
- Substantial justice, pleadings construed to effect, M. R. Civ. P., Rule 8(f)
- Supplemental pleadings, M. R. Civ. P., Rule 15(d)
- Third-party practice, M. R. Civ. P., Rule 14
- Time allowed for responsive pleadings, M. R. Civ. P., Rule 12(a)
- Time, materiality of averments as to, M. R. Civ. P., Rule 9(f)
- Variance of proof, amendment of pleadings, M. R. Civ. P., Rule 15(b)
- Verification of pleading, form and persons by whom made, 93-3702
- Waiver as affirmative defense, M. R. Civ. P., Rule 8(c)
- Waiver of defenses by failure to plead, M. R. Civ. P., Rule 12(h)

### PLEDGES

See SECURED TRANSACTIONS, 87A-9-101 to 87A-9-507

Definition of term, 19-103

### PLUMBERS

- Act not to require employment of licensed plumbers, 66-2415
- Board of plumbing examiners
  - appointment of members, 66-2403
  - duties, 66-2403
  - members, 66-2403
  - term of members, 66-2403
- Declaration of public interest, 66-2412
- Fee on fixtures installed by plumbers, 66-2427
- Licensing
  - bond required of master plumber, 66-2405
  - examination of licensees, 66-2402
  - experience required of licensees, 66-2402
  - fees received for licenses, deposit and use, 66-2407
  - required when working in city or town unless excused by governing body, 66-2401
- Minimum standards
  - exceptions from act, 66-2426
  - inferior installations, restraining, 66-2417
  - municipal ordinances, power to adopt rules and regulations, 66-2424
  - prescribing, 66-2416
  - revocation or suspension of license for work below minimum, 66-2419
    - hearing, 66-2422
    - initiation, 66-2420
    - judicial review, 66-2423
    - procedure, 66-2420
    - process, service, 66-2421
  - state plumbing code, adoption, 66-2416
    - effective date, 66-2425
- State plumbing board
  - board of plumbing examiners constitutes, 66-2413
  - chairman, 66-2414
  - employees, 66-2414
  - rules and regulations, 66-2414

### POISONS

- Insecticides, fungicides and rodenticides, definitions, 27-202
- Warranty accompanying manufacture or sale of economic poison, 27-203

### POLICE COURTS

- Criminal cases, proceedings, 95-2001 to 95-2009—See CRIMINAL PROCEDURE, Police courts
- Criminal jurisdiction, 95-303



## INDEX

References are to Title and Section numbers

### **POLICE COURTS** (Continued)

Disqualification of judge, requirements and procedure, 95-1709  
Fines for city ordinance violations tried on appeal, disposition of, 95-2008.1  
Judges, salaries, 11-726

### **POST-ENEMY-ATTACK PROVISIONS**

Continuity in government, V, 46; 82-3801 to 82-3809—See WAR, Continuity in government  
Resource management, 77-1501 to 77-1508—See WAR, Resource management

### **POTATOES**

Grading of potatoes, 3-1404

### **POULTRY**

Advisory board, appointment, 3-2201  
members serve without compensation, 3-2203  
Breeding plan of accreditation and certification, 3-2204  
Cancellation of certificates of accreditation or certification, 3-2211  
Cancellation or refusal of license, procedure required, 3-2204  
Definitions of terms, 3-2202  
Fees collected, disposition, 3-2207  
Improvement board abolished, 3-2201.1  
Inspection plans, formulation, 3-2204  
Labeling of products required, 3-2209  
License required for hatchery, 3-2205  
Powers and duties of commissioner of agriculture, 3-2201  
Violations of law as misdemeanor, 3-2212

### **POVERTY RELIEF**

See PUBLIC WELFARE, Economic opportunity and poverty relief, 71-1601 to 71-1604

### **PRELIMINARY EXAMINATION**

See CRIMINAL PROCEDURE, Preliminary examination, 95-1201 to 95-1204

### **PRESUMPTION**

Legality of rules, orders, findings, etc., of industrial accident board under occupational disease act, 92-1360

### **PRETRIAL CONFERENCE**

Conduct and scope of conference, M. R. Civ. P., Rule 16

### **PRETRIAL MOTIONS**

Criminal procedure, 95-1701 to 95-1710—See CRIMINAL PROCEDURE, Pretrial motions

### **PRINCIPAL AND INCOME ACT**

Act to govern ascertainment of principal and income and apportionment of receipts and expenses, 67-1902  
Animals, offspring of, 67-1908  
Application to estates created after effective date, 67-1916  
Bonds or obligations, 67-1906  
Business, operation of, 67-1907  
Coverage of act, 67-1902  
Death of tenant between payment dates, apportionment, 67-1904  
Definitions, 67-1901  
Delayed income, 67-1911  
Depletion of property, 67-1910  
Expenses  
apportionment, 67-1912  
expenses where no trust created, 67-1913  
improvement, 67-1913

## INDEX

References are to Title and Section numbers

### PRINCIPAL AND INCOME ACT (Continued)

#### Income

- corporate dividends, when, 67-1905
- definition, 67-1901
- receipts constitute, 67-1903

Interpretation of act, uniformity, 67-1914

Natural resources, 67-1909

Net profits derived from operation of business, 67-1907

Offspring of animals, 67-1908

#### Principal

- change in form of investment of unprofitable principals, 67-1911
- corporate dividends, when, 67-1905
- definition, 67-1901
- loss or gain on sale of bonds or obligations, 67-1906
- property subject to depletion, 67-1910
- receipts constitute, 67-1903

"Remainderman" defined, 67-1901

Severance of natural resources, 67-1909

Short title of act, 67-1915

Stock dividends, 67-1905

"Tenant" defined, 67-1901

"Trustee" defined, 67-1901

Uniform principal and income act, 67-1915

### PRINTING

County printing, 16-1225 to 16-1233—See COUNTIES, Printing

Definition, 19-103.1

#### State printing

- certification of printer as to prices and rates, 82-1152
- claim for printing, approval by state controller, 82-1910
- penalty for violations of act, 82-1138
- preference to Montana printers, 82-1137
- union label required, exceptions, 82-1137
- wages and working conditions required of contractors, 82-1137

### PRISONS AND PRISONERS

Escape from prison, venue of prosecution, 95-409

Inmates of state prison, use of state correspondence school, 75-2006

Intrastate agreement on detainees, text and enactment, 94-1101-1

co-operation of public agencies in enforcement, 94-1101-3

co-ordinator of agreement, appointment and duties, 94-1101-6

delivery of prisoner by institution on detainer, 94-1101-5

district courts to function under agreement, 94-1101-2

escape from custody on detainer, penalty, 94-1101-4

Medical expense for jail prisoners, reimbursement of sheriff, 16-2818

Post-conviction hearing, 95-2601 to 95-2608—See CRIMINAL PROCEDURE, Post-conviction hearing

#### Prisoner furlough program

- administrative rules, 95-2223
- agent, employee or involuntary servant, prisoner not considered as, 95-2224
- application by prisoner, 95-2220
  - consideration, 95-2221
- cancellation and revocation of furlough, 95-2226
- co-operation by state agencies, 95-2223
- definitions, 95-2218
- earnings of prisoner, 95-2222
- furlough plan, 95-2221
- parole eligibility unaffected, 95-2225
- privileges under, 95-2219
- purpose and intent, 95-2217
- sheriff's consent, no prisoner to be released without, 95-2221
- sheriff's responsibility for prisoner, 95-2226
- warden to establish, 95-2219

Review of legal sentences, review division of supreme court, 95-2501 to 95-2504

## INDEX

References are to Title and Section numbers

### PRISONS AND PRISONERS (Continued)

Sentence and judgment, 95-2201 to 95-2216; 95-2301 to 95-2312—See CRIMINAL PROCEDURE, Sentence and judgment

#### State prison

- contracts for confinement of inmates in other institutions, 80-1907
- criminal identification bureau, 80-2001 to 80-2006—See BUREAU OF CRIMINAL IDENTIFICATION AND INVESTIGATION
- death of prisoner, payment of inquest costs, 16-3410
- discharge of prisoner, clothing and money furnished, 80-1906
- good time allowance for inmates, 80-1905
- hours of work for employees of prison, 80-1903
- industrial activities permitted, 80-1501 to 80-1503—See STATE INSTITUTIONS, Industrial activities permitted
- intensive rehabilitation center, 80-1909 to 80-1911
- location of prison, 80-1901
- management and control of prison, 80-1401 to 80-1409—See STATE INSTITUTIONS, Department of institutions
- punishment of inmates, restrictions on, 80-1904
- purpose of prison, 80-1901
- state hospital, commitment and temporary transfer of inmate to, 80-1908
- transfer of prisoners under 21 to department of institutions, 80-2210
- warden, qualifications, 80-1902
- weapons, possession by prisoner, penalty, 94-3527.1

Venereal disease, examination and treatment of prisoners for, 69-4606

Western Interstate Corrections Compact, 95-2308 to 95-2312

Work release program, 95-2216

### PRIVACY RIGHTS

Recording of conversation without knowledge of parties as misdemeanor, 94-35-274

- exemptions from general prohibition, 94-35-275

### PRIVIES

Cleaning of privies, 69-5401 to 69-5408—See SANITARY LICENSEES

### PROBATE PROCEEDINGS

Discovery procedures applicable, M. R. Civ. P., Rule 1

Rules of civil procedure, application to probate proceedings, M. R. Civ. P., Rule 81(a), Table A

### PROBATION, PAROLE AND CLEMENCY

#### Board of pardons

- biennial report to governor, 94-9824
- court to transmit statistical data following sentence and judgment, 95-2210
- expenses of board, payment and reimbursement, 94-9826
- officers and employees of board, employment and compensation, 94-9825

Criminal procedure, sentence and judgment, 95-2201 to 95-2216—See CRIMINAL PROCEDURE, Sentence and judgment

Director, appointment and compensation, 94-9825

Juvenile probation officers, travel expenses, reimbursement for, 10-622

### PROCESS

Amendment of process, when permitted, M. R. Civ. P., Rule 4 D(7)

Criminal procedure, summons, definition, issuance, form and service, failure to appear, 95-601, 95-612, 95-613

Motion to raise question of insufficiency, M. R. Civ. P., Rule 12(b)

Service, M. R. Civ. P., Rule 4 D—See SERVICE OF PROCESS

Summons, M. R. Civ. P., Rule 4 C—See SUMMONS

### PROFESSIONAL SERVICE CORPORATIONS

Advertising prohibited, 15-2112

Annual report, required contents, 15-2115

Business of corporations restricted to professional services, 15-2108

Capital stock, restrictions on holdings, 15-2109

Citation of act, 15-2102



## INDEX

References are to Title and Section numbers

### PROFESSIONAL SERVICE CORPORATIONS (Continued)

- Consolidation and merger of corporations, restrictions, 15-2114
- Definition of terms, 15-2103
- Directors, number required, 15-2113
- Disqualification of agent to practice profession, severance of connection with corporation, 15-2110
- Dissolution of corporation for noncompliance, 15-2110
- Ethical standards for professional conduct unimpaired by act, 15-2107
- General corporation law, application, 15-2114
- Individual liability for professional acts unaffected by incorporation, 15-2107
- Investment of surplus funds permitted, 15-2108
- Legislative intent, 15-2101
- Liability of corporation for acts of agents while rendering professional services, 15-2107
- Previously existing corporations, application of act to, 15-2104
- Property ownership restricted to that necessary for professional services, 15-2108
- Purposes for which corporations organized, 15-2105
- Redemption of shares by corporation, provision for, 15-2111
- Regulatory acts unaffected by act, 15-2116
- Securities law unaffected by act, 15-2116
- Services to be rendered through licensed officers and agents, 15-2106
- Short title of act, 15-2102
- Transfer of shares, restrictions on, 15-2111
- Voting trust agreements prohibited, 15-2109

### PROHIBITION

- Rules of civil procedure, application to proceedings, M. R. Civ. P., Rule 81(a), Table A

### PROMISSORY NOTES

- See COMMERCIAL PAPER, 87A-3-101 to 87A-3-805

### PROPERTY

- Coroner, disposition of property found on body, 95-810
- Pension trusts
  - statutory and common law limitations inapplicable to, 67-423
  - validity, 67-424
- Personal property
  - accessions to personal property, effect of Uniform Commercial Code, 67-1410
  - partition or sale authorized, 93-6301.1
    - county in which action shall be brought, 93-6301.1
    - procedure, 93-6301.2
- Principal and income act, 67-1901 to 67-1916—See PRINCIPAL AND INCOME ACT
- Real property
  - co-ordinate system used in describing property, 67-2011 to 67-2019—See CO-ORDINATE SYSTEM
  - corner recordation
    - certification and signing of records filed, 67-2009
    - citation of act, 67-2001
    - county clerk and recorder, duties concerning filing, 67-2007
    - definition of terms, 67-2003
    - form and contents of filing prescribed by board, 67-2006
    - permitted filing of property corners, 67-2005
    - previously established corners, filings concerning, 67-2010
    - purpose of act, 67-2002
    - reconstruction and rehabilitation of monument, 67-2008
    - required filing of corners and monuments established, 67-2004
  - fixtures, priority of security interest, 87A-9-313
  - inducing engagement as advertising agency for sale of real property by misrepresentation of service, penalty, 94-1822
  - joint tenancy created by direct conveyance, 67-1602.1
  - licensees for recreational purposes, restricted liability to, 67-808
    - definition of recreational purposes, 67-809
  - liens excluded from Uniform Commercial Code, 87A-9-104

## INDEX

References are to Title and Section numbers

### PROPERTY (Continued)

#### Real property (Continued)

- persons who may purchase state lands, 81-908
- subdivided lands, sale or lease outside state
  - additional information required by commissioner, 67-2105
  - fee for filing of questionnaire, 67-2106
- blanket encumbrances
  - definition, 67-2109
  - protection of purchasers and lessees, provisions for, 67-2110
- bond for protection of purchasers and lessees, 67-2110
- change of address or depository, notice to commissioner, 67-2113
- contracts for sale of property, required contents, 67-2111
- desist and refrain orders, 67-2114
- escrow arrangements for protection of purchasers and lessees, 67-2110
- fees payable to commissioner
  - deposit and use of fees, 67-2106
  - notice of intention, filing fee, 67-2104
  - questionnaire filing fee, 67-2106
- findings of commissioner not to be used in advertising, 67-2108
- inspection of records by commissioner, 67-2113
- investigation by commissioner of subdivisions offered, 67-2107
- multiple sales or leases, notice to commissioner, 67-2112
- notice to commissioner of intention to offer lands, contents, 67-2103
- rules and regulations, 67-2102
- size of tracts to which act applies, 67-2101
- statute of limitations, application to actions arising from, 67-2115
- title held in trust for protection of purchasers and lessees, 67-2110
- tracts to which act applies, 67-2101
- violations construed as misdemeanors, 67-2116
- subdivided lands, situate outside of state for sale or disposition within state
  - civil remedy, 67-2132
  - exemptions, 67-2119
  - penalties, 67-2131
  - prohibitions, 67-2120
  - real estate commission as administrative agency, 67-2118
    - agency's powers and duties, 67-2126 to 67-2128
    - judicial review, 67-2130
  - registration, 67-2121 to 67-2124
  - revocation of registration, 67-2129
  - subdivider's annual report, 67-2125
- unit ownership of buildings
  - access to units for maintenance and repair work, 67-2311
  - actions to enforce rights under act, 67-2338
  - alterations jeopardizing property prohibited, 67-2309
  - blanket mortgages and liens, release on conveyance of unit, 67-2323
  - bylaws, adoption, recording and amendment, 67-2320
    - compliance with bylaws required of unit owners, 67-2313
    - contents of bylaws, 67-2321
  - common elements of building
    - access to units to prevent damage to common elements, 67-2311
    - expenses for common elements, charging to unit owners, 67-2308
      - foreclosure of liens for common expenses, 67-2327
      - grantor and grantee jointly liable for unpaid expenses, 67-2330
      - liability for contributions not to be avoided by waiver, 67-2312
    - lien of association for common expenses, 67-2326
    - purchaser at foreclosure sale not liable for expenses, 67-2329
    - records and accounts of expenses, 67-2325
    - rent paid by unit owner after foreclosure of lien, 67-2328
  - maintenance of common elements as provided by bylaws, 67-2311
  - partition of common elements prohibited, 67-2307
  - percentage of common elements held by unit owners, 67-2306
  - profits from common elements, distribution, 67-2308
  - separation from unit ownership prohibited, 67-2307
  - undivided interest held by unit owners, 67-2306
  - use of common elements, rights of unit owners, 67-2310

## INDEX

References are to Title and Section numbers

### PROPERTY (Continued)

#### Real property (Continued)

##### unit ownership of buildings (Continued)

compliance by unit owners with bylaws, rules and regulations, and covenants required, 67-2313

conveyance of individual units permitted, 67-2304  
contents of deed, 67-2322

damage to or destruction of building, repair, reconstruction or removal from act, 67-2334

declaration required to subject building to unit ownership, 67-2303

assessor to approve declaration before recording, 67-2317

contents of declaration, 67-2314

definition of declaration, 67-2302

preliminary declaration, filing, 67-2315

recording of declaration and certified copy, 67-2318

definition of terms, 67-2302

encumbrance of individual units permitted, 67-2304

exclusive ownership and possession of individual units, 67-2305

exemptions from execution, application to units, 67-2341

floor plans recorded with declaration, contents, 67-2319

insurance of building against loss or damage, 67-2331

liens against units, manner of attachment and release, 67-2324

blanket lien, release from on conveyance of unit, 67-2323

common expenses, lien for, 67-2326

foreclosure of liens for common expenses, 67-2327

purchaser at foreclosure not liable for common expenses, 67-2329

rent payable by unit owner after foreclosure of lien, 67-2328

mortgage of individual units permitted, 67-2304

name of property, restrictions on, 67-2316

obsolete property, renewal, restoration or sale, 67-2333

organization of unit owners prescribed by bylaws, 67-2321

preliminary declaration filed before construction, 67-2315

recording of declaration, 67-2318

removal of property from provisions of act

common ownership by unit owners results, 67-2335

lienholders' consent required, 67-2332

partition proceedings by unit owner after removal, 67-2336

resubmission to act permitted after removal, 67-2337

renewal and restoration of obsolete property, 67-2333

sale of building after removal from act, 67-2336

sale of individual units permitted, 67-2304

service of process with respect to two or more units, 67-2338

agent to receive process named in declaration, 67-2314

change of agent for service of process, 67-2339

short title of act, 67-2301

taxation of units, 67-2340

exemptions from taxation, application, 67-2341

rules and regulations for appraisal and assessment, 67-2342

Search and seizure, disposition of seized property, 95-1712 to 95-1716

#### Unclaimed property

attorney-general to assist in regulation, 67-2226

bank deposits and funds, when presumed abandoned, 67-2202

business association deposits and funds, when presumed abandoned, 67-2202

checks, deposits and money orders, when presumed abandoned, 67-2202

citation of act, 67-2230

claim for property delivered to state treasurer, filing, 67-2219

hearing and determination of claim by treasurer, 67-2220

judicial review of treasurer's determination, 67-2221

conflict of laws, 67-2227

cooperative association distributions, when presumed abandoned, 67-2205

corporate stock or distributions, when presumed abandoned, 67-2205

court, when property held by presumed abandoned, 67-2208

definition of terms, 67-2201



## INDEX

References are to Title and Section numbers

### PROPERTY (Continued)

#### Unclaimed property (Continued)

- delivery of property to state treasurer, 67-2213
- action to compel delivery, 67-2224
- dissolution of corporate enterprise, when distributions presumed abandoned, 67-2206
- examination of records of persons required to report, 67-2223
- fiduciary property, when presumed abandoned by beneficiary, 67-2207
- income or increment after delivery to state treasurer, owner not entitled to, 67-2215
- insurance funds, when presumed abandoned, 67-2203
- limitation statutes not affecting duties under act, 67-2216
- money orders, when presumed abandoned, 67-2202
- nonresident owner, reciprocal provisions eliminating presumption of abandonment, 67-2210
- notice by state treasurer to apparent owner, contents, 67-2212
- payment of funds to state treasurer, 67-2213
- penalties for violations of act, 67-2225
- presumption of abandonment for property not otherwise covered, 67-2209
- publication of lists by state treasurer, contents, 67-2212
- public officer or agency, when property held by presumed abandoned, 67-2208
- refunds by state treasurer after payment by holder to another, 67-2214
- relief from liability by payment or delivery to state treasurer, 67-2214
- report by custodian to treasurer, contents and filing, 67-2211
- rules and regulations, 67-2226
- sale of property by state treasurer, 67-2217
  - proceeds of sale, disposition, 67-2218
- seized property in criminal cases, disposition of, 95-716
- severability of provisions of act, 67-2228
- short title of act, 67-2230
- small amounts, declination or postponement of possession by state treasurer, 67-2222
- uniformity of interpretation of act, 67-2229
- utility deposits and refunds, when presumed abandoned, 67-2204

Unsolicited goods deemed a gift, 67-1706.1

### PUBLIC ACCOMMODATIONS

#### Discrimination, freedom from as civil right, 64-301

- definition of terms, 64-302
- denial of accommodations as misdemeanor, 64-303

Fraud, obtaining accommodations with intent to defraud, penalty, evidence of intent, 94-1831

### PUBLIC ACCOUNTANTS

- Annual licenses, 66-1833
- Board of public accountancy, 66-1813 to 66-1818, 66-1826
- Certified public accountants, 66-1819, 66-1822 to 66-1825
- Disciplinary proceedings, 66-1834 to 66-1837
- Partnerships, registration of
  - certified public accountant, 66-1829
  - public accountant, 66-1831
- Registration, 66-1820, 66-1821
- Unlawful acts, 66-1838
  - exceptions, 66-1839
  - misdemeanor penalty, 66-1840

### PUBLICATION

- Legislative proceedings, sale of copies, 43-901 to 43-904—See LEGISLATURE,
- Publication of proceedings
- State publications distribution center, 44-132 to 44-139—See LIBRARIES

### PUBLIC BUILDINGS

Architects to carry errors and omissions insurance, 66-114

## INDEX

References are to Title and Section numbers

### **PUBLIC BUILDINGS (Continued)**

- Construction programs for state buildings
  - architects and consulting engineers, appointment, 82-3319
  - restrictions on architectural work by state, 82-3320
  - buildings subject to control, 82-3314
  - definition of terms, 82-3314
  - emergency repairs and alterations authorized by governor, 82-3316
  - legislative consent, when required for construction, 82-3316
  - pecuniary interest prohibited to controller and employees, 82-3321
  - powers of controller in supervising construction, 82-3318
  - submission of programs to controller, governor and legislative assembly, 82-3315
  - supervision of construction by controller, 82-3317
  - university buildings, authority of regents and governor, 82-3316
- Contracts to be let by competitive bidding for construction or improvement, 82-1131
- institutions exempt, 82-1131.1
- Heating, native coal preferred, 82-1904.1
  - use of other fuels not prohibited, 82-1904.2
- Insurance proceeds from damaged buildings, deposit and use, 78-1101
- Sanitary inspections and correction of conditions by boards of health, 69-4118
- Space assignment by department of administration, 82-3308
- State capitol improvement and repair, 78-737 to 78-746—See STATE CAPITOL, Building improvement and repair

### **PUBLIC CONTRACTORS**

See also STATE PURCHASING DEPARTMENT AND AGENT

- Incomplete contracts, additional bids limited, 82-1927
  - bid to show bidder not working beyond contract time, 84-3507
  - excusable delays exempt, 82-1928
- Licenses
  - additional license fees, 84-3505
    - penalty for failure to file license return, 84-3516
    - refunds of overpayments, 84-3513
    - rules and regulations, board of equalization to establish, 84-3515
    - tax credits allowed, 84-3514
    - withholding of payments, 84-3513
  - bids to show license number and class, 84-3507
  - classes of licenses, 84-3505
  - definition of terms, 84-3501
  - residency for preference, determination of, endorsement upon license, 82-1925.1
- Preference to Montana bidders
  - contract provision for preference to Montana materials and labor, 82-1926
  - definition of residence, 82-1925
  - determination of residency by state board of equalization, 82-1925.1
  - federal aid projects, application to, 82-1926
  - percentage differential, 82-1924
- Substitution of governmental obligations for withheld payments due contractors, 82-4101 to 82-4104

### **PUBLIC DEFENDERS**

- Authority of counties to establish and maintain offices, 95-1006

### **PUBLIC EMPLOYEES' RETIREMENT ACT**

- Annuities, amount receivable, 68-901
- Compulsory retirement, 68-802
- Contributions, normal rate, 68-702
  - voluntary additional contributions, 68-706
- Contributions paid into agency fund, 68-405
- Criminal investigator's office covered, 82-418
- Death benefit, 68-1101
- Deductions from salaries
  - city payrolls, 68-705
  - state salaries, 68-704
  - university salaries, 68-704

## INDEX

References are to Title and Section numbers

### PUBLIC EMPLOYEES' RETIREMENT ACT (Continued)

- Disability retirement allowance, 68-901
- Dormant accounts transferred to pension accumulation fund, 68-710
- Fees, annual membership, 68-707
- Fund abolished, 68-405
- Game wardens, 68-1401 to 68-1429—See FISH AND GAME, Wardens for enforcement of laws
- Judges' retirement fund, payments into, investment, 93-1111
- Municipal employee applying for coverage by act, 68-301
- National guard employees eligible, 68-1316
- Retirement at age 65 or over without accumulated ten years service, election of service retirement allowance, 68-802
- Retirement fund, investment, custody and management, 68-701
- School budget appropriation for reserve fund, 75-1646, 75-1647
- Service retirement allowance, 68-901
- Vehicle equipment safety commission employees, agreement for coverage, 32-21-170
- Withdrawal of contributions on terminating service before retirement, 68-708
- redeposit and reinstatement of membership, 68-709

### PUBLIC FINANCE

- Bond validating act
  - definitions, 79-2002
  - pending actions, act inapplicable to, 79-2004
  - short title, 79-2001
  - validating provisions, 79-2003
- County bond issues
  - election
    - notice, 16-2026
    - preparation of lists of registered electors, 16-2026
    - qualified voters, 16-2026
  - form and execution of bond, 16-2033
- Facsimile signatures of public officials—See PUBLIC OFFICERS AND EMPLOYEES, Facsimile signatures of public officials
- Legislative audit committee and legislative auditor, 79-2301 to 79-2313—See LEGISLATIVE AUDIT ACT
- Limitation on indebtedness of city, town, township, school district or high school district, XIII, 6
- Moneys received from federal government under flood control act
  - distribution to counties, 79-2101
  - expenditure of funds by counties, 79-2102
- Post war planning and construction reserve fund abolished, 79-416
- Revenue bond refunding bonds, terms and negotiability, 79-1905
- State budget act, inapplicable to certain work on state capitol and supreme court and law library building, 78-1209
- State controller—See STATE CONTROLLER
- State finance
  - budget of contemplated expenditures as requirements before federal aid may be received, duty of director of budget concerning, 82-112
  - claims against the state
    - assignment of claims, 83-901 to 83-904
    - authorization for payment given by department head, 82-109.1
    - certification by head of department, 82-109.1
    - disapproval by controller, appeal to board of examiners, 82-109.3
    - forms prescribed by state controller, 82-109.3
    - order of processing of claims, 82-109.3
    - pre-audit of liquidated claims, 82-109.2
    - records maintained by departments, 82-109.1
    - unliquidated claims, transmittal to board of examiners, 82-109.2
  - contingent revolving accounts for state institutions and agencies, 79-602
  - deposit of receipts by state agencies with treasurer or depository, 79-306
  - depositories of state funds
    - bonds and securities pledged as collateral, 79-306
    - deposits by state agencies with depositories, 79-306
    - substitution of collateral by depository, 79-301



## INDEX

References are to Title and Section numbers

### **PUBLIC FINANCE (Continued)**

#### State finance (Continued)

- expenditures in excess of income prohibited, 79-901
- penalty for violations, 79-904
- expert on financial matters, appointment by board of land commissioners, salary for services, 79-1202
- fire insurance fund abolished, 79-416
- institutional support
  - appropriation of income from endowments and grants for support of institutions, 79-601
  - contingent revolving accounts, establishment by controller, 79-602
  - retention of income and deposits by institutions, 79-603
- investment of funds
  - accounts maintained by treasurer, 79-1208
  - departmental requests for investment, 79-1203
  - excessive payment of invested funds prohibited, 79-1214
  - interest from trust and legacy fund, apportionment to subfunds, 79-1211
  - long term investment fund, moneys included, 79-1202
  - payments of interest or principal from invested funds, statement to board of land commissioners, 79-1213
  - permanent school and other funds, types of investment permitted, 81-1001
    - income moneys, 81-1005
  - principal invested in trust and legacy fund, repayment, 79-1212
  - short term investment fund, moneys included, 79-1202
  - sinking funds, investment as part of short term investment fund, 79-304
  - trust and legacy fund, investment by land commissioners, 79-1202
    - supervision by supreme court, 79-1206
  - unified investment plan, 79-1202
- permanent grants to state institutions
  - disbursement of funds, 79-1402
  - income and interest moneys to be used for payment of claims, 79-1403
  - investments, types permitted, 81-1001
    - income moneys, 81-1005
  - receipts, monthly deposit required, 79-1401
- refunding bonds or debentures, nature of issuance, 79-1802
- salary schedules maintained by controller, 82-109.4
- state budget act
  - blanks for preparation of budget estimates
    - distribution, 79-1013
    - duty of department, institutions and agencies, 79-1013
  - budget director
    - duties, 79-1017
    - inquiries and investigations by, 79-1016
    - power to demand and receive information from state departments and officers, 79-1018
    - state controller as ex officio budget director, 79-1012
  - budget message, 79-1015
  - budget of contemplated expenditures required by federal agency as condition to federal aid, duty of director of budget to submit budget to governor, 82-112
  - detailed budget estimate, 79-1015
  - director of budget, appointment, 79-1012
  - division and parts of budget submitted to legislature, 79-1015
  - expenditures during first year of biennium from appropriation for second year, 79-1019
- general fund, reimbursement for costs of central services, 79-2401 to 79-2415
- governor constituted chief budget officer, 79-1012
- inquiries and investigations by budget director, 79-1016
- preliminary budget, preparation, 79-1014
- proposed budget bill, 79-1015
- submission of budget to legislature, 79-1015
- submission of preliminary budget to governor and governor elect, 79-1014
- vehicle equipment safety commission budget, submission to director, 32-21-173

## INDEX

References are to Title and Section numbers

### PUBLIC FINANCE (Continued)

#### State finance (Continued)

##### treasury fund structure

- accounts within funds, creation and abolition by controller, 79-413
- clearing and suspense accounts authorized, 79-412
- disbursements from funds, appropriations, general laws or contracts authorizing, 79-415
- enumeration and description of funds, 79-410
- future laws or contracts requiring segregation of moneys, interpretation, 79-411
- investment funds authorized under unified plan, 79-412
- previous definitions of funds superseded, 79-411
- purpose of act, 79-409
- records of funds and accounts, maintenance by treasurer and controller, 79-414
- short title of act, 79-409
- special funds abolished and transferred to general fund, 79-416

##### unexpended appropriations, dispositions, 79-1011

##### warrants

- order in which drawn, 79-104
- required for payment of moneys by treasurer, 79-202

### PUBLIC HEALTH

Clean Air Act, 69-3904 to 69-3923—See AIR POLLUTION CONTROL

Consent by minors to medical or surgical care, 69-6101 to 69-6105—See CHILDREN AND MINORS

Definition of terms, 69-4102

Hearing aid dispensers, 66-3001 to 66-3023—See HEARING AID DISPENSERS

Occupational disease prevention, 69-4201 to 69-4205—See INDUSTRIAL HYGIENE

Penalty for violation of health laws or rules, 69-5701

State department of health, 69-4101 to 69-4111—See DEPARTMENT OF HEALTH

Tuberculosis—See TUBERCULOSIS

Violation of health laws or rules as misdemeanor, 69-5701

### PUBLIC OFFICERS AND EMPLOYEES

#### Bonds required of state officers and employees

- amount of bond required, determination, 6-106
- companies permitted to write bonds, 6-107
- competitive bidding for bonds required, 6-106
- controller to purchase bonds, 6-105
- form of bonds, approval, 6-105
- group bonds permitted, 6-105
- judicial employees exempt from general provision, 6-105
- legislative employees exempt from general provision, 6-105
- premiums, proration and payment, 6-108

#### Facsimile signatures of public officials

- "authorized officer" defined, 59-1301
- definitions, 59-1301
- effect of facsimile signature, 59-1302
- facsimile seal, use, 59-1303
- "facsimile signature" defined, 59-1301
- "instrument of payment" defined, 59-1301
- "public security" defined, 59-1301
- requirement before facsimile signature may be used, 59-1302
- short title of act, 59-1306
- uniformity of interpretation, 59-1305
- use of facsimile signature in lieu of manual signature, 59-1302
- violations of act with intent to defraud, felony, 59-1304

Hours of work of salaried employees, 59-510

Mileage allowance for travel in own vehicles, 59-801

liability for approval of excess amounts, 59-802

Per diem allowances while in travel status, 59-538

Public employees' retirement act—See PUBLIC EMPLOYEES' RETIREMENT ACT

Salary schedules maintained by controller, 82-109.4

## INDEX

References are to Title and Section numbers

### **PUBLIC OFFICERS AND EMPLOYEES (Continued)**

- Social security coverage authorized, 59-1103
  - contribution account, sources, administration and use, 59-1105
  - contributions fund, investment, 59-1105
  - payment for, 59-1103
  - plans for coverage of employees of political subdivisions, 59-1104
  - school support funds liable for district's share of contributions, 59-1110
- Successor, substitution as party in pending action, M. R. Civ. P., Rule 25(d)

### **PUBLIC PROPERTY**

- Coal leases, county property, term, 16-1030
- Lease of county property, 16-1030
- Taxation of property subject to contract of sale or option to purchase, 84-204
  - valuation and assessment of property, 84-205

### **PUBLIC RECORDS**

- Destruction of old county and school district records, 59-514
  - fiscal records, destruction after period of years, 59-516
- Financial documents, destruction authorized after 25 years, 59-516
- Financing statements under Uniform Commercial Code, period for which retained, 59-516.1

### **PUBLIC SERVICE COMMISSION**

- Licensing of VHF booster or VHF translator systems for television—See TELEVISION

### **PUBLIC UTILITIES**

- Financing statements of utility, contents and place of filing, 87A-9-302.2
  - definition of terms, 87A-9-302.1
  - Uniform Commercial Code, application, 87A-9-302.3
- Highways, location of facilities along, 32-2414
  - costs paid by highway commission, 32-2415
  - definition of terms, 32-2416
- Securities, issuance
  - exemption from Securities Act, 15-2013
  - order of commission authorizing issuance, 70-117.2
  - petition for issuance, contents and filing, 70-117.2
  - purposes for which issuable, 70-117.1
  - short term obligations issuable without commission approval, 70-117.3
  - state not obligated by authorization of issue, 70-117.6
  - subject to regulation and supervision by public service commission, 70-117.1
  - time allowed for disposition of applications, 70-117.4
  - unapproved securities void, 70-117.5
- Unclaimed deposits and refunds, when presumed abandoned, 67-2204—See PROPERTY, Unclaimed property

### **PUBLIC WELFARE**

- Aid to dependent children
  - amounts received by recipients as enrolled member of Indian tribe, effect, 71-509
  - changes in amount of assistance, 71-509
  - guardianship, creating, when, 71-509
- Aid to needy blind
  - amounts received by recipients as enrolled member of Indian tribe, effect, 71-607
  - application, 71-607
- County board of public welfare
  - reimbursement for staff personnel expenses, 71-217
  - staff personnel, appointment and dismissal, 71-217
- County poor fund tax levy, budgeting and use, 71-222
- Day care facilities, licensing and regulation, 10-801 to 10-811—See DAY CARE FACILITIES
- Dependent child aid, students eligible for, 71-501



## INDEX

References are to Title and Section numbers

### **PUBLIC WELFARE** (Continued)

- Economic opportunity and poverty relief
  - city-county commissions, creation authorized, 71-1604
  - federal agencies, agreements with authorized, 71-1602
  - public funds, expenditure authorized, 71-1603
  - purpose of act, 71-1601
- Funds available for welfare, receipt and crediting, 71-901
- General relief
  - payment of relief, means used, 71-307
  - work required of persons on relief, 71-307
  - workmen's compensation coverage, 92-411
- Lien on property of recipient, agreement for, 71-241
- Medical assistance
  - administration and supervision by state and county departments, 71-1511
  - amount, scope and duration of assistance, 71-1517
  - application for assistance to county department, form, 71-1518
  - confidential nature of records, 71-1523
  - contracting with other agencies to process claims and provide services, 71-1515
  - council to advise state department, composition, 71-1513
  - county reimbursement of state payments, 71-1519
  - change of residence, effect on county's obligation, 71-1522
  - discrimination prohibited, 71-1526
  - eligibility for aid, 71-1516
    - change of residence, effect on eligibility, 71-1522
    - determination of eligibility by county department, 71-1520
    - redetermination of eligibility, 71-1521
  - freedom of medical practice and selection of doctor, 71-1514
  - investigation of applications by county department, 71-1520
  - lien on property not to be required of recipient, 71-1524
  - recovery of payments from estate of deceased recipient, 71-1524
  - relative's responsibility, 71-1525
  - services included, 71-1512
- Old-age assistance
  - medical aid disqualifying for old-age assistance, 71-402
  - vendor medical payments
    - county reimbursement, 71-405
    - investigation of applications, 71-406
- Persons receiving benefits under public welfare not entitled to compensation under occupational disease act, 92-1332
- Poverty relief, 71-1601 to 71-1604—See Economic opportunity and poverty relief, above
- Silicosis payments, transfer of records and payrolls to industrial accident board, 71-1009
- State hospital, maintenance of indigent persons discharged from, 38-110

### **PULMONARY DISEASE HOSPITAL**

See GALEN STATE HOSPITAL, 80-1701 to 80-1704

## Q

### **QUARANTINE**

- State quarantine in case of communicable disease, 69-4112
  - emergency action by executive officer, 69-4113
- Venereal disease cases, isolation, 69-4605

### **QUIETING TITLE**

Summons in action, statement to be added, M. R. Civ. P., Rule 4 C(2)

### **QUO WARRANTO**

Supreme court proceedings, M. R. App. Civ. P.—See SUPREME COURT, Original proceedings in supreme court

## INDEX

References are to Title and Section numbers

### R

#### RACING ASSOCIATIONS

Horse racing, 62-501 to 62-514—See HORSE RACING

#### RADAR

Radar arrest cases, 32-2150.1 to 32-2150.3

#### RADIATION CONTROL

Advisory committee, appointment and functions, 69-5805  
Control agency, powers and duties, 69-5804  
Co-operative agreements with federal government and other agencies, 69-5810  
Definition of terms, 69-5803  
Emergency actions by board of health, 69-5812  
Exemptions from statutory regulation, 69-5815  
Exposure records required for persons exposed to radiation, 69-5808  
Federal responsibility for radiation sources, assumption by state, 69-5809  
Hearings required in regulatory proceedings, 69-5812  
Impounding of radiation sources possessed by unauthorized persons, 69-5814  
Inspections to determine compliance with act and rules, 69-5807  
    agreements with other agencies for co-operative inspections, 69-5810  
Licensing of persons handling radioactive materials and equipment, 69-5806  
Local regulations not superseded by act, 69-5811  
Medical use of radiation not restricted, 69-5808  
Penalty for violations, 69-5816  
Policy of state, 69-5801  
Procedural requirements for regulatory acts, 69-5812  
Prohibited uses of radiation sources, 69-5813  
Purpose of regulation, 69-5802  
Records required of persons possessing sources of ionizing radiation, 69-5808  
Registration of persons handling radioactive materials and equipment, 69-5806  
Training programs to qualify personnel, 69-5810

#### RADIO

Publication of notice supplemented by broadcast, 19-201  
    copy of transcript to be retained by broadcasting station, 19-202  
    proof of publication, 19-203

#### RAILROADS

Board of railroad commissioners  
    motor carrier rate regulation, 8-103, 8-104.1 to 8-104.6—See MOTOR CARRIERS  
    rules for protection of health and safety of railroad employees, 72-150  
Bonds of railroad companies, issuance and terms, 72-224  
Borrowing power of railroad companies, 72-211  
Equipment trusts excluded from Uniform Commercial Code, 87A-9-104  
Financing statements of railroad, contents and place of filing, 87A-9-302.2  
    definition of terms, 87A-9-302.1  
    Uniform Commercial Code, application, 87A-9-302.3  
Flood control projects, contracts for use of railroad property for, 89-3310  
Railroad commissioner, salary, 25-501  
Securities, when exempt from securities act, 15-2013

#### REAL ESTATE BROKERS

Action by broker for commission, licensing to be alleged and proved, 66-1941  
Bond required, contents and filing, 66-1933  
Citation of act, 66-1924  
Commission, composition, powers, and duties, 66-1927  
    attorney general to act for commission, 66-1944  
    educational activities authorized, 66-1943  
Definition of terms, 66-1925  
Directory of licensees, publication by commission, 66-1945  
Educational activities of commission, 66-1943  
Employment of salesman by broker, license provisions, 66-1935  
Exemptions from act, 66-1926

## INDEX

References are to Title and Section numbers

### REAL ESTATE BROKERS (Continued)

- Fees payable to commission, 66-1934
  - annual fees, when payable, 66-1934
  - deposit in treasury and apportionment of fees, 66-1927
  - excess fees, disposition, 66-1928
  - expenses of commission, payment from fund, 66-1927
  - schedule of fees prepared by commission, 66-1934
- Fixed office required of broker, 66-1935
- Fraudulent practices act, licensing law supplemental to, 66-1946
- Liability for damages from failure to comply with act, 66-1940
- Licenses
  - annual fees, cancellation for failure to pay, 66-1934
  - bond required for license, 66-1933
  - commission of broker or salesman, proof of licensing required in action to collect, 66-1941
  - corporations, licenses required, 66-1942
  - display of license by broker required, 66-1932
  - employment change by salesman, new license required, 66-1935
  - examination of applicants for license, 66-1930
  - fees payable for licenses, 66-1934
  - form prescribed by commission, 66-1932
  - issuance of license, regulation by commission, 66-1931
  - nonresident brokers, reciprocal licensing and privileges, 66-1936
  - penalty for acting without license, 66-1940
  - pocket card, issuance by commission, 66-1932
  - previously licensed brokers and salesmen, licensing without examination, 66-1930
  - qualification of licensees, 66-1929
  - required for conduct of business, 66-1924
  - revocation or suspension of license, power of commission, 66-1931
    - appeal to courts, 66-1939
    - effective date of decision of commission, 66-1939
    - grounds for revocation or suspension, 66-1937
  - salesman's license kept by broker, 66-1932
- Nonresident brokers, licensing and conduct of business by, 66-1936
- Penalties for violations of act, 66-1940
- Place of business of broker to be designated in license, 66-1935
- Service of process on nonresident brokers, 66-1936
- Short title of act, 66-1924

### REAPPORTIONMENT

- Legislative apportionment, VI, 2 and 3; 43-106.1, 43-106.2

### RECEIVERS

- Appointment for consumer loan licensees, 47-227
- Bulk Transfer chapter inapplicable to sales by receivers, 87A-6-103
- Corporations, liquidation of
  - business corporations, 15-2291, 15-2292
  - nonprofit corporations, 15-2355, 15-2356
- Real estate brokers' act, exemptions from, 66-1926
- Statutes and rules governing receivers, M. R. Civ. P., Rule 66
- Voting of corporate shares standing in name of receiver, 15-2231

### RECIPROCAL ENFORCEMENT OF SUPPORT

- See SUPPORT, Reciprocal enforcement, 93-2601-41 to 93-2601-82

### RECOGNIZANCE

- Preliminary examination of criminal defendant, recognizance by witness after examination, 95-1204
- Release of person in custody on own recognizance, 95-1106

### RECORDING

- After-acquired interests, recording as constructive notice of prior conveyance, 73-201
- Method of recordation of certain instruments, when proper, 16-2903



## INDEX

References are to Title and Section numbers

### **RECORDING (Continued)**

- Microfilm, 16-2903
- Photostatic or other mechanical processes
  - admissibility into evidence, 16-2430
  - authorized in counties, 16-2428
  - enlargement, 16-2430
  - reproduction as public record, 16-2429
  - storage of copy, 16-2431
  - substitution of reproduction for original, 16-2429

### **RECORDS**

- Photostatic or mechanical processes in counties—See **RECORDING**
- State board of review, 79-2405, 79-2406

### **RECREATION**

- Landowner's restricted liability to gratuitous licensee for recreation, 67-808
  - definition of recreational purposes, 67-809
- Outdoor recreational resources, development, 62-401 to 62-404—See **OUTDOOR RECREATIONAL RESOURCES**

### **REFEREES**

- See **MASTERS**, M. R. Civ. P., Rule 53

### **REFRIGERATED LOCKERS**

- See **FOOD AND DRUGS**, Food service establishments, 27-611 to 27-625

### **REFUSE DISPOSAL AREAS**

- Definition of terms, 69-4002
- Disposal in unlicensed area prohibited, 69-4003
- Highway protection laws unimpaired, 69-4010
- Landowner's rights preserved, 69-4008
- Legislative findings, 69-4001
- License required for operation of disposal area, 69-4004
  - application for license, 69-4004
  - expiration and renewal of licenses, 69-4005
  - fee for license, disposition, 69-4004
  - inspection and approval by health officials, 69-4005
  - public agencies exempt from license requirement, 69-4008
  - revocation of or refusal to renew license, 69-4006
- Penalty for violations, 69-4009
- Policy of state, 69-4001
- Publicly operated disposal areas, application of requirements to, 69-4008
- Repeal of conflicting acts, 69-4010
- Rules and regulations, publication and enforcement, 69-4007
- Water supply protection laws unaffected, 69-4010

### **REFUSE DISPOSAL DISTRICTS**

- Board of directors, 69-6009, 69-6010
- Boundary changes, 69-6011
- Creation of district, 69-6003 to 69-6006
- Definitions, 69-6002
- Fees and assessments, 69-6007
- Installment payments for land and equipment, 69-6008
- Purpose, 69-6001

### **RELEASE**

- Affirmative defense, M. R. Civ. P., Rule 8(c)

### **RELIGIOUS CORPORATION SOLE ACT**

- Annual report required, 15-2409
- Application of act, 15-2402
- Articles of incorporation
  - amendment of articles, 15-2410
  - filing with secretary of state, 15-2404
  - form and contents, 15-2404
  - verification by incorporation, 15-2404

## INDEX

References are to Title and Section numbers

### RELIGIOUS CORPORATION SOLE ACT (Continued)

- Board of advisors or consultants, number, qualifications, powers, 15-2408
- Certificate of incorporation, issuance by secretary of state, effect of, 15-2405
- Creation of corporation sole, when lawful, 15-2403
- Incorporator, 15-2403
- Invalidity of part of act, effect of, 15-2413
- Powers of corporation sole, 15-2406
  - succession on death or resignation from office, 15-2407
- Repeal of prior acts, effect of, 15-2412
- Short title, 15-2401
- Succession, when effected, 15-2407
  - interim powers of board of advisors or consultants, 15-2408
- Unauthorized assumption of corporate powers, liability for debts and liabilities incurred, 15-2411

### REPORTS

- Annual report to governor, commissioner of agriculture, 3-122
- Biennial report to governor
  - adjutant general, 77-120
  - arts council, 82-3606
  - board of architectural examiners, 66-109
  - board of barber examiners, 66-408
  - board of chiropractic examiners, 66-513
  - board of dental examiners, 66-904
  - board of examiners in optometry, 66-1311
  - board of osteopathic examiners, 66-1410
  - board of pardons, 94-9824
  - board of pharmacy, 66-1504
  - board of registration for professional engineers and land surveyors, 66-2334
  - board of trustees of state law library, 44-403
  - board of veterinary medical examiners, 66-2203
  - commissioner of agriculture, 3-106
  - commission on uniform state laws, 12-404
  - director of division of vocational rehabilitation, 41-803
  - employment security commission, 87-120
  - grass conservation commission, 46-2306
  - horse racing commission, 62-504
  - industrial accident board, 92-118
  - liquor control board, 4-227
  - oil and gas conservation commission, 60-127
  - public service commission, 70-111
  - state administrator, 71-209
  - state aeronautics commission, 1-202
  - state athletic commission, 82-302
  - state board of arbitration and conciliation, 41-906
  - state board of education, 75-107
  - state board of food distributors, 27-306
  - state board of hail insurance, 82-1519
  - state board of health, 69-4106
  - state board of institutions, 80-1405
  - state examiner, 82-1002
  - state forester, 81-1411
  - state highway commission, 32-2409
  - superintendent of banks, 5-902
  - wheat research and marketing reports, 3-2914
- Printing and distribution of reports, 82-1916

### RESCUES AND ESCAPES

- Escape from prison, venue of prosecution, 95-409
- Interstate detainer, escape from custody on, penalty, 94-1101-4
- Juvenile facilities of department of institutions, apprehension and return of absentee, 80-2211
  - penalty for aiding escape, 80-2212

### RES JUDICATA

- Affirmative defense, M. R. Civ. P., Rule 8(c)

## INDEX

References are to Title and Section numbers

### RESTAURANTS

Licensing and regulation, 27-611 to 27-625—See FOOD AND DRUGS, Food service establishments

Wages of employees of lessees, protection, 41-2001 to 41-2011—See WAGES, Restaurant, Bar and Tavern Wage Protection Act

### RESTRAINT OF TRADE

Bids for contracts, unlawful agreements for refunds or returns, penalty, 94-1104

### RETIREMENT

See PUBLIC EMPLOYEES' RETIREMENT ACT

Game wardens, 68-1401 to 68-1429—See FISH AND GAME, Wardens for enforcement of laws, retirement system

Judges, 93-1107 to 93-1132—See JUDGES, Retirement system

### ROADBLOCKS

Arrests at, requirements, 95-618

### RUBBISH

Disposal areas regulated, 69-4001 to 69-4010—See REFUSE DISPOSAL AREAS

### RULES OF APPELLATE CIVIL PROCEDURE

See Title 93, Chapter 3001

### RULES OF CIVIL PROCEDURE

See Title 93, Chapter 2701

### RULES OF CRIMINAL PROCEDURE

See Title 95, Chapter 28

### RURAL IMPROVEMENT DISTRICTS

See COUNTIES, Rural improvement districts

## S

### SALARIES

Adjutant general, 77-117, 77-120

Assignment of claims against state, 83-901 to 83-904

Central payroll system

death of employee, reissuance of warrant in name of designated person, 25-507.7

duplicate payroll warrants, 25-507.6

exceptions from, 25-507.1

lost or destroyed payroll warrants, 25-507.6

pay rate, determination of weekly or hourly, 25-507.9

payroll periods, 25-507.2

notice prior to change of period, 25-507.3

payroll roster, 25-507.4, 25-507.5

service charges, 25-507.10

state agencies, applicable to, 25-507.1

state auditor to install and operate, 25-507.1

state payroll revolving account, 25-507.8

uniform pay dates, 25-507.2

Commissioner of labor and industry, 41-1603

Commissioner of state lands and investments, 81-209

County officers, 25-605

establishment before election, 25-609

District court judges, 93-303

Elected state officials, 25-501

salary in full for all services, exceptions, 25-501.1

Highway patrolmen, 31-105

Industrial accident board appointed member, 92-104

Justices of the peace, 25-306

Schedules maintained by controller, 82-109.4



## INDEX

References are to Title and Section numbers

### SALARIES (Continued)

State board of equalization members, 84-702  
State examiner, 82-1011  
State forester, 81-1403

### SALES

Acceleration of performance, good faith required in exercising option, 87A-1-208

#### Acceptance of goods

acts constituting acceptance, 87A-2-606  
approval sales, effect, 87A-2-327  
damages for nonacceptance by buyer, measure, 87A-2-708  
evidence of conformity or nonconformity, rights of parties to preserve, 87A-2-515  
failure to reject as acceptance, 87A-2-606  
inspection rights of buyer, 87A-2-513  
nonconforming goods, buyer's right to accept or reject, 87A-2-601  
    effect of acceptance on remedies, 87A-2-607  
    recovery of damages by buyer, 87A-2-714  
ownership rights, exercise as acceptance, 87A-2-606  
partial acceptance of commercial unit, effect, 87A-2-606  
payment before inspection not acceptance, 87A-2-512  
payment required for goods accepted, 87A-2-607  
revocation of acceptance, 87A-2-608  
tender of delivery as condition to seller's right to acceptance, 87A-2-507

Acceptance of offer, means permitted, 87A-2-206

additional terms proposed in acceptance, effect, 87A-2-207  
auction sales, 87A-2-328

Anticipatory repudiation, 87A-2-610

retraction of repudiation, 87A-2-611

Approval sales, 87A-2-326, 87A-2-327

Assignment of rights under contract, effect on parties, 87A-2-210

Assortment of goods to be selected by buyer, 87A-2-311

Assurance of performance, rights of parties to demand, 87A-2-609

Auction sales, special provisions applicable, 87A-2-328

Authenticity of third-party documents presumed, 87A-1-202

#### Breach of contract

remedies of seller, 87A-2-703  
risk of loss, effect of breach on, 87A-2-510

Bulk sales, 87A-6-101 to 87A-6-111—See BULK TRANSFERS

Casualty to identified goods, effect on rights of parties, 87A-2-613

C.&F. terms, effect on obligations, 87A-2-320, 87A-2-321

C.I.F. terms, effect on obligations, 87A-2-320, 87A-2-321

Citation of Uniform Commercial Code chapter, 87A-2-101

Conditional sales, 87A-9-101 to 87A-9-507—See SECURED TRANSACTIONS  
definition of term, 19-103

Consignment sales, 87A-2-326, 87A-2-327

Consumer sales statute unimpaired by Uniform Commercial Code, 87A-2-102

Course of dealing between parties, application, 87A-1-205

Course of performance, effect on contract, 87A-2-208

#### Creditors' rights against sold goods

agreements as to applicable state law, restrictions, 87A-1-105  
approval sales, claims of buyer's creditors against, 87A-2-326  
buyer's interest taking priority, 87A-2-402  
fraudulent sales, avoidance, 87A-2-402  
return sales, claims of buyer's creditors against, 87A-2-326  
voidable preference, sale constituting, 87A-2-402

#### Damages for breach

agreements limiting or altering measure of damages, 87A-2-719  
buyer's damages for nondelivery or repudiation, measure, 87A-2-713  
incidental expenses of seller, items recoverable, 87A-2-710  
liquidated damages, 87A-2-718  
market price, determination, 87A-2-723  
    published quotations, use in evidence, 87A-2-724  
penal damages prohibited, 87A-2-718

## INDEX

References are to Title and Section numbers

### SALES (Continued)

Definition of terms, 87A-2-103

“agreement,” 87A-2-106

“between merchants,” 87A-2-104

“cancellation,” 87A-2-106

“commercial unit,” 87A-2-105

“conforming,” 87A-2-106

“contract,” 87A-2-106

“financing agency,” 87A-2-104

“future” goods, 87A-2-105

general definitions in Commercial Code, 87A-1-201

“goods,” 87A-2-105

index of definitions, 87A-2-103

“lot,” 87A-2-105

“merchant,” 87A-2-104

“present sale,” 87A-2-106

“sale,” 87A-2-106

“termination,” 87A-2-106

Delegation of performance, effect on rights of parties, 87A-2-210

Delivery of goods

C.&F. terms, construction, 87A-2-320

C.I.F. terms, construction, 87A-2-320

cure by seller of improper tender or delivery, 87A-2-508

damages for nondelivery, measure, 87A-2-713

delay excused by failure of presupposed conditions, 87A-2-615

buyer's remedy on claim of excuse, 87A-2-616

evidence of conformity or nonconformity, rights of parties to preserve, 87A-2-515

excuse by failure of presupposed conditions, 87A-2-615

buyer's remedy on claim of excuse, 87A-2-616

ex-ship delivery terms, effect on obligation, 87A-2-322

F.A.S. terms, construction, 87A-2-319

F.O.B. terms, construction, 87A-2-319

no arrival, no sale term, effect on obligation, 87A-2-324

nonconforming goods, buyer's right to accept or reject, 87A-2-601

place of delivery in absence of agreement, 87A-2-308

remedies of buyer for nondelivery, 87A-2-711

shipment by seller as delivery, acts constituting, 87A-2-504

reservation of interest by seller shipping goods, 87A-2-505

shipment means to be selected by seller, 87A-2-311

single lot delivery presumed, 87A-2-307

stoppage in transit on breach or insolvency of buyer, 87A-2-705

indemnification of carrier for loss or expenses, 87A-7-504

substituted performance, when permitted, 87A-2-614

tender of delivery, requirements and acts constituting, 87A-2-503

time for delivery in absence of agreement, 87A-2-309

title passing on delivery in absence of agreement, 87A-2-401

Uniform Commercial Code, applicability, 74-325

Documents of title

adequacy of document governed by chapter on sales, 87A-7-509

customary banking channels used for delivery, 87A-2-308

defects apparent on face of document, payment as waiver of objection, 87A-2-605

draft against documents, acceptance for payment requiring delivery of documents,  
87A-2-514

financing agency, rights acquired in documents, 87A-2-506

inspection of goods covered by document, 87A-2-513

overseas shipment, form of bill of lading required, 87A-2-323

shipping documents, tender required for delivery of goods, 87A-2-504

reservation of security interest by seller, 87A-2-505

stoppage in transit by seller

indemnification of carrier for losses and expenses, 87A-7-504

presentation of documents required, 87A-2-705

tender of document as tender of delivery, 87A-2-503

Duration of contract providing for successive performances, 87A-2-309

Exclusive dealing contracts, obligations imposed on parties, 87A-2-306

## INDEX

References are to Title and Section numbers

### SALES (Continued)

- Excuse of performance by failure of presupposed conditions, 87A-2-615
  - buyer's remedies on claim of excuse, 87A-2-616
- Ex-ship delivery terms, effect, 87A-2-322
- Farmer sales statutes unimpaired by Uniform Commercial Code, 87A-2-102
- F.A.S. terms, construction, 87A-2-319
- Fiduciaries, validation of sales, 91-4324, 91-4325
- Financing agency purchasing draft, rights acquired, 87A-2-506
- Firm offer to buy or sell, effect, 87A-2-205
- F.O.B. terms, construction, 87A-2-319
- Formal requisites for contract of sale, 87A-2-204
- Fraud, remedies available, 87A-2-721
- Fungible goods
  - undivided share in identified bulk, sale permitted, 87A-2-105
  - warehouse receipt claim subordinate to buyer from warehouseman, 87A-7-205
- Good faith required, 87A-1-203
- Identification of goods, time of occurrence, 87A-2-501
- Indian articles, regulations for sale of imitation articles, 85-301 to 85-304
- Infringement actions against buyer, rights of seller to defend, 87A-2-607
- Insecurity of contract, rights of parties to demand assurance, 87A-2-609
- Insolvency of buyer, remedies available to seller, 87A-2-702
- Insolvency of seller, buyer's right to goods, 87A-2-502
- Inspection rights of buyer of goods, 87A-2-513
  - evidence of conformity or nonconformity, rights of parties to preserve, 87A-2-515
- Installment contracts, effect of breach, 87A-2-612
- Insurable interest of buyer and seller in goods, 87A-2-501
- Judicial sales validated despite defects, 93-5846
- Letter of credit, failure of buyer to furnish, 87A-2-325
- Limitation of actions arising out of contract, 87A-2-725
- Liquidated damage clauses, 87A-2-718
- Market price, determination, 87A-2-723
  - published quotations, use in evidence, 87A-2-724
- Merchantable goods, definition, 87A-2-314
- Modification of contract, means permitted, 87A-2-209
- No arrival, no sale term, effect on obligations, 87A-2-324
- Obligations of parties in general, 87A-2-301
- Open terms in contract, effect, 87A-2-204
  - price left open, 87A-2-305
- Optional means of performance not invalidating contract, 87A-2-311
- Oral evidence to vary written agreement, 87A-2-202
- Output of seller, contracts measuring quantity by, 87A-2-306
- Overseas shipments, form of bill of lading required, 87A-2-323
- Parol evidence to vary written agreement, 87A-2-202
- Part interest in identified goods, sale permitted, 87A-2-105
- Payment for goods
  - acceptance creating duty to pay, 87A-2-607
  - apportionment where delivery is in lots, 87A-2-307
  - C.&F. terms, construction, 87A-2-320, 87A-2-321
  - check payment conditional on honor, 87A-2-511
  - C.I.F. terms, construction, 87A-2-320, 87A-2-321
  - F.A.S. terms, effect on obligation, 87A-2-319
  - F.O.B. terms, effect on obligation, 87A-2-319
  - forms of payment permissible, 87A-2-304
  - inspection by buyer before payment, 87A-2-310
  - letter of credit, delivery suspending obligation to pay, 87A-2-325
  - nonconformity of goods, effect where contract requires payment before inspection, 87A-2-512
  - open price terms in contract, 87A-2-305
  - property to be used in payment, 87A-2-304
  - substituted means of payment, when permitted, 87A-2-614
  - tender of delivery as condition to right to payment, 87A-2-507
  - tender of payment, forms permitted, 87A-2-511
  - time for payment or running of credit, 87A-2-310
- Penalty clauses unenforceable, 87A-2-718
- Realty, contract requiring severance of goods from, 87A-2-107



## INDEX

References are to Title and Section numbers

### SALES (Continued)

#### Rejection of goods

- acceptance of nonconforming goods precluding rejection, 87A-2-607
- installment contracts, effect of rejection of installment, 87A-2-612
- instructions from seller as to disposition of goods, 87A-2-603
- nonconforming goods, buyer's right to accept or reject, 87A-2-601
- notice of rejection to seller, 87A-2-602
- obligations of buyer with respect to rejected goods, 87A-2-602
  - merchant buyer's duties, 87A-2-603
- return of goods to seller, 87A-2-604
- sale of rejected goods by buyer, 87A-2-603, 87A-2-604
- salvage of rejected goods by buyer, 87A-2-604
- security interests of buyer in rejected goods, 87A-2-711
- storage of rejected goods for seller's account, 87A-2-604
- time allowed for rejection, 87A-2-602
- waiver of objections by failure to particularize, 87A-2-605

#### Remedies of buyer, 87A-2-711

- agreements limiting or excluding remedies, 87A-2-719
- ancillary obligations, remedies unimpaired by Commercial Code chapter, 87A-2-701
- anticipatory repudiation, 87A-2-610
- cancellation of contract, remedies preserved, 87A-2-720
- collateral obligations, remedies for unimpaired by Commercial Code chapter, 87A-2-701
- consequential damages recoverable from seller, 87A-2-715
- covering purchases of substitute goods, 87A-2-712
- damages for nondelivery or repudiation by seller, measure, 87A-2-713
- deduction of damages from contract price, 87A-2-717
- fraud of seller, remedies available, 87A-2-721
- incidental damages recoverable from seller, 87A-2-715
- limitation of actions, 87A-2-725
- liquidated damages, 87A-2-718
- nonconforming goods, recovery after acceptance, 87A-2-714
- recovery of identified goods, 87A-2-716
- rescission of contract, remedies preserved, 87A-2-720
- security interests in rejected goods, 87A-2-711
- specific performance, when authorized, 87A-2-716
- third parties, actions against for injury to goods, 87A-2-722
- warranty, damages for breach, 87A-2-714

#### Remedies of seller, 87A-2-703

- agent standing in position of seller, 87A-2-707
- agreements limiting or excluding remedies, 87A-2-719
- ancillary obligations, remedies unimpaired by commercial code chapter, 87A-2-701
- anticipatory repudiation, 87A-2-610
- cancellation of contract, remedies preserved, 87A-2-720
- collateral obligations, remedies unimpaired by commercial code chapter, 87A-2-701
- completion of unfinished goods, 87A-2-704
- damages for nonacceptance or repudiation, measure, 87A-2-708
- fraud of buyer, remedies available, 87A-2-721
- identification of goods to contract after breach, 87A-2-704
- incidental damages, items included, 87A-2-710
- insolvency of buyer, remedies available on discovery, 87A-2-702
- limitation of actions, 87A-2-725
- liquidated damages, 87A-2-718
- price of goods, recovery from buyer, 87A-2-709
- resale of goods and recovery of difference from buyer, 87A-2-706
- rescission of contract, remedies preserved, 87A-2-720
- salvage of unfinished goods, 87A-2-704
- secured creditor standing in position of seller, 87A-2-707
- stoppage of delivery in transit, 87A-2-705
  - indemnification of carrier for expenses or loss, 87A-7-504
- third parties, actions against for injury to goods, 87A-2-722

#### Repudiation of contract

- anticipatory repudiation, 87A-2-610
  - retraction of repudiation, 87A-2-611
- damages for repudiation by buyer, measure, 87A-2-708

## INDEX

References are to Title and Section numbers

### SALES (Continued)

#### Repudiation of contract (Continued)

- damages for repudiation by seller, measure, 87A-2-713
- remedies of buyer, 87A-2-711
- remedies of seller, 87A-2-703

#### Requirements of buyer, contract measuring quantity by, 87A-2-306

#### Rescission of contract, means permitted, 87A-2-209

#### Reservation of rights by party while performing or accepting performance, 87A-1-207

#### Retail installment sales act, 74-601 to 74-612—See INSTALLMENT SALES ACT

#### Return of goods, contract permitting, 87A-2-326, 87A-2-327

#### Risk of loss

- agreements shifting or dividing risk, 87A-2-303
- approval sales, effect, 87A-2-327
- breach of contract, effect on risk, 87A-2-510
- C.&F. terms, effect, 87A-2-320, 87A-2-321
- C.I.F. terms, effect, 87A-2-320, 87A-2-321
- ex-ship delivery terms, effect, 87A-2-322
- F.A.S. terms, effect, 87A-2-319
- F.O.B. terms, effect, 87A-2-319
- no arrival, no sale term, effect, 87A-2-324
- passage of risk, principles for determining time, 87A-2-509
- return sales, effect, 87A-2-327

#### Scope of Uniform Commercial Code chapter, 87A-2-102

#### Seals on writings inoperative, 87A-2-203

#### Security interest retained by seller, law governing interest, 87A-9-113, 87A-9-206

#### Security transactions exempt from Uniform Commercial Code chapter, 87A-2-102

#### Severance of goods from realty, sale contract required, 87A-2-107

#### Short title of Uniform Commercial Code chapter, 87A-2-101

#### Statute of frauds

- goods, contracts for sale of, 87A-2-201
- property other than goods and securities, 87A-1-206

#### Statute of limitations in contracts for sale, 87A-2-725

#### Statutes unimpaired by Uniform Commercial Code chapter, 87A-2-102

#### Substituted performance, when permitted, 87A-2-614

#### Termination of contract

- indefinite duration contracts, 87A-2-309
- notice of termination by party, 87A-2-309

#### Time allowed for required actions, 87A-1-204

#### Transfer of title

- approval sales, effect, 87A-2-327
- delivery constituting transfer in absence of agreement, 87A-2-401
- entrusting of goods to merchant, merchant's power to transfer title, 87A-2-403
- identification of goods required for passage, 87A-2-401
- rejection or refusal by buyer, reversion of title, 87A-2-401
- reservation of title by seller after delivery limited to security interest, 87A-2-401
- voidable title giving power to transfer good title, 87A-2-403

#### Unconscionable provisions, effect on contract, 87A-2-302

#### Undivided share of fungible goods, sale permitted, 87A-2-105

#### Usage of trade, application, 87A-1-205

#### Waiver of executory portion of contract, effect, 87A-2-209

#### Warranties

- action against buyer for breach of warranty, duty to notify seller, 87A-2-607
- affirmation creating express warranty, 87A-2-313
- conflicting warranties, resolving, 87A-2-317
- consequential damages recoverable for breach, 87A-2-715
- course of dealing creating implied warranty, 87A-2-314
- cumulation of warranties where reasonable, 87A-2-317
- damages for breach of warranty, measure, 87A-2-714
- description creating express warranty of conformity, 87A-2-313
- encumbrance, warranty against, 87A-2-312
- exclusion of warranties by agreement, 87A-2-316
- express warranties, means of creation, 87A-2-313
- fitness for particular purpose warranted where buyer relies on seller's judgment, 87A-2-315

## INDEX

References are to Title and Section numbers

### SALES (Continued)

#### Warranties (Continued)

- implied warranties, 87A-2-314, 87A-2-315
- infringement, warranty against, 87A-2-312
- merchantability warranted by implication, 87A-2-314
- modification of warranties by agreement, 87A-2-316
- promise creating express warranty, 87A-2-313
- remedies for breach of warranty, limitation by agreement, 87A-2-316
- sample creating express warranty of conformity, 87A-2-313
- third-party beneficiaries of warranties, 87A-2-318
- title to goods, 87A-2-312
- Uniform Commercial Code, applicability, 74-325
- usage of trade creating implied warranty, 87A-2-314

### SANITARIANS

Appeal procedure, 69-3408

#### Council

- establishment, 69-3402
- issuance of certificate of registration to applicants, 69-3403
- meetings, 69-3402
- officers, 69-3402
- register, duties to keep, 69-3402
- service of process upon, 69-3409
- terms of members, 69-3402

#### Definitions, 69-3401

Penalty for violation of act, 69-3406

Register, council to keep, 69-3402

#### Registration

- application fee, 69-3404
- applications for, 69-3403
- issuance of certificate, 69-3403
- operating as without being registered prohibited, penalty, 69-3406
- reciprocity registration, 69-3407
- renewal fee, 69-3404
- revocation or suspension
  - grounds, 69-3405
  - hearing, 69-3405
  - power of council, 69-3405
- term of certificate, 69-3403

### SANITARY LICENSEES

Application for license, contents, 69-5402

Denial, suspension or revocation of license, 69-5401

Enforcement of license requirements, 69-5408

Expiration of licenses, 69-5403

Fee for license, 69-5403

- local permit fee, 69-5405

Issuance and numbering of licenses, 69-5403

License required for business of cleaning cesspools, septic tanks or privies, 69-5401

Penalty for violations, 69-5408

Permit required from local health officer, 69-5405

Public agencies exempt from license requirement, 69-5407

Rules adopted by state board, 69-5406

Vehicles of licensees, marking, 69-5404

### SAVINGS AND LOAN ASSOCIATIONS

Accounts excluded from chapter on secured transactions, 87A-9-104

Dissolution of association, when distribution presumed abandoned, 67-2206—See also

PROPERTY, Unclaimed property

Real estate loans permitted, 7-113.1

Retail installment sales act

- compliance with provisions of act other than licensing required, 74-603

- licensing under not required, 74-603

Unclaimed deposits, when presumed abandoned, 67-2202—See PROPERTY, Unclaimed property



## INDEX

References are to Title and Section numbers

### SCHOOL FOR DEAF AND BLIND

- Control and supervision vested in state board of education, 75-301
- Executive board, composition and duties, 75-302
  - officers of board, 75-303
- Expenditures of school, control by state board, 75-310
- Treasurer of school, appointment and bond, 75-303

### SCHOOLS

Arbor day, date of observance, 75-2212

#### Attendance

- attendance outside of district of residence, 75-1630
  - high school pupil attending outside county, 75-4230
  - high school pupil attending outside state, 75-4146
- Indian children
  - boards to require attendance, 75-2910
  - enforcement of attendance laws on reservations, 75-2909
  - intent of act, 75-2907
  - tribal authority, acceptance by school boards, 75-2908

#### Bonds

- investment of funds not immediately needed for construction, 75-3922
- notice of election, 75-3912
- registration of bond, 75-3942
- specification of bond, 75-3942

#### Budget system

- appropriation for public employees' retirement reserve fund, 75-1646, 75-1647
- elementary schools, maximum budget, 75-1713.1
- emergency budgets, preparation by board and approval by state superintendent, 75-1716
- high schools, maximum budget, 75-4518.1
  - emergency budgets, procedure for adoption, 75-4521
    - tax levy to pay emergency warrants, 75-4525
    - warrants against emergency budget, 75-4524
- joint school districts, preparation and adoption, 75-1816
- preliminary budget, preparation and adoption, 75-1706
- reduction of elementary school budget to foundation program, 75-1713.1
- tax levy for elementary school, 75-1723
- tax levy for joint school districts, 75-1816
- transportation budget, preparation and adoption, 75-3414

#### Buildings

- federal construction aid, acceptance authorized, 75-5101
- health department to set standards and approve plans for construction, 69-4117
  - inspection and correction of conditions by boards of health, 69-4118
- joint interstate facilities, agreements for authorized, 75-3109
  - election on approval of agreement, 75-3111
  - financing of facilities, 75-3113
  - location of joint facilities, 75-3112
  - rental of buildings and facilities, 75-1632
  - superintendent of public instruction to approve agreements, 75-3110
- leasing of sites, 75-3114 to 75-3125—See Leasing of school house sites and buildings, below

Child nutrition program, 75-4802, 75-4803, 75-4805, 75-4806

Community colleges, 75-4413 to 75-4430—See COLLEGES AND UNIVERSITIES, Community colleges

County school superintendent, establishment of salary before election, 25-609

County treasurer, accounts maintained by, 75-3722

#### Driver education program

- account established in earmarked revenue fund, 75-5313
  - allocation and disbursement of funds in account, administrative expense, 75-5317
- driver's license proceeds credited in part to account, 75-5313
- finances, portion credited to account, 75-5313
- forfeited bail, portion credited to account, 75-5314
- juvenile offenders, payments into account, 94-801-2

## INDEX

References are to Title and Section numbers

### SCHOOLS (Continued)

#### Driver education program (Continued)

- account established in earmarked revenue fund (Continued)
  - transmittal of gross proceeds by court, 75-5316
  - transmittal of proceeds from fines, 75-5315
- license, issuance after completion of course, 31-127

#### Elections, absent or physically incapacitated voters, 23-3702

#### Elections on school matters, payment of expenses, 75-1620

#### Equalization aid

- administration by state board, 75-3614
- ANB, computation, 75-3611
- community colleges, aid to, 75-4425
- data compiled and kept by state superintendent, 75-3615
- definition of terms, 75-3611
- distribution of funds to counties, 75-3616
  - insufficient funds for foundation program, apportionment, 75-3619
- distribution of funds to districts by county, 75-3619
- foundation program, computation, 75-3612
  - anticipatory increase in program, 75-3612.1
  - minimum increase required for application of act, 75-3612.2
  - supplemental nature of provision, 75-3612.3
- county tax levies, distribution among school districts, 75-3618
- insufficient funds to support foundation program
  - apportionment of available funds to counties and districts, 75-3619
  - certificate of deficiency by state superintendent, 75-3620
  - warrants issued by school district to meet deficiency, 75-3621
- isolated schools, application and approval, 75-3617
- opening or reopening of school, basis for equalization aid, 75-3611
- payment of funds to counties, 75-3616
  - insufficient funds for foundation program, apportionment, 75-3619
- reports of state superintendent concerning aid, 75-3615
- reports required of county and school officers, 75-3614
- rules and regulations, 75-3614
- sources of money used for aid, 75-3613
- state institution employees' children attending, state payments to district, 75-3624
- state land equalization payments to counties, distribution to districts, use of proceeds, 81-1120, 81-1121
- unused equalization aid, use to reduce high school levy, 75-3616

#### Federal funds, acceptance, deposit and expenditure, 75-5101

- allocation to operating budgets, 75-1723.1, 75-4516.2
- school lunch funds, 75-4802

#### Fines paid into county school fund, 75-3706

#### Foundation program, 75-3612—See also Equalization aid, above

#### Handicapped children

- reimbursement by state for special classes, 75-5003
- retarded children eligible for special education, 75-5001
- special classes for educable mentally retarded children or physically handicapped children, 75-5003
- transportation reimbursement not limited by restrictions on general allowances, 75-3414
- tuition charges for children attending school outside district, 75-5003

#### Health instruction, courses and supervisor, 75-2009

#### High schools

- abolishment of county high school
  - authority for abolishment, 75-4120
  - ballots, form, 75-4124
  - bonded indebtedness of high school, liquidation, 75-4134
  - county commissioners to submit question to voters, 75-4122
  - election, conduct, 75-4124
  - funds of high school, disposition, 75-4127
  - inventory and appraisal of property of abolished high school, 75-4128
  - petition for abolishment, filing with county clerk, 75-4121
  - poll books, preparation, 75-4123

## INDEX

References are to Title and Section numbers

### SCHOOLS (Continued)

#### High schools (Continued)

- abolishment of county high school (Continued)
  - publication of notice of petition and election, 75-4123
  - rejection of proposition by voters, waiting period before new petition, 75-4126
  - resolution of county commissioners after approval by voters, 75-4125
  - sale and conveyance of property of abolished high school, 75-4130
  - taxes collected after abolishment, disposition, 75-4133
- additional trustees, when authorized, 75-4601
- attendance outside county of residence, 75-4230
- attendance outside state, 75-4146
- branch of county high school
  - authority for establishment, 75-4138
  - budget for first year of operation, 75-4139
  - superintendent of public instruction to investigate and approve establishment, 75-4139
- budget, maximum supported by tax levy, 75-4518.1
- children's center inmates attending Twin Bridges high school, state payments for, 75-4230
- district high schools
  - authority for establishment, 75-4138
  - budget for first year of operation, 75-4139
  - superintendent of public instruction to investigate and approve establishment, 75-4139
- emergency budget, procedure for adoption, 75-4521
  - tax levy to pay emergency warrants, 75-4525
  - warrants against emergency budget, 75-4524
- emergency relocation of building, trustees remain in office, 75-4601
- examination of county free high schools, fee for, 5-906
- joint high school districts authorized, procedure for formation, 75-4612
  - bonded indebtedness remains that of original territory, 75-4614
  - general school laws govern, 75-4613
- junior high school, election required for establishment, 75-4202
- tax necessary, computation and levy by county commissioners, 75-4516.1
  - reduction of levy by use of undistributed equalization aid, 75-3616
- unification of county high school with school district
  - appointment of additional trustees by county superintendent, 75-4120.2
  - authority for unification, 75-4120
  - bond obligations taken over by school district, 75-4134
  - budget, adoption after unification, 75-4120.3
  - county becoming high school district after unification, 75-4120.2
  - election on unification, 75-4120.1
  - funds, disposition after unification, 75-4127
  - resolution of trustees requesting unification, 75-4120.1
  - taxes collected after unification paid to school district, 75-4133
  - transfer of property to school district after unification, 75-4128
    - conveyances and instruments of title, 75-4130
- Interest and income moneys, apportionment and certification to counties, 75-1315
- Interlocal co-operative agreements, financial administration of, 75-3738 to 75-3742
- Isolated schools for state aid purposes, approval, 75-3617
- Junior colleges subject to supervision by state board, 75-4414, 75-4429
  - conversion to community college district, 75-4429
- Leasing of school house sites and buildings authorized, 75-3114
  - attorney general to examine and rule on proceedings, 75-3125
  - bids on leasing land, 75-3122
  - "building" defined, 75-3114
  - construction of building, terms of agreement and bids, 75-3118
  - election required before entering lease or agreement, 75-3119
    - ballots, form, 75-3120
    - manner of holding election, 75-3120
  - lease of site providing for construction of building to vest in school district at expiration of term, 75-3117
  - rent as obligation of district, 75-3123



## INDEX

References are to Title and Section numbers

### SCHOOLS (Continued)

- Leasing of school house sites and buildings authorized (Continued)
  - resolution of intent to enter lease, 75-3122
  - site and plans required before entering lease or agreement, 75-3115
  - tax rate, authorization for increase void if lease not entered into, 75-3121
  - term of lease or agreement, maximum, 75-3116
- Liability insurance, purchase by trustees and payment of premiums, 75-1645
- Limitation on indebtedness of school districts and high school districts, XIII, 6
- Nurse, employment by school board, 75-1632
- Permanent school fund
  - investment of funds, types permitted, 81-1001
  - income moneys, 81-1005
  - sources of fund, 75-3701
  - subfund in trust and legacy fund, 75-3701
  - transfer of title of farm mortgage lands, effect, 75-3729.1
  - validation of conveyances of farm mortgage lands, 75-3729.1
- Physician, employment by school board, 75-1632
- Prayer to open day, 75-2405.1
- Records, destruction when old and worthless, 59-514
  - fiscal records, destruction after period of years, 59-516
- Research programs of state institutions, participation by governing boards, 80-1413
- Retarded children, 75-5001 to 75-5007—See Handicapped children, above
- Rules of civil procedure, application to special proceedings, M. R. Civ. P., Rule 81(a), Table A
- Safety patrols, establishment authorized, 75-5401
  - appointment of members of patrol, 75-5402
  - drivers to honor stop signs and permit movement of children, 32-2177
  - identification and operation of patrols as prescribed by department of public instruction, 75-5404
  - liability not incurred by operation of patrol, 75-5403
  - training of patrol members provided by municipalities, 75-5405
- School board meetings, mileage for attending, 75-1622
- School buses
  - depreciation reserve, 75-3403
  - flashing lights required on buses, 32-21-132
    - use of lights when stopped or preparing to stop, 32-2197
  - reimbursable transportation, standards for vehicles and drivers used for, 75-1643
- School districts
  - annexation of districts to existing districts, procedure for, 75-1813
    - intercounty districts, procedure, 75-1813.1
  - boundary changes, when prohibited, 75-1804
  - child care institution, creation of district for authorized, 75-5502
    - application for creation of district, 75-5503
    - contiguous land acquired coming within district, 75-5508
    - disapproval of plan by county superintendent, 75-5503, 75-5506
    - hearing on proposal to create district, 75-5505
      - notice of hearing, publication, 75-5504
    - institutions for which district may be created, 75-5501
    - order of county superintendent creating district, 75-5507
    - plan of operation submitted with application, 75-5503
    - trustees of existing district, approval or disapproval by, 75-5506
    - trustees of new district appointed by county superintendent, 75-5507
  - community college districts, 75-4413 to 75-4430—See COLLEGES AND UNIVERSITIES, Community colleges
    - community college considered as school district, 75-4425
  - consolidated districts, procedure for formation, 75-1813
    - indebtedness assumed by new district, 75-1810
    - intercounty districts, procedure, 75-1813.1
  - creation of district, when prohibited, 75-1804
  - intercounty districts, procedure for formation, 75-1813.1
  - interlocal co-operation, 16-4901 to 16-4904—See INTERLOCAL CO-OPERATION
  - investment of surplus funds, 16-2050

## INDEX

References are to Title and Section numbers

### SCHOOLS (Continued)

#### School districts (Continued)

##### joint districts

budget, preparation and adoption, 75-1816

high schools, procedure for formation of joint district, 75-4612

bonded indebtedness remains that of original territory, 75-4614

general school laws govern, 75-4613

state funds paid to county treasurer, 75-1728

##### purchases and contracts, preference to Montana bidders

definition of residence, 82-1925

federal aid projects exempt, 82-1926

percentage differential, 82-1924

provision in contract for preference to Montana materials and labor, 82-1926

service of process on school districts, M. R. Civ. P., Rule 4 D(2)

special examination by state examiner, fee, 5-910

surplus property, lease or sale to community college, 75-4428

trustees, number authorized, 75-1802

warrants to meet deficiencies in equalization aid, 75-3621

#### School lunches

accounts and records, 75-4806

administration of program, 75-4803

authority of school board, 75-4805

federal funds, acceptance and deposits, 75-4802

federally connected indigent children, allocation of funds to provide for, 75-4809

#### State aid

equalization aid, 75-3611 to 75-3621—See Equalization aid, above

transportation costs, reimbursement, 75-3413

#### State board of education

donations of land for western Montana branch experiment station, authority to receive, 75-710.3

donations of money, implements, livestock, etc., for use of western Montana branch experiment station, authority to receive, 75-710.4

institutions under control and supervision of state board, 75-301

members, 75-104

officers, 75-104

powers and duties, 75-107

State land equalization payments, distribution to districts, use of proceeds, 81-1120 to 81-1121

#### Superintendent of public instruction

department of public instruction created, 75-1303

salary, 25-501

Surplus property, 82-3101 to 82-3106—See STATE AGENCY FOR SURPLUS PROPERTY

#### Tax levies

building reserve fund, election, 75-3806

community college tax levy, 75-4425, 75-4426

county basic levy, 75-3706

distribution among school districts, 75-3618

district levy to provide foundation program, 75-3706

additional levy, adoption on approval by taxpayers, 75-3801

transportation levy, 75-3414

#### Teachers

administrative and supervisory certificates, 75-2516

age at which termination of services permitted or required, 75-2401

automatic re-election on failure to give notice of dismissal, 75-2401

certification

fees for certification, 75-2521

provisional certification

academic requirement for certification, 75-2516

alien, certification, 75-2501

renewal of provisional certificate, 75-2518

child abuse reports required, 10-901 to 10-905—See CHILDREN AND MINORS, Abuse of children

## INDEX

References are to Title and Section numbers

### SCHOOLS (Continued)

#### Teachers (Continued)

- dismissal, notice and hearing, 75-2401
- emergency authorization to teach, 75-2522
- retired teachers, employment, 75-2707
- retirement system
  - community college teachers and trustees eligible, 75-4424
  - contributions by employers, 75-2709
  - moneys collected, management and investment, 75-2708
  - reserve fund, inclusion in school budget, 75-2709.1
    - use of fund, 75-2709.2
  - salary on which contribution based, 75-2701
  - superannuation retirement allowance, 75-2707
- tenure, 75-2401

Temporary quarters or portable buildings, use by schools, 75-3124

#### Textbooks

- abridged and special edition, agreements filed with, 75-3505
- bond of person offering books for adoption or sale, 75-3503
- filing of textbook offered for adoption or sale, 75-3503
- license to offer book for adoption or sale, fees, 75-3503
- price agreements on offer of book for adoption or sale, 75-3503

#### Transportation of pupils

- budget for transportation, preparation and adoption, 75-3414
- pupils living within three miles of school, transportation authorized, 75-1641
  - parents, collection of costs from, 75-1641
    - accounting for charges, 75-1644
  - preference to children living farthest from school, 75-1641
- routes to be used for transportation, 75-1642
- standards for vehicles and drivers, 75-1643
- reserve fund, 75-3414
- state reimbursement of transportation cost, 75-3413
- tax levy for transportation, 75-3414

Travel expenses for attendance at educational conventions, 25-508

Tuition payments for attendance outside district, 75-1630

University of Montana—See COLLEGES AND UNIVERSITIES

#### Vocational-technical education, post-secondary, 75-4309

- admission, 75-4315
- designation of centers, 75-4312
- fees for equipment and material, 75-4314
- fiscal provisions, 75-4317 to 75-4319
- lease of state lands or buildings, 75-4322
- nonresidents' tuition, 75-4316
- transfer of title to state buildings and/or lands to school districts, 75-4323

### SEARCH AND SEIZURE

Admissibility of articles or things seized as evidence in other proceedings, 95-718

Arrest, search and seizure authorized as incident to, 95-701

Authority to make search and seizure, 95-701

Consent of accused or other person, search and seizure authorized, 95-701

Illegally seized evidence, motion to suppress, 95-1806

Inspections granted by law, searches and seizures authorized, 95-701

Legality, when search and seizure not illegal, 95-717

Motion to suppress evidence illegally seized, 95-1806

#### Property or things seized

- admissibility in other proceedings, 95-718
- custody and disposition of things seized under warrant, 95-713
- custody and disposition of things seized without warrant, 95-714
- return of property seized, 95-715
- return to court of things seized under warrant, 95-712
- unclaimed property, disposition of, 95-716

#### Warrant

- application, filing of, 95-706
- definition, 95-703
- detention and search of persons on premises, 95-710



## INDEX

References are to Title and Section numbers

### SEARCH AND SEIZURE (Continued)

#### Warrant (Continued)

- execution, procedure, use of force, 95-708, 95-709
- grounds for search warrant, 95-704
- limitation on time when warrant may be executed, 95-711
- scope of search, 95-705
- search and seizure authorized by authority of, 95-701
- service, by whom served, procedure, 95-707, 95-708
- time warrant may be executed, 95-711

#### Without warrant, scope of search, 95-702

- custody and disposition of things seized, 95-714
- return of property seized, 95-715

### SECRETARY OF STATE

Business corporations, powers and duties relating to—See BUSINESS CORPORATION ACT, Secretary of state

Business trusts—See BUSINESS TRUSTS, Secretary of state

Expenses paid from appropriations, 82-2212

Fees collectible, 25-102

- cooperative associations, 14-201, 14-204
- cooperative marketing associations, 14-422
- rural electric and telephone cooperatives, 14-527
- water users' association articles, filing and recording, 25-110

Lobbyist, duties concerning—See LOBBYING

Nonprofit corporations, powers and duties relating to—See NONPROFIT CORPORATION ACT, Secretary of state

Religious corporation sole

- articles of incorporation, filing with secretary of state, 15-2404
- certificate of incorporation, issuance by secretary of state, effect, 15-2405

Rosters prepared from election records, 43-206.1

Salary, 25-501

Service of process on secretary of state as agent, M. R. Civ. P., Rule 4D(6)

### SECURED TRANSACTIONS

Acceleration of performance, good faith required in exercising option, 87A-1-208

Accessions to property, conflicting security interest in, 87A-9-314

Accounts sold as part of business, exclusion from chapter, 87A-9-104

After-acquired collateral

- new value, when considered to have been given by secured party, 87A-9-108
- time of attachment of security interest to, 87A-9-204

Agreement for security interest

- contents required, 87A-9-203
- effect of agreement against parties, purchasers and creditors, 87A-9-201
- required for enforceability of security interest, 87A-9-203

Agreement to subordinate prior interest, 87A-9-316

Antecedent debt secured by after-acquired collateral, when debt secured not considered antecedent, 87A-9-108

Assignment of collateral for benefit of creditors of debtor—See Lien adverse to security interest, below

Assignment of security interest, filing not required to continue perfected interest, 87A-9-302

Attachment of collateral by third party—See Lien adverse to security interest, below

Attachment of security interest, requirements for, 87A-9-204

Authenticity of third-party documents presumed, 87A-1-202

Bank accounts excluded from chapter, 87A-9-104

Bankruptcy of debtor, status of trustee—See Lien adverse to security interest, below

Bulk Transfer chapter, secured transactions not subject to, 87A-6-103, 87A-9-111

Care required by secured party in possession of collateral, 87A-9-207

Certificate of title indicating security interest, conflict of laws, 87A-9-103

Citation of Uniform Commercial Code chapter, 87A-9-101

Claim against seller or lessor, waiver by buyer or lessee against assignee, 87A-9-206

Claims of account debtor against creditor, assertion against assignee of account, 87A-9-318

## INDEX

References are to Title and Section numbers

### SECURED TRANSACTIONS (Continued)

- Collateral to secure debt
  - after-acquired collateral, time of attachment to, 87A-9-204
  - list of collateral supplied by secured party to debtor, 87A-9-208
  - owner of collateral other than debtor, rights and immunities, 87A-9-112
  - possession of collateral by secured party, rights and duties of parties, 87A-9-207
  - proceeds of disposition of collateral, attachment of security interest to, 87A-9-306
  - release of collateral, filing, 87A-9-406
  - title immaterial in applying chapter, 87A-9-202
  - transfer of debtor's rights in collateral, 87A-9-311
  - use of collateral by debtor, effect of agreements permitting, 87A-9-205
  - use of collateral by secured party in possession, 87A-9-207
- Collection, assignment of accounts for excluded from chapter, 87A-9-104
- Collection of assigned accounts by debtor, effect of agreement permitting, 87A-9-205
- Commercial Paper chapter subject to Secured Transactions chapter, 87A-3-103
- Commingled goods, conflicting security interest in, 87A-9-315
- Commingling of collateral by debtor, effect of agreements permitting, 87A-9-205
- Conflict of laws, 87A-9-103
  - restriction on agreement as to applicable law, 87A-1-105
- Consumer Loan Act, application to transactions, 87A-9-203
- Course of dealing between parties, application, 87A-1-205
- Creditors, effect of security agreement against, 87A-9-201
- Default by debtor
  - attorney fee to be allowed in foreclosure action, 93-8613
  - collection on accounts or instruments by secured party, 87A-9-502
  - deficiency in collateral, liability of debtor, 87A-9-504
    - collections on accounts or instruments by secured party, 87A-9-502
  - disposition of collateral by secured party, 87A-9-504
    - compulsory disposition, 87A-9-505
    - price at which sale made, reasonableness, 87A-9-507
  - judgment for secured party, relation back of judgment lien, 87A-9-501
  - liability of secured party for noncompliance with requirements, 87A-9-507
  - possession of collateral taken by secured party, 87A-9-503
  - purchase by secured party at sale of collateral, 87A-9-504
  - real property included in security agreement, remedies available, 87A-9-501
  - redemption by debtor after default, 87A-9-506
  - remedies available to debtor, 87A-9-501
  - remedies available to secured party, 87A-9-501
  - retention of collateral by secured party in satisfaction of debt, 87A-9-505
  - sale of collateral by secured party, 87A-9-504
    - compulsory sale, 87A-9-505
    - judicial sale, right of secured party to purchase at, 87A-9-501
    - postponement of sale, 52-313
    - price at which sale made, reasonableness, 87A-9-507
    - report of sale, filing and recording, 52-314
    - sheriff making seizure and sale, 52-312
    - time of sale, 52-313
  - subrogation of guarantor or endorser to rights of secured party, 87A-9-504
  - surplus proceeds of collateral, disposition, 87A-9-504
    - collections on accounts or instruments by secured party, 87A-9-502
  - waiver of certain rights of debtor prohibited, 87A-9-501
- Defenses against seller or lessor, waiver by buyer or lessee against assignee, 87A-9-206
- Defenses available to account debtor against assignee of account, 87A-9-318
- Definition of terms, 87A-9-105
  - "account," 87A-9-106
  - "consumer goods," 87A-9-109
  - "contract right," 87A-9-106
  - "equipment," 87A-9-109
  - "farm products," 87A-9-109
  - general definitions in Uniform Commercial Code, 87A-1-201
  - "general intangibles," 87A-9-106
  - index of definitions, 87A-9-105
  - "inventory," 87A-9-109
  - "purchase money security interest," 87A-9-107

## INDEX

References are to Title and Section numbers

### SECURED TRANSACTIONS (Continued)

- Description of property, sufficiency, 87A-9-110
- Disposal of collateral by debtor, effect of agreement permitting, 87A-9-205
- Effectiveness of security agreement among parties, 87A-9-201
- Exclusion of transactions from chapter, 87A-9-104
- Federally governed security interests excluded from chapter, 87A-9-104
- Filing of financing statement
  - acts constituting filing, 87A-9-403
  - amendments to statement, effective date, 87A-9-402
  - assignment of security interest or rights under financing statement, 87A-9-405
    - filing not required to continue perfected status, 87A-9-302
  - change of debtor's address or location of collateral, effect, 87A-9-401
  - conflict of laws, 87A-9-103
  - contents of statement required, 87A-9-402
  - continuation statements, manner of filing and effect, 87A-9-403
  - destruction of record permitted after lapse of time, 59-516.1
  - duration of effectiveness of filing, 87A-9-403
  - erroneous filing in improper place, effect, 87A-9-401
  - fees chargeable for filing, 87A-9-403
    - assignment of security interest, filing, 87A-9-405
    - information, fees chargeable for furnishing, 87A-9-407
    - release of collateral, filing, 87A-9-406
    - termination statement, 87A-9-404
  - formal requisites of statement, 87A-9-402
  - future goods, application of financing statement to, 87A-9-402
  - indexing of statements, 87A-9-403
  - information furnished from files, 87A-9-407
  - lapse of security interest on expiration of period for which filing effective, 87A-9-403
  - numbering of statement, 87A-9-403
  - out-of-state transactions filed in this state, 87A-9-103
  - period for which retained, 59-516.1
  - place of filing, 87A-9-401
  - public inspection, statement held for, 87A-9-403
  - public utility statement, contents and place of filing, 87A-9-302.2
    - definition of terms, 87A-9-302.1
    - Uniform Commercial Code applicable, 87A-9-302.3
  - purchase money security interest, time allowed for filing, 87A-9-301
  - release of collateral, filing, 87A-9-406
  - required for perfection of security interest, exceptions, 87A-9-302
  - signature affixed to statement, 87A-9-402
  - statutory registration systems, interests in property subject to, 87A-9-302
  - termination statement, furnishing and filing, 87A-9-404
- Fixtures, priority of security interest in, 87A-9-313
- Foreclosure of security interest
  - joinder with action for recovery of possession, 52-312
  - proceedings as in foreclosure of real estate mortgage, 52-312
  - seizure and sale by sheriff
    - authority in security agreement for seizure, 52-312
    - indemnity bond to sheriff given by secured party, 52-312
    - postponement of sale, 52-313
    - report of sale, filing and recording, 52-314
    - time of sale, 52-313
- Future advances, coverage by security agreement, 87A-9-204
- Good faith required, 87A-1-203
- Illegal transactions not validated by chapter, 87A-9-201
- Insolvency of debtor, attachment of security interest to proceeds of disposition of collateral, 87A-9-306
- Installment sales act unaffected by chapter, 87A-9-201
- Insurance policy interest, transfer excluded from chapter, 87A-9-104
- Judgment rights excluded from chapter, 87A-9-104
- Landlord's lien excluded from chapter, 87A-9-104



## INDEX

References are to Title and Section numbers

### SECURED TRANSACTIONS (Continued)

#### Lien adverse to security interest

- attachment of collateral by third party, method of levy, 93-4338
- priority over security interest of liens in ordinary course of business, 87A-9-310
- subordination of unperfected security interest to prior lien, 87A-9-301

#### Livestock as collateral, 52-319 to 52-323, 87A-9-203

- collection of debt, officers not responsible for, 52-323
- contents of notices filed, 52-320
- fees chargeable for filing, disposition, 52-322
- filing with recorder of marks and brands, 52-319
- satisfaction of agreement, duty to file, 52-321

#### Manufactured products, security interest in material attaching to, 87A-9-315

#### Mechanic's and materialman's lien excluded from chapter, 87A-9-104

#### Modification of contract after assignment of account receivable, effect as against assignee, 87A-9-318

#### Motor vehicles, security interest in, 53-110

#### Negotiable instrument signed by buyer with security agreement, effect, 87A-9-206

#### Notification to account debtor of assignment of account receivable, 87A-9-318

#### Pawnbroker law, application to transactions, 87A-9-203

#### Perfection of security interest

- bailed goods, perfection of interest in, 87A-9-304
- chattel paper, means of perfection, 87A-9-304
- continuity of perfected status under different means of perfection, 87A-9-303
- filing necessary to perfect interest, 87A-9-302—See also Filing of financing statement, above
- instruments, security interest in, 87A-9-304
- negotiable documents, interest in, 87A-9-304
- possession by secured party as means of perfection, 87A-9-305
- priority between interests governed by time of perfection, 87A-9-312
- purchase money security interest, time allowed for filing, 87A-9-301
- statutory registration systems, property subject to, 87A-9-302
- time of perfection, 87A-9-303

#### Possession of collateral by secured party, rights and duties of parties, 87A-9-207

- perfection of security interest by possession, 87A-9-305
- security interest supported by possession, 87A-9-203

#### Preservation of collateral by secured party in possession, 87A-9-207

#### Priorities among conflicting security interests in same collateral, 87A-9-312

- fixtures, 87A-9-313

#### Proceeds of disposition of collateral, attachment of security interest to, 87A-9-306

#### Processed goods, security interest in, 87A-9-315

#### Purchase money security interest governed by chapter on sales, 87A-9-206

- priority as against other security interests, 87A-9-312
- time allowed for filing of financing statement, 87A-9-301

#### Purchaser of collateral, effect of security agreement against, 87A-9-201

- chattel paper purchaser, priority as against security interest, 87A-9-308
- consumer goods purchaser taking free of security interest, 87A-9-307
- farm equipment purchaser taking free of security interest, 87A-9-307
- negotiable instrument or document, rights of holder in due course against security interest, 87A-9-309
- nonnegotiable instrument purchaser, priority as against perfected security interest, 87A-9-308
- ordinary course of business buyer taking free of security interest, 87A-9-307

#### Railway rolling stock equipment trusts excluded from chapter, 87A-9-104

#### Raw material, security interest attaching to finished product, 87A-9-315

#### Real estate interests excluded from chapter, 87A-9-104

#### Real property included in security agreement, remedies available on default of debtor, 87A-9-501

#### Redemption of collateral by debtor after default, 87A-9-506

#### Repossession of goods by seller of account receivable, attachment of account buyer's interest to goods, 87A-9-306

#### Reservation of rights by party while performing or accepting performance, 87A-1-207

#### Retail Installment Sales Act, application to transactions, 87A-9-203

#### Sale of goods, application of chapter to security interest arising under, 87A-9-113

## INDEX

References are to Title and Section numbers

### SECURED TRANSACTIONS (Continued)

Sales chapter inapplicable to transactions, 87A-2-102  
Scope of Uniform Commercial Code chapter, 87A-9-102  
Setoff rights excluded from chapter, 87A-9-104  
Short title of Uniform Commercial Code chapter, 87A-8-101  
Small loans laws unaffected by Secured Transactions chapter, 87A-9-201  
Statement of account by secured party to debtor, 87A-9-208  
Statutory liens, chapter inapplicable, 87A-9-102  
Subordination of priority by agreement, 87A-9-315  
Subordination of unperfected security interest to prior lien, 87A-9-301  
Time allowed for required actions, 87A-1-204  
Time of attachment of security interest, 87A-9-204  
Title to collateral immaterial in applying chapter, 87A-9-202  
Tort claims excluded from chapter, 87A-9-104  
Transfer of debtor's rights in collateral, 87A-9-311  
Usage of trade, application, 87A-1-205  
Use of collateral by debtor, effect of agreements permitting, 87A-9-205  
    secured party not liable for debtor's acts or omission in use, 87A-9-317  
Use of collateral by secured party in possession, 87A-9-207  
Usury laws unaffected by chapter, 87A-9-201  
Wage assignments excluded from chapter, 87A-9-104  
Waiver of certain rights of debtor prohibited, 87A-9-501  
Warehouseman reserving security interest in goods covered by warehouse receipt, 87A-7-209

### SECURITIES REGISTRATION

See also INVESTMENT SECURITIES, 87A-8-101 to 87A-8-406  
Accountant excluded from definition of "investment adviser," 15-2004  
Annuity contracts excluded from definition of "security," 15-2004  
Attorneys excluded from definition of "investment adviser," 15-2004  
Bank securities exempt, 15-2013  
Banks excluded from definition of "investment adviser," 15-2004  
Bonds included in definition of "security," 15-2004  
Bonuses construed as sales, 15-2004  
Broker-dealers  
    definition, 15-2004  
    fees payable for registration, 15-2016  
    records and accounts required, 15-2006  
    registration required, procedure, 15-2006  
    service of process on dealer, 15-2015  
    suspension or revocation of registration, 15-2006  
Building and loan securities exempt, 15-2013  
Burden of proof as to exemption, 15-2025  
Carrier securities, when exempt from registration, 15-2013  
Certificates of deposit included in definition of "security," 15-2004  
Citation of act, 15-2002  
Civil liability for unlawful acts and practices, 15-2022  
Collateral-trust certificates included in definition of "security," 15-2004  
"Commissioner" defined, 15-2004  
Coordination, registration by  
    contents and filing of statement, 15-2009  
    stop order on failure to file price amendment, 15-2009  
    time registration effective, 15-2009  
Copies of documents filed, availability to public, 15-2024  
Criminal liability, 15-2021  
Damages, measure of civil liability, 15-2022  
Debentures included in definition of "security," 15-2004  
Definition of terms, 15-2004  
Denial of registration, grounds and procedure, 15-2012  
Effect of registration, 15-2011  
Employee benefit plans, exemption of investment contracts in connection with, 15-2013  
Engineers, exclusion from definition of "investment adviser," 15-2004  
Escrow deposits of securities to be issued to promoters, 15-2011  
Evidences of indebtedness included in definition of "security," 15-2004

## INDEX

References are to Title and Section numbers

### SECURITIES REGISTRATION (Continued)

- Exchange-listed securities, exemption, 15-2013
- Exempt securities, 15-2013
- Exempt transactions, 15-2014
- Expenses of investigation, payment by issuer or broker-dealer, 15-2024
- False and misleading statements filed unlawful, 15-2017
- Federal statutes defined, 15-2004
- Fees payable for registration and certificates, 15-2016
  - disposition of moneys received, 15-2024
- Forms prescribed by commissioner, 15-2024
- Fraudulent practices prohibited, 15-2005
- Gift of assessable stock construed as offer and sale, 15-2004
- Good faith conformity exempt from liability, 15-2024
- Governmental securities exempt, 15-2013
- "Guaranteed" defined, 15-2004
- Impounding of proceeds of sale, 15-2011
- Incorporation of documents by reference in registration statement, 15-2011
- Information confidential, 15-2024
- Injunction against unlawful acts and practices, 15-2020
- Insurance companies excluded from definition of "investment adviser," 15-2004
- Insurance policies excluded from definition of "security," 15-2004
- Insurance policies exempt, 15-2013
- Investigation by investment commissioner, 15-2019
- Investment advisers
  - assignment of contract, consent required, 15-2005
  - compensation of adviser, prohibited provisions, 15-2005
  - contracts, required provisions, 15-2005
  - definition, 15-2004
  - fees payable for registration, 15-2016
  - partnership changes, notice required, 15-2005
  - records and accounts required, 15-2006
  - registration required, procedure, 15-2006
  - service of process on adviser, 15-2015
  - suspension or revocation of registration, 15-2006
- Investment commissioner
  - administration of act, 15-2024
  - enforcement powers, 15-2019, 15-2020
  - office created, 15-2001
- Investment contract included in definition of "security," 15-2004
- Isolated transactions, exemption, 15-2014
- "Issuer" defined, 15-2004
- Joint liability for damage from unlawful practices, 15-2022
- Judicial sales, exemption, 15-2014
- Methods of registration enumerated, 15-2007
- Mining interests included in definition of "security," 15-2004
- Misleading statements as to effect of registration unlawful, 15-2018
- "Non-issuer" defined, 15-2004
- Non-issuer transaction, when exempt, 15-2014
- Non-profit corporations, exemption of securities, 15-2013
- Notes included in definition of "security," 15-2004
- Notification, registration by
  - contents and filing of statement, 15-2008
  - eligibility of securities for registration by notification, 15-2008
  - time of effectiveness of registration, 15-2008
- "Offer" defined, 15-2004
- Oil and gas interests included in definition of "security," 15-2004
- Participation certificates included in definition of "security," 15-2004
- Penalties for violation, 15-2021
- "Person" defined, 15-2004
- Pledgee, exemption of sales by, 15-2014
- Pre-organization certificates and subscriptions included in definition of "security," 15-2004
- Private offerings, exemption, 15-2014
- Profit-sharing agreements, certificates included in definition of "security," 15-2004



## INDEX

References are to Title and Section numbers

### SECURITIES REGISTRATION (Continued)

Public hearings required, 15-2024  
Public utility securities, when exempt, 15-2013  
Publishers excluded from definition of "investment adviser," 15-2004  
Qualification, registration by  
    contents and filing of statement, 15-2010  
    prospectus, required contents, 15-2010  
    time registration effective, 15-2010  
Register of applications and statements open for inspection, 15-2024  
Reorganization issues, exemption, 15-2014  
Reports to be filed with commissioner after registration of securities, 15-2011  
Review of orders of commissioner, 15-2023  
Revocation of registration, grounds and procedure, 15-2012  
Rules, adoption by commissioner, 15-2024  
"Sale" defined, 15-2004  
Sale of unregistered securities prohibited, 15-2007  
Salesmen  
    association with issuer or broker-dealer required, 15-2006  
    bond required for registration, 15-2006  
    definition, 15-2004  
    fee for registration, 15-2016  
    registration required, procedure, 15-2006  
    service of process on salesmen, 15-2015  
Savings institutions excluded from definition of "investment adviser," 15-2004  
Securities exempt, 15-2013  
"Security" defined, 15-2004  
Service of process on registrant or issuer, 15-2015  
Short-term obligation, exemption, 15-2013  
"State" defined, 15-2004  
Statement for registration, by whom filed, 15-2011  
Stock dividends, exemption, 15-2014  
Subpoena powers of investment commissioner, 15-2019  
Suspension of registration, grounds and procedure, 15-2012  
    federal suspension or stop order, automatic suspension on, 15-2011  
Teachers, exclusion from definition of "investment adviser," 15-2004  
Title of act, 15-2002  
Treasury stock included in definition of "security," 15-2004  
Trust companies excluded from definition of "investment adviser," 15-2004  
Underwriter purchases, exemption, 15-2014  
Uniformity of construction of act, 15-2003  
Unsolicited offers, exemption, 15-2014  
Voting-trust certificates included in definition of "security," 15-2004  
Warrant to purchase security construed as offer, 15-2004  
Withdrawal of registration, registration statement, 15-2011

### SEEDS

Agricultural seeds, labeling, 3-802.2  
Classifications, revision of, 3-821  
Definitions, 3-802.1  
Prohibitions, 3-820  
Vegetable and flower seeds, labeling, 3-802.3

### SENTENCES

See CRIMINAL PROCEDURE, Sentence and judgment  
Appellate review of legal sentences, 95-2501 to 95-2530  
Commutation of prison sentence to commitment to juvenile facilities, 80-2210  
Good time allowance to prison inmates, 80-1905  
Post-conviction hearing, 95-2601 to 95-2608  
Western Interstate Corrections Compact, 95-2308 to 95-2312

### SEPTIC TANKS

Cleaning of septic tanks, 69-5401 to 69-5408—See SANITARY LICENSEES

## INDEX

References are to Title and Section numbers

### SERVICE OF PROCESS

- Affidavit of service, M. R. Civ. P., Rule 4 D(9)
- Attorney general, service upon in tort actions against state, 83-704
- Attorney, service on, M. R. Civ. P., Rule 5(b)
- Continuance to allow opportunity to defend, M. R. Civ. P., Rule 4 D(6)(b)
- Criminal procedure, summons, definition, issuance, form and service, failure to appear, 95-601, 95-612, 95-613
- Delivery of copy, manner of making, M. R. Civ. P., Rule 5(b)
- Fraternal benefit societies, service through commissioner of insurance, 40-5352
- Industrial accident board under occupational disease act, service of process on, 92-1344
- Insurers, service through commissioner of insurance, 40-2818
  - proceedings after service, 40-2819
- Jurisdiction of person acquired by service, M. R. Civ. P., Rule 4 B(2)
- Justices' court, service of summons, 93-6711
- Milk control board, method of serving, 27-429
- Motions, when service required, M. R. Civ. P., Rule 5(a)
- Motion to raise insufficiency, M. R. Civ. P., Rule 12(b)
- Numerous defendants, service on, M. R. Civ. P., Rule 5(c)
- Orders, when service required, M. R. Civ. P., Rule 5(a)
- Personal service outside state, M. R. Civ. P., Rule 4 D(3)
- Personal service within state, M. R. Civ. P., Rule 4 D(2)
- Persons by whom served, M. R. Civ. P., Rule 4 D(1)
- Pleadings, when service required, M. R. Civ. P., Rule 5(a)
- Proof of service, M. R. Civ. P., Rules 4 D(8), 5(f)
  - amendment of proof, M. R. Civ. P., Rule 4 D(7)
- Publication, service by, M. R. Civ. P., Rule 4 D(5)
- Real estate brokers residing outside state, service through real estate commission, 66-1936
- Sanitarians registration council, service on, 69-3409
- Secretary of state, service through, M. R. Civ. P., Rule 4 D(6)
- Securities act registrant or issuer, service on, 15-2015
- Sheriffs and deputies to serve process, M. R. Civ. P., Rule 4 D(1)
- Subpoena, service, M. R. Civ. P., Rule 45(c)
- Third parties, service on, M. R. Civ. P., Rule 14(a)
- Time allowed for proceedings after service by mail, M. R. Civ. P., Rule 6(e)
- Unauthorized insurers, service on
  - attorney's fee, when included in judgment, 40-3408
  - citation of act, 40-3403
  - commissioner as agent for process, 40-3404
  - default judgment, when allowed, 40-3405
  - defense of action, 40-3407
  - exemptions from service of process provisions, 40-3406
  - motion to quash or set aside service, 40-3407
  - procedure for service, 40-3405
  - uniformity of interpretation of act, 40-3403
- Unit ownership property, service with respect to, 67-2338
  - agent to receive service named in declaration, 67-2314
  - change of agent to receive process, 67-2339

### SETOFF

Assignments excluded from Uniform Commercial Code, 87A-9-104

### SEWAGE DISPOSAL

- Classification of waters for industrial use, criteria, 69-4803
- Definition of terms, 69-4802
- Domestic water supply, protection, 69-4901 to 69-4908—See WATER SUPPLY,  
Domestic water supply
- Permit required for sewage disposal system, 69-4806
  - plans and specifications to be filed before permit issued, 69-4807
  - revocation of permit for violations, 69-4807
  - state department functions with respect to permits, 69-4809
- Policy of state, 69-4801
- Privately owned waters, chapter not applicable to, 69-4804

## INDEX

References are to Title and Section numbers

### SEWAGE DISPOSAL (Continued)

- Subdivision plans subject to sanitary restriction, 69-5003
  - definition of "subdivision," 69-5002
  - plat of subdivision not to be filed unless in compliance, 69-5004
  - policy of state, 69-5001
  - rules and standards for enforcement of requirements, 69-5005

### SHERIFFS

- Accident report forms for motorboat or vessel accidents, 69-3512
- Arrest, sheriffs privileged from arrest, when, 95-616
- Deputies, qualifications of, 16-3705
- Fingerprints taken on felony arrest, 80-2003
  - salary withheld on failure to furnish information, 80-2004
- Fish and game laws, enforcement by sheriffs, 26-114
- Identification bureaus, assistance by state bureau in establishing, 80-2006
- Law enforcement teletypewriter communications committee, membership on, 82-3902
- Medical expense for prisoners, reimbursement, 16-2818
- Practice of law by sheriff, restrictions on, 93-902
- Salaries, establishment before election, 25-609
- Service of process by sheriffs, M. R. Civ. P., Rule 4 D(1)
- Summoning of jurors, 93-1509
- Vehicle, purchase or lease with county funds authorized, 16-2724
- Work release program for prisoners, duties, 95-2216

### SHODDY

- Condemnation of mattresses in violation, 69-4706
- Definition of "mattress," 69-4701
- Inspections by health authorities, 69-4705
- Label required on each mattress, 69-4702
- Prohibited acts, 69-4703
  - separate offense for each mattress made or sold, 69-4707
- Rules and standards of state board, 69-4704

### SHOOTING PRESERVES

- See FISH AND GAME, Shooting preserves, 26-1601 to 26-1614

### SIDEWALKS

- Municipal construction without special improvement district, 11-2226

### SIGNATURES

- Facsimile signatures of public officials—See PUBLIC OFFICERS AND EMPLOYEES, Facsimile signatures of public officials

### SLANDER

- Notice to publisher or broadcaster and opportunity to correct, 64-207.1

### SMALLPOX

- Vaccination required for school attendance, 69-4515

### SMALL TRACT FINANCING ACT

- See TRUST INDENTURES, 52-401 to 52-417

### SNOWMOBILES

- See MOTOR VEHICLES, Snowmobiles, 53-1001 to 53-1011

### SOIL AND WATER CONSERVATION

- Citation of act, 76-101
- Corrective methods, declaration of policy, 76-102
- Legislative policy, 76-102
- Project areas, 76-224 to 76-229
- Soil and water conservation districts
  - assessments and funds
    - certification of assessment to county assessor, 76-211



## INDEX

References are to Title and Section numbers

### SOIL AND WATER CONSERVATION (Continued)

#### Soil and water conservation districts (Continued)

##### assessments and funds (Continued)

- collection of tax, application of general law, 76-212
- depository of funds of district, 76-215
- division between counties of amount to be raised by assessment, 76-205
- entry of assessment on assessment roll, 76-211
- estimate by supervisors of amount to be raised by assessment, 76-204
- expenses covered by estimates, 76-206
- general law on levy and collection, application to assessments, 76-212
- investment of funds, 76-221, 76-222
- levy of assessment by county commissioners, 76-209
- liability of officers on official bonds, 76-212
- maximum income from levy, 76-209
- maximum regular assessments, 76-208
- notice of organization of district filed with county clerk, 76-201
  - copies of notice transmitted to county commissioners, 76-202
- payment of district moneys on order by supervisors, 76-217
- "principal county" defined, 76-213
- purpose of expenditures, 76-219
- rate of assessment, computation, 76-210
- receipt and crediting of district funds by treasurer of principal county, 76-216
- regular assessments defined, 76-207
- report by treasurer to supervisors, 76-218
- settlements and payments by county treasurers other than of principal county, 76-214

authorized to borrow money, 76-220

body corporate, district constitutes, 76-108

bonds, issuance authorized, 76-223

chairman, 76-107

change of name, procedure, 76-117

combination of districts, 76-117

creation of districts, 76-105

notice of organization filed with county clerk, 76-201

copies of notice transmitted to county commissioners and assessor, 76-202

definition of terms, 76-103

division of districts, 76-117

employees, 76-107

flood control measures, 76-108

powers, enumeration, 76-108

supervisors, number, 76-107

term of office, 76-107

vacancy among, filling, 76-107

Water resources board, establishment, members, 89-103—See WATER RESOURCES BOARD

### SOLDIERS AND SAILORS

See MILITIA AND MILITARY; VETERANS

### STATE AGENCY FOR SURPLUS PROPERTY

Cost of operation, payment from receipts from sales, 82-3104

Rebate of surplus funds, 82-3104

### STATE AUDITOR

Assignment of claims against state

effect of assignment, 83-904

limitations on assignment, 83-902

notice to auditor, 83-901

rules promulgated by auditor, 83-903

Insurance commissioner ex officio, 40-2701

Investment commissioner ex officio, 15-2001

Salary, 25-501

Warrants, order in which drawn, 79-104

## INDEX

References are to Title and Section numbers

### STATE BOARD OF EQUALIZATION

See TAXATION, State board of equalization

### STATE BOARD OF HEALTH

See DEPARTMENT OF HEALTH, Board of health

### STATE BOARD OF REVIEW

Creation, membership and compensation, 79-2401 to 79-2404

Quorum and vacancies, 79-2407

Records, 79-2405, 79-2406

Reimbursement of general fund for costs of central services, 79-2409 to 79-2415

### STATE CAPITOL

Budget requests for maintenance, repair, replacement, renewal and additions to state buildings, 82-3309

#### Building improvement and repair

bonds, indentures and notes, issuance authorized, 78-737

registration of instruments, 78-742

sale of instruments, 78-742

terms of instruments, 78-741

borrowing power of board of examiners, 78-737

maximum amount, 78-740

contracts for work authorized, 78-739

employment of architects and engineers authorized, 78-738

legislative areas, consultation with legislative council, 78-746

repayment of obligations, funds available for, 78-743

budget act inapplicable to appropriations, 78-745

sinking fund, deposit of moneys in, 78-744

Building program, scheduling to minimize effects of weather on construction and work opportunities, 78-910

Controller and department of administration to oversee property in capitol area, 82-3309, 82-3310

Custodian, office abolished, 82-3322

Emergency temporary seat of government in event of enemy attack, designation, method, 82-1310

Insurance proceeds from damaged state buildings, deposit and use, 78-1101

#### Land grants for capitol building

dedication of funds accumulated, 78-503

deposit of revenue in federal and private revenue fund, 78-501

income dedicated to repayment of improvement and repair bonds, indentures and notes, 78-743

#### Long-range building program financing

bonds authorized, form, contents and terms, 79-2202

amount of authorization, 79-2205

definition of terms, 79-2201

fiscal agent to assist state board of examiners, 79-2202

referendum on tobacco tax, 79-2203

refunding bonds authorized, 79-2203

sinking fund account, sources and use of funds, 79-2203

taxes pledged to sinking fund, 79-2203

waiver of security provisions by bondholders, 79-2204

#### Reconstruction and improvement

acquisition of land, 78-1201, 78-1203

architect and engineers, employment authorized, 78-1202

bonds, indentures and notes, 78-1205 to 78-1208

borrowing power, 78-1201, 78-1204

budget act inapplicable, 78-1209

#### Unemployment compensation commission building

architect, employment, 78-1002

bids for construction, 78-1003

bond issue authorized, 78-1001

bonds

amount authorized, 78-1004

interest, 78-1005

interest and sinking fund, 78-1008

## INDEX

References are to Title and Section numbers

### STATE CAPITOL (Continued)

- Unemployment compensation commission building (Continued)
  - bonds (Continue)
    - principal and interest, payment, 78-1007
    - provisions, 78-1005
    - purchase by state board of land commissioners, 78-1009
    - registration, 78-1006
    - sale, 78-1006
    - term, 78-1005
  - budget act inapplicable, 78-1010
  - contractor's bond, 78-1003
  - location, 78-1001
- Veterans' and pioneers' memorial, purpose and use, 78-202
- historical society and library, fittings and furnishings, 44-526
- moneys available for expenditure in, 78-302
- War, moving seat of state government, V, 46; 82-3807

### STATE CONTROLLER

- Appointment, 82-106
- Building program of state, scheduling to minimize effects of weather on construction and work opportunities, 78-910
- Claims against the state, processing, 82-109.1 to 82-109.4—See PUBLIC FINANCE, State finance
- Department of administration, 82-3301 to 82-3322—See DEPARTMENT OF ADMINISTRATION
- Duties, 82-109
  - ex-officio budget director, 79-1012
- Examination into audits and reports, 82-110
- Expenditure control, 82-109
- Oath of office, 82-107
- Qualifications, 82-106
- Reports to governor and legislature, 82-3305
- State board of review, controller as member and chairman, 79-2402, 79-2404
- State printing, approval of claim for, 82-1910
- Surplus property of state, power to dispose of, 82-1914
- Treasury fund accounts, creation and abolition, 79-413
  - records of funds and accounts maintained by controller, 79-414
- Uniform accounting system, 82-110

### STATE DEPARTMENTS AND BOARDS

- Facsimile seal, use authorized, 59-1303
- Interlocal co-operation, 16-4901 to 16-4904—See INTERLOCAL CO-OPERATION
- Open meetings of public agencies
  - legislative intent, 82-3401
  - meetings to be open, exceptions, 82-3402
  - minutes to be available for public inspection, 82-3403
- Service of process on state boards or agencies, M. R. Civ. P., Rule 4 D(2)(h)

### STATE ENGINEER

- Funds and appropriations transferred to water conservation board, 89-103.6
- Powers transferred to water conservation board, 89-103.4
- Records and property transferred to water conservation board, 89-103.5

### STATE ENTOMOLOGIST

- Appointment and qualifications, 82-804.1
- Biennial report required, contents, 82-804.3
- Duties, 82-804.2
- Expenses, appropriations for, payment, 82-804.4

### STATE EXAMINER

- Audit of extracurricular funds of schools, 75-1632
- Banks, investment companies and trust companies, fee for examination, 5-908
- Biennial report to governor, 82-1002
- Building and loan associations, fee for examination, 5-909



## INDEX

References are to Title and Section numbers

### STATE EXAMINER (Continued)

- Cities and towns, examination of, fee, 4-905, 82-1008
- Claims against state, assignment of, duties of state auditor, 83-901 to 83-904
- Counties, fee for examination, 5-904
- County free high schools, fee for examination, 5-906
- Irrigation districts
  - fee for examination, 5-907
  - joint operations, examination by state examiner, 89-1215
- Salary and reimbursement of expenses, 82-1011
- School districts, examination of, 82-1008
- Special examinations, fee, 5-910
- Vehicle equipment safety commission accounts, inspection by examiner, 32-21-174

### STATE INSTITUTIONS

- Advisory committees for institutions, appointment by warden or superintendent, 80-1406
- Agricultural programs for treatment or rehabilitation, 80-1405
- Boulder river school and hospital, 80-2301 to 80-2312—See BOULDER RIVER

#### SCHOOL AND HOSPITAL

- Budget requests, review and approval by board, 80-1405
- Center for the aged, 80-2501 to 80-2503—See CENTER FOR THE AGED
- Children's center, 80-2101 to 80-2107—See CHILDREN'S CENTER
- Cost of support of residents
  - action for collection of costs, 80-1604
  - definition of terms, 80-1602
  - deposit of receipts in state treasury, 80-1603
  - financial ability of resident or responsible person, investigation, 80-1603
  - institution subject to per diem charge, enumeration, 80-1601
  - investigation to determine per diem, 80-1603
  - lien of judgment or claim on property of responsible person, 80-1604
  - monthly assessment of charges against resident or responsible person, 80-1603
  - rate of per diem, annual recomputation, 80-1603

#### Department of institutions

- board of institutions, qualifications and appointment, 80-1407
  - compensation and reimbursement of board members, 80-1408
  - function of board in general, 80-1409
  - meetings of board, 80-1409
  - officers of board, 80-1408
  - quorum of board, 80-1409
  - report to governor, 80-1405
- council of superintendents, 80-1406
- definition of terms, 80-1402
- director, qualifications, appointment and duties, 80-1404
- division of mental hygiene
  - powers and duties of division, 80-2403
  - state hospital in division, 80-2401
  - supervisor of division, 80-2402
- division of mental retardation, 80-2302
- employees of department, appointment, 80-1404
- institutions subject to control by department enumerated, 80-1403
- juvenile correctional facilities, establishment, control and management, 80-1410 to 80-1412—See Juvenile facilities, below
- powers and duties of board in general, 80-1405
- purpose of department, 80-1401
- reports of board to governor and legislative assembly, 80-1405
- superintendents and wardens, appointment by board, 80-1405
  - duties of warden and superintendents, 80-1406

#### Employment of personnel at institutions, 80-1406

#### Galen state hospital, 80-1701 to 80-1704—See GALEN STATE HOSPITAL

#### Industrial activities permitted, 80-1501

- contract labor arrangements prohibited, 80-1503
- exchange of products with other states prohibited, 80-1503
- payments to prison inmates permitted, 80-1501
- public sale of products prohibited, 80-1503
- receipts from sale of goods, disposition, 80-1502

## INDEX

References are to Title and Section numbers

### STATE INSTITUTIONS (Continued)

#### Juvenile facilities

- absentee from facilities, apprehension and return, 80-2211
- penalty for aiding residents to leave facility, 80-2212
- aftercare division and agreements, 80-1414 to 80-1416
- age of child for commitment, 80-2204
- control and management of correctional centers, 80-1411
- curriculum of instruction, standards and subjects included, 80-2203
- establishment by department, 80-1410
- expense of commitment and transportation, 80-2206
- Galen State Hospital, juvenile reception and evaluation center, 80-1704
- industrial activities permitted, 80-1501 to 80-1503—See Industrial activities permitted, above
- institutions in department, 80-1403
- medical examination before commitment, 80-2205
- physical education building at Pine Hills School, construction and retirement of bonds, 80-2207
- prison sentence, commutation to commitment to department of institutions, 80-2210
- records and reports to accompany child committed, 80-2205
- special programs, 80-1411
- superintendents to manage facilities, 80-2202
- support and maintenance costs at Pine Hills School, payment by county or federal government, 80-2207
- transfer of child from children's center, 80-2105
- transfer to other facilities or institutions, 80-2209
- transportation to school, 80-2206
- university aid to residents, 80-2213
- youth forest camp, work program, 80-1412
- Lands for use of institutions, lease or purchase, 80-1405
- Legislative consent required to move, discontinue or abandon institution, 80-1403
- Legislative proposals for long-range programs, 80-1405
- Mental health centers in Miles City and Glasgow, staffing, supervision by board of institutions, 80-2410, 80-2411
- Mental health programs controlled through division of mental hygiene, 80-2405—See INSANE AND MENTALLY ILL, Division of mental hygiene
- Mental retardation center at Glendive, 80-2310 to 80-2312
- Prison, 80-1901 to 80-1908—See PRISONS AND PRISONERS, State prison
- Pulmonary disease hospital, 80-1701 to 80-1704—See GALEN STATE HOSPITAL
- Research programs, participation by governing boards of institutions, 80-1413
- Rules and regulations for government of institutions, 80-1405
- Schools attended by children of institutional employees, state payments to district, 75-3624
- State hospital, 80-2401 to 80-2411—See WARM SPRINGS STATE HOSPITAL
- State training school and hospital, 80-2301 to 80-2312—See BOULDER RIVER SCHOOL AND HOSPITAL
- Superintendents and warden, appointment and discharge, 80-1404
- powers and duties in general, 80-1406
- University facilities, utilization by institutions, 80-1405
- Veterans' home, 80-1801 to 80-1804—See VETERANS, Home for veterans
- Warm Springs state hospital, 80-2401 to 80-2411—See WARM SPRINGS STATE HOSPITAL

### STATE LANDS

- Brush disposal on state lands, 81-1601
- Commissioner of state lands and investments, compensation, 81-209
- Definition of terms relating to, 81-102
- Development of resources, 81-2401 to 81-2408—See Resource development, below
- Equalization payments to counties
  - claim for payments filed by commissioner, 81-1118
  - computation of payments to counties, 81-1116
  - county distribution of payments, 81-1120
  - form for computing payment completed by county assessor, 81-1117
  - examination by commissioner, 81-1118
  - school district use of payments, 81-1121
  - statement transmitted to county assessors, 81-1115
  - warrant for payments to counties issued by controller, 81-1119

## INDEX

References are to Title and Section numbers

### STATE LANDS (Continued)

- Federal installations and facilities donated, acceptance by board of examiners, 81-1101.1
- Fees chargeable by commissioner of state lands and investments, 81-1113
- Forests
  - conservation appropriations and allotments, receipt by state treasurer, 81-1410
  - sale of timber from state forests, supervision and scaling by state forester, 81-1408
- Lease for coal mining, maximum term, 81-502
- Leases of agricultural and grazing lands and city and town lots
  - agricultural use of land leased for grazing, 81-414
  - animal-unit-month formula for rental on grazing land, 81-433
  - appraisal of lands, frequency, 81-401
  - bids and applications to be in writing and sealed, 81-405
  - crop share rental basis for leasing of agricultural lands, 81-402
  - deposit required with bid, retention, return or forfeiture, 81-436
  - duration of leases, 81-407
  - improvements, sale by lessee to successor, arbitration, 81-406
  - inspection of land to determine best possible use, 81-413
  - notice of expiration or cancellation of lease, 81-407
  - policy of state as to leasing of lands, 81-401
  - qualifications of lessee, 81-407
  - renewal of lease, preference of lessee, 81-405
  - rent to be charged in lease, 81-402
  - sale of land, right reserved by state in lease, 81-402
  - withdrawal of land from leasing, 81-405
- Leases of mineral lands, authority, 81-701
- Lease with option to purchase, taxability of land, 84-204
  - valuation and assessment of land, 84-205
- Multiple-use management concept, 81-103
- Oil and gas leases
  - authority for lease, 81-1701
  - payment of royalties to state, 81-1705
  - reports of lessees to commissioner, 81-1705
  - royalties payable under lease, 81-1704
  - rules and regulations, adoption and publication, 81-1707
  - surface rights reserved, 81-1701
  - waste, provisions for prevention, 81-1701
- Resource development
  - account in earmarked revenue fund, creation, purposes, 81-2403
    - deduction from income, maximum percentage, crediting deductions, 81-2405, 81-2406
    - investment of moneys in account, 81-2407
    - restriction on use of funds, 81-2404
  - definition of terms, 81-2402
  - policy of state, 81-2401
  - rules and regulations adopted by board, 81-2408
- Sale of lands
  - amounts purchased by one person, 81-908
  - forfeiture for failure to pay for lands purchased, 81-912
  - improvements by lessee, settlement for, 81-919
  - mineral reservations required, 81-902
  - notice of sale, publication, 81-910
  - payment terms, 81-915
  - preference to lessee, 81-912
  - price for which sold, 81-912
  - proceeds of sale, funds to which credited, 81-912
  - public auction, where held, 81-909
  - qualifications of purchasers, 81-908
  - shoreline lands reserved from sale, 81-903
  - taxability of property held under contract of sale, 84-204
    - valuation and assessment of property, 84-205
- Timber sales from state lands in general, prices and terms, 81-1601



## INDEX

References are to Title and Section numbers

### STATE OF MONTANA

- Action authorized for use or benefit of another, M. R. Civ. P., Rule 17(a)
- Claims against state, assignment of, duties of state auditor, 83-901 to 83-904
- Contract actions against state, law not modified by Uniform Commercial Code, 87A-10-103
- Criminal jurisdiction, 95-304
- Employees
  - group insurance for employees authorized, 11-1024
  - minimum hours of salaried personnel, 59-510(1)
- Flathead Indian country, criminal jurisdiction
  - county commissioner's consent required for assumption of jurisdiction, 83-802
  - customs and culture of Indians to be preserved, 83-805
  - date of assumption of jurisdiction, 83-803
  - obligation of state to assume jurisdiction, 83-801
  - proclamation of governor assuming jurisdiction, 83-802
  - resolution of tribes requesting state jurisdiction, 83-802
  - rights, privileges, and immunities of Indians preserved, 83-804
  - withdrawal of tribal consent to state jurisdiction, 83-806
- Service of process on state or state agencies, M. R. Civ. P., Rule 4 D(2) (h)
- Territorial jurisdiction
  - Blackfeet highway, reassumption of jurisdiction, 83-104.1
  - migratory bird reservations, consent to acquisition by United States, 83-113
- Tort actions against
  - act not to affect actions arising under workmen's compensation act, 83-707
  - appeals
    - bond not to be required of state, 83-703
    - right of, 83-703
  - bonds not to be required of state, 83-703
  - compromise and settlement, power, 83-704
  - immunity for claims in excess of collectible insurance, 83-706
  - insurance, effect, 83-706
  - judgment as obligation of state, 83-705
  - jurisdiction of district courts, 83-701
  - limitation of liability of state to extent of insurance coverage, 83-701
  - procedure and practice, 83-702
  - service of process upon attorney general, 83-704
  - state not to be liable for interest prior to judgment nor for punitive damages, 83-701
- War
  - post-attack resource management, 77-1501 to 77-1508—See WAR, Resource management
  - post-enemy-attack, continuity in government, V, 46; 82-3801 to 82-3809—See WAR, Continuity in government

### STATE ORPHANS' HOME

See CHILDREN'S CENTER, 80-2101 to 80-2107

### STATE-OWNED MOTOR VEHICLES

- Pool created, 53-511
  - highway commission to operate and maintain, 53-511, 53-512
  - rules and regulations, 53-513

### STATE PLANNING BOARD

Industrial development projects, assistance in, 11-4110

### STATE PUBLICATIONS DISTRIBUTION CENTER

See LIBRARIES, State publications distribution center, 44-132 to 44-139

### STATE PURCHASING DEPARTMENT AND AGENT

- Contractors—See PUBLIC CONTRACTORS
  - licenses, 84-3501 et seq.
  - preference to Montana bidders, 82-1924 to 82-1926
- Duties of purchasing agent in general, 82-1902

## INDEX

References are to Title and Section numbers

### STATE PURCHASING DEPARTMENT AND AGENT (Continued)

Emergency purchases by departments, 82-1919  
Estimates by departments, approval and authority to purchase, 82-1904  
Fresh fruits and vegetables, purchase, 82-1919  
Institutions and departments, exclusive power to purchase for, 82-1906  
Legislative assembly, supplies and services for, 82-1909  
Payment for purchases, 82-1905  
Printing and publications, 82-1916  
Requisitions by departments, approval and authority to purchase, 82-1904  
Warehouses, lease, construction and maintenance, 82-1903

### STATE RECORDS

Committee abolished, 82-3322  
Department of administration management program, 82-3311  
    definition of "records," 82-3312  
    destruction of records, procedure for authorization, 82-3313  
    library and museum material excluded from program, 82-3312  
Microfilm division of historical society, creation and functions, 82-3205  
Preservation of noncurrent records of permanent value, 82-3207  
    state archives and archivist, 82-3208, 82-3209  
Tax records, destruction authorized by board of equalization, 84-724

### STATE TRAINING SCHOOL AND HOSPITAL

See BOULDER RIVER SCHOOL AND HOSPITAL, 80-2301 to 80-2312

### STATE TREASURER

Deposit of funds with treasurer by state agencies, 79-306  
Duties in general, 79-201  
Funds in treasury  
    accounts within funds, creation and abolition by controller, 79-413  
    clearing and suspense accounts authorized, 79-412  
    disbursements from funds, appropriations, general laws or contracts authorizing, 79-415  
    enumeration and description of funds, 79-410  
    future laws or contracts requiring segregation of moneys, interpretation, 79-411  
    investment funds authorized under unified plan, 79-412  
    previous definitions of funds superseded, 79-411  
    purpose of act, 79-409  
    records of funds and accounts maintained by treasurer and controller, 79-414  
    short title of act, 79-409  
    special funds abolished and transferred to general fund, 79-416  
    state payroll revolving account, 25-507.8  
Insurance department examinations revolving fund, establishment, 40-2717  
Investment department examinations revolving fund, establishment and use, 15-2024  
Investment funds, separate accounts maintained, 79-1208  
Salary, 25-501  
Sale of personal property in escheated estates, disposition of proceeds, 79-813  
Treasurer of all state agencies, 79-306  
Unclaimed bank funds, deposit in general fund, 5-1117  
Warrants required for payment of all money, 79-202

### STATE WATER CONSERVATION BOARD

Name changed to Montana Water Resources Board, 89-103—See WATER RESOURCES BOARD

### STATUTE OF FRAUDS

Affirmative defense, M. R. Civ. P., Rule 8(c)  
Agreement not to be performed within year, 13-606, 93-1401-7  
Answer for default of another, promise to, 13-606, 93-1401-7  
Investment securities, contract for sale, 87A-8-319  
Marriage as consideration for agreement, 13-606, 93-1401-7  
Personal property other than goods and securities, contract for sale, 87A-1-206  
Real property agency contract, 13-606  
Real property sale or lease, 13-606, 93-1401-7  
Sale of goods, 87A-2-201

## INDEX

References are to Title and Section numbers

### STERILIZATION LAW, VOLUNTARY

Applicability, 69-6401  
Board of eugenics, 69-6402  
Liability, 69-6405  
Showing prerequisite to approval, 69-6403, 69-6404

### STOLEN PROPERTY

Vehicles used in transporting stolen livestock, forfeiture to state, 94-35-204  
Venue of prosecution, 95-408

### STREET RAILROADS

Financing statements of railroads, contents and place of filing, 87A-9-302.2  
definition of terms, 87A-9-302.1  
Uniform Commercial Code, application, 87A-9-302.3

### STREETS

Sidewalks, curbs and gutters, construction without special improvement district, 11-2226  
Special fuel dealers and users license tax, disposition of funds, 84-1840

### STRIP COAL MINES

See MINES AND MINING, Strip coal mining  
License tax provisions, 84-1302 to 84-1304  
Reclamation of lands, 50-1001 to 50-1004

### SUBDIVISIONS

Sanitary restrictions as to water supply and sewage disposal, 69-5003  
definition of "subdivision," 69-5002  
plat not accepted unless in compliance, 69-5004  
policy of state, 69-5001  
rules and standards for enforcement of requirements, 69-5005

### SUBPOENAS

Coroner's inquest, subpoena of witnesses, compelling attendance, 95-805, 95-806  
Criminal procedure, issuance, requirements and form, 95-1801  
discovery, subpoena as discovery device, 95-1803  
District court subpoena requiring attendance or production of evidence, M. R. Civ. P., Rule 45(a), (b)  
Grand jury, issuance of subpoenas, 95-1407

### SUMMONS

Amendment of summons, when permitted, M. R. Civ. P., Rule 4 D(7)  
Criminal cases, definition, issuance, form and service, failure to appear, 95-601, 95-612, 95-613  
Dismissal for failure to issue or serve summons, M. R. Civ. P., Rule 41(e)  
Form and signature of summons, M. R. Civ. P., Rule 4 C(2)  
Forms suggested by rules, M. R. Civ. P., Appendix of Forms, Forms 1, 18  
Issuance by clerk, M. R. Civ. P., Rule 4 C(1)  
Justices' courts, service of summons, 93-6711  
Service with complaint, M. R. Civ. P., Rule 4 D(2)

### SUPERINTENDENT OF PUBLIC INSTRUCTION

Department of public instruction created, 75-1303  
Salary, 25-501

### SUPPORT

Reciprocal enforcement  
citation of act, 93-2601-82  
civil enforcement  
appeals in the public interest to be taken by attorney general, 93-2601-74  
arrest of obligor to prevent fleeing jurisdiction, 93-2601-56  
bond or cash deposit required by responding state, 93-2601-66  
communications between husband and wife not privileged, 93-2601-62  
conflict of laws determined by state in which obligor present, 93-2601-47



## INDEX

References are to Title and Section numbers

### SUPPORT (Continued)

#### Reciprocal enforcement (Continued)

##### civil enforcement (Continued)

- contempt proceedings by responding court, 93-2601-66
- continuance, when granted to permit adducing of evidence, 93-2601-60
- cost and fees, 93-2601-55
- counties within state, application of procedure between, 93-2601-73
- credit of payment under responding court order against other support orders, 93-2601-71
- diligent prosecution required in responding state, 93-2601-58
- enforcement of duties of support, proceedings for, 93-2601-49
- evidence, rules governing, 93-2601-63
- immunity of obligor from criminal prosecution based on required answers, 93-2601-61
- initiating court, duty of, 93-2601-54
- jurisdiction of parties restricted to support proceedings, 93-2601-72
- minor obligee, legal custodian may file petition in behalf of, 93-2601-53
- officials to represent obligee, 93-2601-52
- order of support by responding court, 93-2601-64
  - transmission of order to initiating court, 93-2601-65
  - transmission of order to other counties in state, 93-2601-64
- paternity, adjudication of, 93-2601-67
- pending actions do not stay support proceedings, 93-2601-70
- periodic payments required by responding court, 93-2601-66
- petition for support, contents, filing and venue, 93-2601-51
- receipt and disbursement of payments by initiating court, 93-2601-69
- remedies of state or political subdivision furnishing support, 93-2601-48
- state information agency, duties of, 93-2601-57
- statement of payments, transmittal to initiating court, 93-2601-68
- support pendente lite, 93-2601-70
- tracing of obligor and property, duties of prosecuting attorney in responding state, 93-2601-59
- transmission of payments to initiating court, 93-2601-68

##### criminal enforcement

- interstate rendition, 93-2601-45
  - conditions of interstate rendition, 93-2601-46

##### definitions, 93-2601-42

##### presence of obligee in state not required for duty, 93-2601-6

##### purposes of act, 93-2601-41

##### registration of foreign support orders

- additional remedies, 93-2601-75
- clerk to maintain registry of orders, 93-2601-77
- enforcement of registered foreign order, 93-2601-80
- filing necessary to register, 93-2601-79
- notice of registration to obligor, 93-2601-79
- prosecuting attorney to represent obligee, 93-2601-78
- registered foreign order treated like order of state, 93-2601-80
- registration by obligee authorized, 93-2601-76

##### uniformity of interpretation of acts, 93-2601-81

### SUPREME COURT

#### Appointment of commission to prepare rules of civil procedure for adoption, 93-222

#### Briefs filed in supreme court

- amicus curiae briefs, when permitted, M. R. App. Civ. P., Rule 24
- appellant's brief, contents and arrangement, M. R. App. Civ. P., Rule 23(a)
- appendices to briefs, when filed, M. R. App. Civ. P., Rule 25(a)
  - arrangement of appendix, M. R. App. Civ. P., Rule 25(c)
  - contents of appendix, M. R. App. Civ. P., Rule 25(b)
- costs allowed for briefs, M. R. App. Civ. P., Rule 23(g)
- cross-appeals, briefs in cases involving, M. R. App. Civ. P., Rule 23(h)
- dismissal of appeal on failure to file brief, M. R. App. Civ. P., Rule 26(c)
- exhibits, reproduction in separate volume, M. R. App. Civ. P., Rule 25(d)
- length of briefs, M. R. App. Civ. P., Rule 23(g)
- number of copies filed and served, M. R. App. Civ. P., Rule 26(b)

## INDEX

References are to Title and Section numbers

### SUPREME COURT (Continued)

#### Briefs filed in supreme court (Continued)

- parties, references to in briefs, M. R. App. Civ. P., Rule 23(d)
- record, references to in briefs, M. R. App. Civ. P., Rule 23(e)
- reply brief, contents, M. R. App. Civ. P., Rule 23(c)
- respondent's brief, contents, M. R. App. Civ. P., Rule 23(b)
- statutes, rules and regulations, reproduction in briefs, M. R. App. Civ. P., Rule 23(f)
- time for filing briefs, M. R. App. Civ. P., Rule 26(a)
- title of case, statement on cover and first page, M. R. App. Civ. P., Rule 27(c)
- typewritten briefs, format, M. R. App. Civ. P., Rule 27(b)
- typographical form of briefs, M. R. App. Civ. P., Rule 27(a)

#### Building, construction of

- architects and engineers, employment authorized, 78-1202
- bonds, indentures and notes, 78-1205 to 78-1208
- borrowing authorized, 78-1203, 78-1204
- budget act inapplicable, 78-1209

#### Calendar, placement of causes on, M. R. App. Civ. P., Rule 39(a)

- advancement of causes having precedence, M. R. App. Civ. P., Rule 39(c)
- setting causes for argument, M. R. App. Civ. P., Rule 39(b)

#### Commissions of justices and clerk, recording, M. R. App. Civ. P., Rule 19(a)

#### Criminal law study commission, control over, 94-1001-1 to 94-1001-11—See CRIMINAL LAW STUDY

#### Entry and notice of judgments and orders, M. R. App. Civ. P., Rule 30(a)

#### Fees chargeable by clerk, 82-503

#### Filing of papers with supreme court, manner of accomplishment, M. R. App. Civ. P., Rule 20(a)

#### Injunction granted by supreme court on ex parte proceedings, M. R. App. Civ. P., Rule 40

#### Minutes of court, approval and attestation, M. R. App. Civ. P., Rule 19(b)

#### Motions in supreme court, contents and manner of filing, M. R. App. Civ. P., Rule 22

#### Oaths of justices and clerk, recording, M. R. App. Civ. P., Rule 19(a)

#### Oral argument before supreme court

- agreement of parties to dispense with argument, M. R. App. Civ. P., Rule 29(f)
- consolidation of cross and separate appeals for argument, M. R. App. Civ. P., Rule 29(d)
- exhibits, use during argument, M. R. App. Civ. P., Rule 29(g)
- failure of counsel to appear for argument, M. R. App. Civ. P., Rule 29(e)
- notice of time and place of argument, M. R. App. Civ. P., Rule 29(a)
- order and content of argument, M. R. App. Civ. P., Rule 29(c)
- postponement of argument, request for, M. R. App. Civ. P., Rule 29(a)
- time allowed for argument, M. R. App. Civ. P., Rule 29(b)

#### Original proceedings in supreme court

- application for writ or order, contents, M. R. App. Civ. P., Rule 17(d)
- presentation of application to clerk, M. R. App. Civ. P., Rule 17(c)
- time allowed for presentation of application, Rule 17(e)
- briefs, contents and filing, M. R. App. Civ. P., Rule 17(g)
- circumstances justifying institution of original proceedings, M. R. App. Civ. P., Rule 17(a)
- constitutional questions raised, notice to attorney general, M. R. App. Civ. P., Rule 38
- costs taxed by court, M. R. App. Civ. P., Rule 33(d)
  - briefs and appendices, restriction on costs, M. R. App. Civ. P., Rule 33(b)
  - notation of costs by clerk, M. R. App. Civ. P., Rule 33(f)
  - unnecessary costs not recovered, M. R. App. Civ. P., Rule 33(e)
- decision, notice to parties, M. R. App. Civ. P., Rule 35(a)
- hearing on application, M. R. App. Civ. P., Rule 17(h)
- parties to proceedings, designation, M. R. App. Civ. P., Rule 1
  - public officer as party to proceeding, M. R. App. Civ. P., Rule 37(c)
  - substitution of parties for death or other cause, M. R. App. Civ. P., Rule 37
- preliminary action by supreme court on application, M. R. App. Civ. P., Rule 17(f)
- rehearing, grounds and time for filing of petition, M. R. App. Civ. P., Rule 34
- Rules of Appellate Civil Procedure
  - application of rules and statutes, M. R. Civ. P., Rule 72
  - citation of rules, M. R. App. Civ. P., Rule 43(a)
  - effective date of rules, M. R. App. Civ. P., Rule 43(b)

## INDEX

References are to Title and Section numbers

### **SUPREME COURT (Continued)**

- Original proceedings in supreme court (Continued)
  - Rules of Appellate Civil Procedure (Continued)
    - exemption of statutory proceedings from rules, M. R. App. Civ. P., Rule 42(a)
    - pending proceedings, application of rules to, M. R. App. Civ. P., Rule 43(b)
    - scope of rules, M. R. App. Civ. P., Rule 1
    - statutes superseded by rules, M. R. App. Civ. P., Rules 42(c), 43(c)
    - suspension of rules by supreme court, M. R. App. Civ. P., Rule 3
  - statutory provisions, application to proceedings, M. R. Civ. P., Rule 72, M. R. App. Civ. P., Rule 17(b)
  - voluntary dismissal of proceeding, M. R. App. Civ. P., Rule 36
- Practice of law by justices, restrictions on, 93-902
- Prehearing conference to simplify issues before court, M. R. App. Civ. P., Rule 28
- Removal of papers from clerk's office, restrictions, M. R. App. Civ. P., Rule 39(d)
- Retired justice, call for duty, 93-1130
- Retirement system for justices, 93-1107 to 93-1132—See JUDGES, Retirement system
- Review division for review of certain criminal sentences, 95-2501
- Rules of civil procedure, power to prescribe, 93-2801-1 to 93-2801-8—See CIVIL PROCEDURE
- Rules of criminal procedure, adoption of, 95-2801 to 95-2806—See CRIMINAL PROCEDURE, Supreme court rules
- Salary of chief justice and justices, 25-501
- Service of papers filed in supreme court required on all parties, M. R. App. Civ. P., Rule 20(b)
  - personal service or mail, M. R. App. Civ. P., Rule 20(c)
  - proof of service, M. R. App. Civ. P., Rule 20(d)
- Time allowed for proceedings in supreme court
  - computation of days, M. R. App. Civ. P., Rule 21(a)
  - extension of time allowed by court, M. R. App. Civ. P., Rule 21(b)
  - mail service, additional time allowed after, M. R. App. Civ. P., Rule 21(c)
- Trust and legacy fund investments, supervision, 79-1206
- United States Supreme Court, action on receipt of mandate from, M. R. App. Civ. P. Rule 35(c)

### **SURPLUS PROPERTY**

See STATE AGENCY FOR SURPLUS PROPERTY

### **SWIMMING POOLS AND BATHING AREAS**

- Definition of terms, 69-5502
- Enforcement powers of state and local officers, 69-5505
- Inspections by state and local health officials, 69-5505
  - publication of reports of inspections, 69-5506
- Nuisance, violation of chapter or rules as, 69-5510
  - abatement of nuisance, 69-5505
- Penalty for violations, 69-5511
- Plans for construction submitted to state department, 69-5507
- Policy of state, 69-5501
- Records and data furnished to state department, 69-5508
- Rules for sanitation adopted by state board, 69-5503
- Standards for sanitation and safety, 69-5509
- Supervision of sanitation by state board, 69-5504

### **SYPHILIS**

See VENEREAL DISEASE, 69-4601 to 69-4617

## **T**

### **TAXATION**

- Air pollution equipment and facilities, classification for tax purposes, 69-3923
- Assessment of property for taxation
  - industrial development projects, 11-4108
  - irrigation and drainage facilities, 84-206
  - livestock in feeding pens or enclosures, 84-406
  - motor vehicles, 53-114, 84-406, 84-6008



## INDEX

References are to Title and Section numbers

### TAXATION (Continued)

#### Assessment of property for taxation (Continued)

time of assessment, 84-406

unit ownership property, assessment against unit owners, 67-2340

rules and regulations for appraisal and assessment, 67-2342

#### Banks

corporation license tax, state banks exempt until national banks taxable, 84-1501.4

offices in more than one county, assessment and apportionment of tax, 84-4606

#### Barrelage tax on beer, 4-317

Beer tax proceeds, disposition, 84-1901

Bounty fund levy against livestock, 46-1914

Boxing, sparring and wrestling exhibitions, tax on gross receipts, 82-308

Business trusts, 15-2507

Cattle protective district special levy, 46-2804

Change in assessment of property assessed to any particular person, notice of intention, 84-710

Changes in assessed valuation of classes of property, notice of contemplated action, 84-710

#### Cigarette tax

amount of levy, 84-5606

appeals, application of rules of civil procedure to, M. R. Civ. P., Rule 81(a), Table A

board of equalization

appeal, 84-5606.25

assistants, employment of, 84-5606.30

hearings, 84-5606.23, 84-5606.24

investigative powers, 84-5606.23

powers and duties, 84-5606.26

rule-making power, 84-5606.27

suit by board for unpaid tax and costs, treble damages, 84-5606.29

building program, referendum on pledge of proceeds to, 79-2203

deductibility on federal income tax, 84-5606.1

definitions, 84-5606.2

direct tax on retail consumer, 84-5606

disposition of taxes, 84-5606.30

insignia, affixing to package, 84-5606

marking of imported packages required, 84-5606.13

resale of insignia prohibited, 84-5606.14

tax meter machines, 84-5606.13

tax meters, records concerning, 84-5606.17

unused meter settings, 84-5606.14

insignia, purchase of, 84-5606.12

insignia requirements, noncompliance a misdemeanor, 84-5606.18

insignia, time for payment for and affixing of, 84-5606.15

bond, 84-5606.15

interstate carrier's reports, 84-5606.20

misdemeanor penalties, 84-5606.31

nuisance, 84-5606.19

penalty for unpaid tax, 84-5606.16

seized cigarettes, inventory of, 84-5606.22

tax meter machines, 84-5606.13

unlawful transportation of cigarettes, 84-5606.21

vending machines, 84-5606.4

War Veterans' Compensation Fund abolished, 84-5606.30

wholesaler's and retailer's licenses, 84-5606.3

board of equalization

funds for, 84-5606.6

display, 84-5606.5

fees, 84-5606.5

disposition, 84-5606.6

probation against unlicensed activities, 84-5606.8, 84-5606.9

renewal, 84-5606.5

revocation or suspension, 84-5606.8

violations, 84-5606.8, 84-5606.9

## INDEX

References are to Title and Section numbers

### TAXATION (Continued)

#### Cities and towns

- all-purpose exclusive levies, 84-4701.1 to 84-4701.6
- levy for fund for payment of police officers on reserve list, 11-1823
- tax levy for fire department relief association disability and pension fund, 11-1912

#### Classification of property for taxation, 84-301

- percentage basis for imposition of taxes, 84-302

#### Coal mines license tax, 84-1302 to 84-1304

- credit for reclamation of strip mining land, 50-1004

#### Collection of personal property tax by county treasurer, 84-4202

#### Contractors, license tax, 84-3501 et seq.—See PUBLIC CONTRACTORS, Licenses

#### Corporate dissolution, tax clearance certificate, 15-2285

#### Corporation license tax

- action by attorney general for collection of tax, 84-1505

#### amount, 84-1501

#### assessment of tax, 84-1505

- demand for immediate payment, 84-1505.2

#### banks, state banks exempt until national banks taxable, 84-1501.4

#### building program, portion of tax proceeds pledged to, 79-2203

#### clearance certificate available to taxpayer, 84-733

- disposition of fees collected, 84-734

- returns to which act applies, 84-735

#### "corporation" defined, 84-1501

#### deductions allowable in computing income, 84-1502

#### deficiency assessments

- notice of assessment, mailing to taxpayer, 84-1508.1

- protest of deficiency, procedure on, 84-1508.1

- time within which assessment must be made, 84-1508.2

#### disclosure of necessary facts, state board requiring, 84-1508

#### dissolution of corporation, liability for final year's tax, 84-1511

#### election by small business corporation not to be subject to tax

- definitions, 84-1501.1

- dissolution of corporation, agreement by shareholder to assume personal liability required for election, 84-1501.3

- effect of election, 84-1501.2

- "electing small business corporation" defined, 84-1501.1

- limitations upon right to election, 84-1501.2

- method of making election, 84-1501.2

- minimum fee, 84-1501.5

- "small business corporation" defined, 84-1501.1

- termination of election, 84-1501.2

- validity of election, 84-1501.2

#### exempt corporations, 84-1501

#### federal income tax return, 84-1517

#### "fiscal year" defined, 84-1504

#### "gross income" defined, 84-1504

#### interest on delinquent payment, 84-1505

#### levy on and sale of property for payment of tax, 84-1505

#### "net income" defined, 84-1504

#### overpayments of tax

- disallowance for claim for refund, procedure on, 84-1508.2

- interest on overpayments, 84-1508.1

- refund or credit to be allowed on overpayment, 84-1508.1

- time within which claim for refund or credit must be made, 84-1508.2

#### public contractors, credit for additional license fees, 84-3514

#### proceeds of tax, disposition, 84-1901

#### regulations for enforcement of act, 84-1508

#### release of lien and discharge of property, 84-1505.1

#### return, contents and filing, 84-1504

- certified copies available to taxpayer, 84-732

- disposition of fees collected, 84-734

- returns to which act applies, 84-735

#### reviver of corporation after suspension or forfeiture for failure to pay, 84-1515

## INDEX

References are to Title and Section numbers

### TAXATION (Continued)

#### Corporation license tax (Continued)

- school equalization aid, proceeds used for, 75-3613
- time of payment, 84-1505
- water users' association exempt, 25-110
- witnesses, compelling attendance before board, 84-1508

#### County license taxes, disposition of proceeds, 84-2708

#### County water district taxes—See COUNTIES, County water districts

#### Disaster emergency tax, city-county, 11-4301 to 11-4306—See CITIES AND TOWNS,

#### Disaster emergency tax; COUNTIES, Disaster emergency tax

#### Electrical energy producers' license tax proceeds, disposition, 84-1901

#### Exemptions

- fraternal benefit societies, 40-5343
- game wardens' retirement benefits, 68-1420
- irrigation and drainage facilities taxed as like federal and state facilities, 84-206
- judges' retirement benefits, 93-1126
- nursing homes operated not for profit, 84-202
- unit ownership property, application of exemptions to, 67-2341
- urban renewal property held by municipality, 11-3912

#### Federal tax lien

- execution of notices and certificates, 45-1502
- fees for filing liens, 45-1504
- filing officer, duties, 45-1503
- place of filing of notices and certificates, 45-1501
- previously filed liens, 45-1507
- short title of act, 45-1506
- uniformity of interpretation of act, 45-1505

#### Freight merchandise, classification for taxation, 84-301

#### Freight line companies

- proceeds of tax, disposition, 84-4825
- refund claims, 84-4825

#### Gasoline distributor's license tax

- amount of tax, 84-1847
- aviation gasoline tax exemption certificates, 84-1848
- board of equalization to establish rules and regulations, 84-1861
- bond of distributors, 84-1857
- collection of delinquent tax, 84-1858
- definitions, 84-1846
- delinquent payments and penalty, 84-1858
- distribution of state highway construction funds
  - bridge construction and reconstruction on Federal-aid system, special allocations for, 32-2604
  - districts for apportionment of funds, 32-2603
  - increase of expenditures in particular districts, 32-2610
  - interstate highway system, allocation of funds to, 32-2609
  - matching of federal funds, apportionment for, 32-2605
  - primary federal-aid system, allocation of funds for, 32-2606
  - secondary federal-aid system, allocation of funds for, 32-2607
  - urban federal-aid funds, allocation, 32-2611
- invoice to be issued purchaser, 84-1853
- license of distributors, 84-1857
  - revocation for noncompliance with act, 84-1858
- lien for unpaid taxes, 84-1858
- misdemeanor penalties, 84-1859
- payment of tax, 84-1849
- proceeds of tax, distribution and use, 32-2601
  - aeronautics commission, proceeds used for, 1-501
- records of distributor
  - examination, 84-1850
  - inspection, 84-1852
  - period for which records to be preserved, 84-1851
- refund of tax, 84-1855
  - refund permits, 84-1855
- statement of distributor, 84-1849



## INDEX

References are to Title and Section numbers

### TAXATION (Continued)

#### Gasoline distributor's license tax (Continued)

- statements concerning receipt of gasoline, 84-1854
- penalty for failure to file, 84-1854
- statute of limitations, 84-1860
- timely mailing treated as timely filing and paying, 84-1856

House trailers, tax on, 84-6601 to 84-6607—See Mobile homes, below

#### Imported beer, 4-324

#### Income tax

- adjusted gross income, definition, 84-4905
- nonresident taxpayers, exclusions, 84-4907
- amounts earned in partnership, 84-4911
- certified copies of returns available to taxpayers, 84-732
- disposition of fees collected, 84-734
- returns to which act applies, 84-735
- change of status from that of nonresident to resident, effect, 84-4915
- change of status from that of resident to nonresident, effect, 84-4915
- computation of amount, 84-4914
- credits for income taxes imposed by foreign states, 84-4937
- definitions, 84-4901
- delinquent returns and payments, penalties and interest added, 84-4924
- dependency exemptions, 84-4910
- federally related income excluded from adjusted gross income, 84-4905
- federal returns, corrections and amended returns, filing requirements, 84-4938
- information agents' duties, 84-4913
- jeopardy assessments, 84-4928.1
- lien of tax, release or discharge of property from, 84-4958
- limitation on time for determining tax, suspension of running of statute, 84-4920.1
- nonresident
  - ad valorem taxpayers, list, 84-4903.11
  - amounts withheld as lien against agent, 84-4903.9
  - amounts withheld considered funds held in trust, 84-4903.9
  - annual payment of withheld amount, when authorized, 84-4903.5
  - application to, 84-4903
  - county assessor, duties regarding, 84-4903.11
  - deductions restricted to those related to Montana income, 84-4907
  - exceptions from withholding requirements, 84-4903.3
  - exclusions from adjusted gross income, 84-4907
  - failure of agent to withhold or pay over to state, penalty, 84-4903.7
  - income subject to tax, 84-4903
  - loans made to nonresidents for grain on which chattel mortgage filed, list, preparation, 84-4903.12
  - modification of withholding provisions, 84-4903.6
  - personal and dependency exemptions prorated, 84-4910
  - quarterly payment by withholding agent, 84-4903.5
  - rents and royalties, rules requiring withholding on, 84-4903.2
  - requiring withholding agent to make return and pay tax, power of board, 84-4903.8
  - rights of nonresident, 84-4903.10
  - rules and regulations, power of state board of equalization, 84-4903.13
  - transmittal of amount of withholding to state board of equalization, 84-4903.2
  - withholding agent, 84-4903.4
  - withholding from payments to, 84-4903.2
  - withholding of amount of tax, authorized, 84-4903.1
- overpayment, credits and refunds, 84-4956
- partnership income, 84-4911
- penalties for violation of act, 84-4924
- personal exemptions, 84-4910
- persons moving out of state, 84-4915
- persons who must file return and pay tax, 84-4914
- proceeds of tax, disposition, 84-1901
- public contractors, credit for additional license fees, 84-3514
- rate of tax, 84-4902
- refund of overpayments, 84-4956

## INDEX

References are to Title and Section numbers

### TAXATION (Continued)

#### Income tax (Continued)

- relocation assistance for persons affected by highway department's land acquisitions not income, 32-3930
- returns, 84-4914
- revision of return, when permitted, 84-4922
- school equalization aid, proceeds used for, 75-3613
- status changed from that of resident to nonresident, effect, 84-4915
- surtax, 84-4902.1
- temporary residents, deductions allowed to, 84-4907
- time for payment, 84-4914
- withholding, quarterly payment by employer, exception, 84-4946

#### Income tax surtax, 84-4902.1

Industrial development projects subject to tax, remedies against, 11-4108

#### Inheritance tax—See INHERITANCE TAX

#### Insurance premiums tax, 40-2821

- fire insurance, 82-1231
- independently procured coverage, 40-3427
- retaliatory tax provisions, 40-2826
- surplus line premiums, 40-3420
- penalty for failure to file or pay, 40-3421

Irrigation and drainage facilities, when subject to taxation, 84-206

Judgment, tax operating as, 84-3807

#### Levy of taxes

adult education, tax levy for, 75-1633

all-purpose exclusive levy by cities and towns

abandonment of method in future years, 84-4701.4

allocation of levy to departments of municipality, 84-4701.3

binding effect of election to use all-purpose levy, 84-4701.4

certification of levy to county officers, 84-4701.5

extraordinary levies to pay bonded indebtedness and judgments authorized, 84-4701.6

maximum rate of levy, 84-4701.2

multiple-levy statutes not repealed, 84-4701.1

purpose of act, 84-4701.1

county basic school levy, 75-3706

distribution among districts, 75-3618

high school levy, 75-4516.1

county poor fund levy, 71-222

county tax levy, 16-1015

county tax levy for construction, maintenance and repair of public ferries, 32-1518

elementary school levy, 75-1723

fire districts in unincorporated areas, levy for, 11-2008

flood control levy by county or municipality, 89-3312

joint school district levies, 75-1816

school district levy to provide foundation program, 75-3706

additional levy, adoption on approval by tax payers, 75-3801

school transportation levy, 75-3414

soil conservation district assessment, 76-209

university system, property tax for, 84-3804

Lien of tax operating as execution, 84-3807

Limitation of actions on claim for refund, 84-726

Liquor license tax proceeds, disposition, 84-1901

#### Livestock

assessment of stock in feeding pens or enclosures, 84-406

bounty tax levy, 84-5214

maximum rate of tax, 84-5211

proceeds of tax, deposit and use, 84-5212

purposes for which proceeds used, 84-5211

#### Metalliferous mines

amount of tax, 84-2004

computation of tax, 84-2006

delinquent taxes, penalty, 84-2007

notice of tax, 84-2006

proceeds of tax, disposition, 84-1901

## INDEX

References are to Title and Section numbers

### TAXATION (Continued)

#### Mobile homes

- application of act to mobile homes and trailers subject to taxation, 84-6605
- assessment of property tax, time of, 84-406
- classification for taxation, 84-301
- definitions, 84-101, 84-6601
- fees in addition to registration and license fees, 32-3305
- highway checking of trailers, receipt to be produced, 84-6603
- moving of mobile home, declaration of destination required, procedure, 84-6606
- penalty for failure to display or produce declaration, sticker or receipt, 84-6604
- regulations of state board of equalization, 84-6607
- stickers to show property tax paid, issuance and display required, 84-6602

#### Motor vehicles

- assessment and registration provisions, 53-114, 84-406, 84-6008
- interstate fleets
  - apportionment on basis of in-state miles traveled, 84-727
  - assessment of property tax by state board, 84-727
  - collection of tax by state board, 84-730
  - cost of vehicle to be included in application for registration, 84-729
  - deposit and distribution of taxes, 84-731
  - partial year's tax, 84-727
  - rate of levy applied to fleet, 84-729
  - registration of fleet, payment of tax as condition precedent, 84-727
  - situs of vehicles in state for purposes of taxation, 84-730
  - valuation of fleet, method of computation, 84-728

#### Motor vehicles and motor fuels, taxing extends only to vehicles operated on public roads, 32-2124.2

- operation across public roads and highways not considered operation on roads, when, 32-2124.1

#### Multistate Tax Compact, 84-6701 to 84-6704

- advisory committee, 84-6704
- state commissioner, 84-6702
- alternate, 84-6703
- text of compact, 84-6701

#### Natural gas tax

- assessment to pay expenses of conservation commission, 60-145
- collection of tax by county treasurer, 84-6208
- computation of tax by county assessor, 84-6208
- extension of filing time, 84-6202
- penalty for untimely filing, 84-6202
- proceeds of distributor's license tax, disposition, 84-1901
- withholding of tax from royalties, 84-6208

#### Net proceeds tax

- assessment roll, 84-5408
- computation, 84-5403
- extension of filing time, 84-5402
- lien of tax and penalty, 84-5405
- penalty for untimely filing, 84-5402
- valuation of net proceeds, transmission to county assessor, 84-5408

#### Oil producers

- computation of tax, 84-2202
- proceeds of tax, disposition, 84-1901
- rate of tax, 84-2202

#### Privilege tax on tax-exempt property, 84-207 to 84-211

- assessment, collection and distribution, 84-209
- constitutional exemptions unaffected, 84-211
- credit on use of federally owned property, 84-208
- delinquent taxes, collection of, 84-210
- exceptions, 84-207
- rate, 84-208

#### Property tax, levy for support of university system, 84-3804

#### Protest payment of license fees, procedure after, 84-4501

#### Public contractors' license tax, 84-3501 et seq.—See PUBLIC CONTRACTORS, Licenses



## INDEX

References are to Title and Section numbers

### TAXATION (Continued)

Public property subject to taxation when subject to sale contract or option to purchase, 84-204

valuation and assessment of property, 84-205

Records of taxation, destruction authorized by state board, 84-724

Refund of overpayments, 84-726

Royalty interests, 84-5409

Sale of property for taxes

county leased lands, resale, 84-4198

rules of civil procedure, application to special proceedings, M. R. Civ. P., Rule 81(a), Table A

Special fuel dealers and users

bond required of dealers and users, 84-1833

credits allowed, 84-1836, 84-1837

definition of terms, 84-1831

examination of records, 84-1838

lien of tax on property of dealer or user, 84-1833

proceeds of tax, disposition, 84-1840

returns required, filing date, 84-1835

temporary permits to unlicensed users

fees, 84-1843

issuance of permit, 84-1842

penalty for operation without permit, 84-1844

time of attachment of tax, 84-1832

time of collection, 84-1832.1

State board of equalization

change in assessed valuation of classes of property, notice and hearing, 84-710

change in assessment of property assessed to any particular person, notice of intention, 84-710

cigarette sales regulation, 51-301 to 51-314—See CIGARETTE SALES

compensation of members, 84-702

computation of net proceeds, 84-5403

contractors, determination of residency of bidder on public contract, duties, 82-1925.1

qualifications of members, 84-702

records, destruction authorized by state board, 84-724

reports to governor and legislature, 84-708

rules and regulations regarding collection of taxes from nonresidents, power to adopt, 84-4903.13

schools and meetings for assessors and appraisers, 84-708

supervision of county officials by state board, 84-708

transmission of net proceeds assessments to county assessor, 84-5408

visits to county officials, 84-708

State property subject to taxation when subject to sale contract or option to purchase, 84-204

valuation and assessment of property, 84-205

Suspense account for receipts and refunds, 84-725

Telegraph company's license tax proceeds, disposition, 84-1901

Telephone company's license tax proceeds, disposition, 84-1901

Tobacco tax (cigarettes excluded), 84-6801 to 84-6807

board of equalization, rule-making power of, 84-6807

definitions, 84-6801

defrayment of wholesaler's expenses, 84-6806

direct tax on consumer, 84-6802

refunds, 84-6806

unlawful sales, 84-6804, 84-6805

wholesaler's duties, 84-6802, 84-6803

Wheat, assessment on annual crop when sold, 3-2911 to 3-2913

### TELEPHONE AND TELEGRAPH

Abuse, harassment or extortion by telephone, penalty, 94-35-221.5, 94-35-221.6

Credit card, unauthorized use, 94-1823

interstate communications, application of credit law to, 94-1830

## INDEX

References are to Title and Section numbers

### TELEPHONE AND TELEGRAPH (Continued)

- Credit card (Continued)
  - knowledge implied from use of false or revoked credit card or telephone number, 94-1828
  - notice of revocation of credit card, manner of giving, 94-1827
- Emergency call, failure to relinquish line for, penalty, 94-35-221.1
- emergency as defense, 94-35-221.2
- false pretext of emergency, penalty, 94-35-221.3
- lack of knowledge as defense, 94-35-221.2
- printing of act in directories, 94-35-221.4
- Financing statements of utility, contents and place of filing, 87A-9-302.2
- definition of terms, 87A-9-302.1
- Uniform Commercial Code, application, 87A-9-302.3
- Fraudulent devices to obtain service without payment, 94-1824
- Injury to or removal of coin box or wires, penalty, 94-3211
- Tampering with or tapping lines, penalty, 94-3203

### TELETYPEWRITER COMMUNICATIONS SYSTEM

See LAW ENFORCEMENT TELETYPEWRITER COMMUNICATIONS, 82-3901 to 82-3906

### TELEVISION

Definitions, 70-402

Districts

- abandonment of district, disposition of property and funds, 70-425
- annexation of contiguous areas to district, 70-426
- areas includible in district, 70-410
- assessor to list television owners within district, 70-417
- budget for district, preparation and presentation, 70-418
- cable systems not within purpose of district, 70-408
- filing of order creating district, 70-415
- funds, disbursement, 70-419
- hearing on formation of district, 70-414
- naming of district, 70-415
- organization of districts authorized, 70-409
- petition to form district, contents, 70-411
- filing and transmission of petition to county commissioners, 70-412
- powers of districts, 70-420
- publication of petition and notice of meeting to consider, 70-413
- purposes for which districts authorized, 70-408
- resolution creating district or denying petition, 70-414
- tax on television sets, levy, 70-418
- exemption of taxpayers who do not benefit from translator, 70-422
- false or fraudulent claim for exemption, misdemeanor, 70-424
- treasurer of district, 70-419
- trustees of district
- appointment and terms, 70-416
- expenses, reimbursement, 70-421
- meetings of trustees, 70-423

Legislative purpose, 70-401

License for operation of VHF booster or VHF translator system

- application, 70-404
- contents of application, 70-404
- fee for license, 70-405
- issuance, 70-405
- requirement, 70-403

Publication of notice supplemented by broadcast, 19-201

- copy of transcript to be retained by broadcasting station, 19-202
- proof of broadcast, 19-203

Rules and regulations, 70-406

Violations of act, penalty, 70-407

### TERMS OF COURT

Expiration, effect on time limitation in civil proceedings, M. R. Civ. P., Rule 6(c)

## INDEX

References are to Title and Section numbers

### THEATERS

Sanitary inspections and correction of conditions by boards of health, 69-4118

### TIME

Computation of time allowed in civil proceedings, M. R. Civ. P., Rule 6(a)

Extension of time allowed in civil proceedings, M. R. Civ. P., Rule 6(b)

Term of court, effect on limitations in civil proceedings, M. R. Civ. P., Rule 6(c)

### TORTS

Licensees for recreational purposes, landowner's restricted liability to, 67-808

definition of recreational purposes, 67-809

Tort actions against state, 83-701 to 83-707—See STATE OF MONTANA, Tort actions against

### TOURIST CAMPS

Definition, 69-5601

Inspection of grounds by state and local officers, 69-5605

operators to permit inspections, 69-5603

License required for operation, 69-5603

application for license, 69-5604

denial or revocation of license, grounds, 69-5605

hearing on denial or revocation, 69-5606

expiration of license, 69-5604

fee for license, 69-5604, 69-5605

Penalties for violations, 69-5607

Rules for operation adopted by state board, 69-5602

posting of rules, 69-5603

### TOWNSHIPS

Mileage allowances to officers for use of own vehicles, 59-801

liability for approval of excess amount, 59-802

### TRADE-MARKS

Indian articles, regulations for sale of imitation articles, 85-301 to 85-304

Recording of trade-marks by secretary of state, 85-103

fees of secretary of state, 25-102

### TREASON

Venue of prosecution, 95-412

### TRIALS

Assignment of cases for trial, M. R. Civ. P., Rule 40

Calendar for trial, placement of actions, M. R. Civ. P., Rule 40

Consolidation of actions for trials, M. R. Civ. P., Rule 42(a)

Criminal cases, 95-1901 to 95-1916—See CRIMINAL PROCEDURE, Trials

Exceptions to rulings of court unnecessary, M. R. Civ. P., Rule 46

Findings by court, separate statement, M. R. Civ. P., Rule 52(a)

Hostile witnesses, examination as on cross-examination, M. R. Civ. P., Rule 43(b)

Instructions to jury, M. R. Civ. P., Rule 51

Jury trial

advisory jury, M. R. Civ. P., Rule 39(c)

court ordering jury trial, M. R. Civ. P., Rule 39(b)

demand for jury trial, M. R. Civ. P., Rule 38(b)

issues, designation for jury trial, M. R. Civ. P., Rule 38(c)

right to jury trial in civil cases, M. R. Civ. P., Rule 38(a)

right to jury trial in criminal cases, 95-1901, 95-2004

summoning of jurors, 93-1509

waiver of right to jury trial, M. R. Civ. P., Rule 38(d)

Open court trials required, M. R. Civ. P., Rule 77

Separation of claims for trials, M. R. Civ. P., Rule 42(b)

Summoning of jurors, 93-1509

### TRUST INDENTURES

Acceleration provisions not applied when grantor cures default, 52-412

Authorization of trust indentures, 52-404



## INDEX

References are to Title and Section numbers

### TRUST INDENTURES (Continued)

Citation of act, 52-401

Deficiency judgment not allowed after foreclosure by advertisement and sale, 52-414

Definition of terms, 52-403

#### Foreclosure

attorney's fees allowed on foreclosure, 52-416

deed given by trustee after sale, contents and effect, 52-410

deficiency judgment not allowed after foreclosure by advertisement and sale, 52-414

discontinuance of proceedings on payment of amount in default, 52-412

fees allowed on foreclosure, 52-416

notice of sale by trustee

affidavits of mailing, posting and publication, recording, 52-409

cancellation on cure of default before sale, 52-412

mailing, posting and publication of notice, 52-409

recording of notice, 52-408

requests for copies of notice, recording, 52-415

parcels in which sold, 52-409

payment of price bid in cash, 52-409

possession of property, when purchaser at trustee's sale entitled to, 52-411

postponement of sale, 52-409

proceeds of sale by trustee, disposition, 52-413

real estate brokers' act inapplicable to sale by trustee, 66-1926

refusal of successful bidder to pay purchase price, 52-409

required conditions for foreclosure by advertisement and sale, 52-408

sale to highest bidder, 52-409

time within which proceedings to be commenced, 52-407

Mortgage laws, application to indentures, 52-417

Policy of state declared, 52-402

Power of sale implied in indenture, 52-404

Qualifications of trustee, 52-405

Reconveyance to grantor on performance of obligation secured, 52-406

Short title of act, 52-401

Size of tract for which indenture authorized, 52-404

Substitution for previously existing mortgage prohibited, 52-404

Successor trustee, appointment, filing, 52-405

### TRUST RECEIPTS

See SECURED TRANSACTIONS, 87A-9-101 to 87A-9-507

### TRUSTS AND TRUSTEES

Action brought without joining beneficiaries as parties, M. R. Civ. P., Rule 17(a)

Business corporations, voting trusts, 15-2232

Business trusts, 15-2501 to 15-2508—See BUSINESS TRUSTS

Compensation of trustee, 86-511

Devise or bequest in will to trustee of inter vivos trust established by testator

effect of entire revocation of trust prior to death, 91-321

property not deemed held under testamentary trust, 91-321

validity, 91-321

Equipment trusts, 87A-9-101 to 87A-9-507—See SECURED TRANSACTIONS

Investments, retention permitted when received from source other than purchase, though not qualified investment, 86-327

Massachusetts trust, 15-2501 to 15-2508—See BUSINESS TRUSTS

Pension trusts, statutory or common-law rules relating to restraint against alienation, suspension of power of alienation, accumulation of income, perpetuities or remoteness of vesting, not applicable to, 67-423

Principal and income act—See PRINCIPAL AND INCOME ACT

Real estate brokers' act inapplicable to trustees, 66-1926

Rules of civil procedure, application in administration, M. R. Civ. P., Rule 81(a), Table A

Sale of property in good faith, validation, 91-4324

Statement of trustee to income trust beneficiary, 86-513

Validity, 67-424

## INDEX

References are to Title and Section numbers

### TUBERCULOSIS

- Commitment to hospital for diagnosis and treatment
  - court costs, expenses and fees, payment by county, 69-4315
  - detention at hospital of person committed, 69-4311
  - failure to submit to examination as cause for commitment, 69-4309
  - maintenance and treatment expenses at state hospital, payment, 69-4316
  - order of commitment forwarded to hospital and board of health, 69-4310
  - release from commitment to hospital, 69-4313
    - court order for release, 69-4312
  - transfer between hospitals of person committed, 69-4314
  - transportation expenses, payment by county, 69-4316
  - warrant directed to sheriff, 69-4310
- Definition of terms, 69-4302
- Examination of suspected cases ordered by district court
  - application for court order, contents, 69-4306
  - commitment to hospital on failure to submit to examination, 69-4309
  - court costs, expenses and fees, payment by county, 69-4315
  - findings and order of court, 69-4308
  - hearing on application, procedure, 69-4307
- Facilities for treatment maintained by state hospital, 69-4317
- Federal funds, acceptance and use, 69-4304
- Policy of state, 69-4301
- Rules for determination of communicable state, 69-4303
- State departmental powers, 69-4304
- Suspected cases of tuberculosis, application for examination or commitment, 69-4305

## U

### UNCLAIMED PROPERTY

- See PROPERTY, Unclaimed property, 67-2201 to 67-2230

### UNDERTAKERS

- See MORTICIANS AND FUNERAL DIRECTORS, 66-2701 to 66-2717

### UNEMPLOYMENT COMPENSATION

- Account in agency fund
  - custodian of account, 87-112
  - establishment of account, 87-111
  - moneys paid into account, 87-111
  - subaccounts, enumeration and use, 87-112
- Administration account in federal and private revenue fund, sources and use, 87-133
- Benefits
  - disqualification for benefits, 87-106
  - duration of benefits, 87-104
  - eligibility conditions, 87-105
  - qualifying wages, 87-103
  - schedule of benefits, 87-103
  - weekly benefit amounts, 87-103
- Commission
  - administration of act, 87-120
  - change of name, 87-117
  - report to governor, 87-120
- Contributions by employers
  - classification and rating of employers, 87-109
  - levy and sale for collection of contributions, 87-139
  - maximum wages used as basis for contributions, 87-109
  - schedule of contributions, 87-109
- Cooperation with federal government, 87-128
- Definitions used in act, 87-148, 87-149
- Extended benefits, cooperation with federal government, 87-128
- Federal moneys paid into administration account, 87-133
- Penalties for violations, 87-145
- Reciprocity in collection of unpaid contributions, 87-136
- Rules of civil procedure, application to review of orders, M. R. Civ. P., Rule 81(a), Table A
- Secretary of labor, approval of act by, 87-152

## INDEX

References are to Title and Section numbers

### UNEMPLOYMENT COMPENSATION COMMISSION BUILDING

See STATE CAPITOL, Unemployment compensation commission building

### UNIFORM COMMERCIAL CODE

- Acceleration of performance, good faith required in exercising option, 87A-1-208
- Actions permitted to enforce rights and obligations, 87A-1-106
- Agreement as to which state's laws apply, 87A-1-105
- Agreement to vary terms of code, 87A-1-102
- Authenticity of third-party documents presumed, 87A-1-202
- Bank deposits and collections, 87A-4-101 to 87A-4-504—See BANKS AND BANKING, Deposits and collections
- Bills of lading, 87A-7-101 to 87A-7-105, 87A-7-301 to 87A-7-603—See BILLS OF LADING
- Bulk transfers, 87A-6-101 to 87A-6-111—See BULK TRANSFERS
- Captions as part of act, 87A-1-109
- Citation of act, 87A-1-101
- Commercial paper, 87A-3-101 to 87A-3-805—See COMMERCIAL PAPER
- Conflict of laws, 87A-1-105
- Course of dealing between parties, application, 87A-1-205
- Damages, principles for measurement, 87A-1-106
- Definition of terms in general, 87A-1-201
- Documents of title, 87A-7-101 to 87A-7-603—See BILLS OF LADING; WAREHOUSE RECEIPTS
- Effective date, 87A-10-101
- Gender of words used, interchangeability, 87A-1-102
- Good faith obligation imposed, 87A-1-203
- Investment securities, 87A-8-101 to 87A-8-406—See INVESTMENT SECURITIES
- Letters of credit, 87A-5-101 to 87A-5-117—See LETTERS OF CREDIT
- Liberal administration of remedies, 87A-1-106
- Mortgage law, conflicts with, 52-117
- Plural includes singular, 87A-1-102
- Policies of act, 87A-1-102
- Prior transactions, application of prior law to, 87A-10-102
- Purposes of act, 87A-1-102
- Renunciation of claim or right without consideration, 87A-1-107
- Repeal of code provisions not to be implied, 87A-1-104
- Reservation of rights by party while performing or assenting to performance, 87A-1-207
- Sale of goods, 87A-2-101 to 87A-2-725—See SALES
- Saving of certain laws from repeal by code, 87A-10-103
- Secured transactions, 87A-9-101 to 87A-9-507—See SECURED TRANSACTIONS
- Severability of provisions, 87A-1-108
- Short title, 87A-1-101
- Singular includes plural, 87A-1-102
- Storage deposits, applicability to, 20-314
- Supplementary general principles of law applicable, 87A-1-103
- Territorial application by agreement, 87A-1-105
- Time allowed for required actions, 87A-1-204
- Transitional provisions, 87A-10-102
- Usage of trade, application, 87A-1-205
- Variation of terms by agreement, 87A-1-102
- Waiver of claim or right without consideration, 87A-1-107
- Warehouse receipts, 87A-7-101 to 87A-7-210, 87A-7-401 to 87A-7-603—See WAREHOUSE RECEIPTS

### UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT

See PROPERTY, Unclaimed property, 67-2201 to 67-2230

### UNIFORM FACSIMILE SIGNATURES OF PUBLIC OFFICIALS ACT

See PUBLIC OFFICERS AND EMPLOYEES, Facsimile signatures of public officials

### UNIFORM PRINCIPAL AND INCOME ACT

Text, 67-1901 to 67-1916—See PRINCIPAL AND INCOME ACT



## INDEX

References are to Title and Section numbers

### UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT

See SUPPORT, Reciprocal enforcement, 93-2601-41 to 93-2601-82

### UNITED STATES

Installations and facilities donated to state, acceptance by board of examiners, 81-1101.1  
Migratory bird reservations, consent to acquisition, 83-113

### UNIVERSITY OF MONTANA

See COLLEGES AND UNIVERSITIES

### URBAN RENEWAL LAW

See CITIES AND TOWNS, Urban renewal law

### USURY

Secured Transactions chapter, usury law not affected by, 87A-9-201

## V

### VEHICLE EQUIPMENT SAFETY COMMISSION

Accounts of commission, inspection by state examiner, 32-21-174  
Budgets submitted to state budget director, 32-21-173  
Co-operation of governmental agencies with commission, 32-21-171  
Creation by terms of interstate compact, 32-21-166  
Documents of commission to be filed with highway patrol board, 32-21-172  
Legislative approval required for rules and regulations of commission, 32-21-168  
Notices to be filed with highway patrol supervisor, 32-21-172  
Representation of Montana on commission, 32-21-169  
Retirement of commission employees, 32-21-170

### VENEREAL DISEASE

Blood tests, standards and laboratories approved by department, 69-4611  
    birth certificate to show whether test given, 69-4614  
    positive results reported to department, 69-4613  
    follow-up procedures on reports of positive tests, 69-4615  
    pregnant women, testing required, 69-4612  
Certificates of freedom from disease, restrictions on issuance and use, 69-4609  
Consent by minors to medical or surgical care, 69-6101 to 69-6105—See CHILDREN  
AND MINORS  
Definition of disease, 69-4601  
Disclosure of information on persons infected, restrictions, 69-4610  
Drugs for treatment of disease, restrictions on sale or recommendation, 69-4608  
Educational campaigns for control of disease, 69-4602  
Examination of suspects required by health officer, 69-4605  
Exposure of other persons prohibited, 69-4601  
    misdemeanor, 69-4617  
    report of exposure to state department, 69-4607  
Federal funds, acceptance and use for control of disease, 69-4603  
Isolation of persons who refuse examination or treatment, 69-4605  
Penalty for violation of chapter or rules, 69-4617  
Prisoners, examination and treatment for disease, 69-4606  
Reports of cases by physicians, 69-4604  
    exposure of other persons to be reported, 69-4607  
Rules of state board having effect of law, 69-4616  
State department's functions with respect to disease, 69-4602  
Treatment required by health officer, 69-4605

### VENUE

Change of venue in civil cases, procedure, M. R. Civ. P., Rule 12(b)  
Criminal cases, 95-401 to 95-412—See CRIMINAL PROCEDURE, Venue  
Rules of civil procedure do not affect venue, M. R. Civ. P., Rule 82

### VERDICTS

Coroner's inquest, verdict in writing, contents, 95-807  
Criminal cases, 95-1909, 95-2006—See CRIMINAL PROCEDURE, Verdicts  
Directed verdict, motion for, M. R. Civ. P., Rule 50  
Interrogatories to jury, M. R. Civ. P., Rule 49(b)

## INDEX

References are to Title and Section numbers

### VERDICTS (Continued)

- Judgment, entry on verdict, M. R. Civ. P., Rule 58
- Judgment notwithstanding the verdict, motion for, M. R. Civ. P., Rules 50(b) to (d)
  - conditional rulings on grant of motion, M. R. Civ. P., Rule 50(c)
  - denial of motion, M. R. Civ. P., Rule 50(d)
- Number of jurors required to concur in civil cases, M. R. Civ. P., Rule 48
- Special verdicts, M. R. Civ. P., Rule 49(a)

### VETERANS

- Bonds for payment or redemption of compensation bonds, 79-2202, 79-2205
- Burial of veteran, duties of county clerk, 71-123
- Home for veterans
  - cost of support, payment by resident or responsible person, 80-1601 to 80-1604—
    - See STATE INSTITUTIONS, Cost of support of residents
  - eligibility for residence in home, 80-1803
    - wives and widows admitted as space allows, 80-1801
  - Federal money, acceptance and use for benefit of home, 80-1804
  - industrial activities permitted, 80-1501 to 80-1503—See STATE INSTITUTIONS, Industrial activities permitted
  - location, 80-1801
  - management and control of home, 80-1401 to 80-1409—See STATE INSTITUTIONS, Department of institutions
  - purpose of home, 80-1801
  - superintendent to be honorably discharged veteran, 80-1802
- Organizations housed in Veterans and Pioneers Memorial Building, 78-202

### VETERANS AND PIONEERS MEMORIAL BUILDING

See STATE CAPITOL, 78-202

### VETERANS' MEMORIAL MONEYS

- Appropriations, requests for, 78-302
- Commission abolished, 82-3322
- Purpose of expenditures, 78-302

### VETERINARY MEDICINE

- Alcoholic beverage, administration by veterinary, 4-138
- Compensation of members and officers of board of examiners, 66-2203
- Corporations for practice of veterinary medicine, 15-2101 to 15-2116—See PROFESSIONAL SERVICE CORPORATIONS
- Examination of applicants for license to practice, 66-2204
- Moneys received by board of examiners, deposit and use, 66-2203
- Pregnancy and fertility testing within scope of practice, 66-2209
  - exemptions from veterinary practice law unimpaired, 66-2209.2
  - testing of own animals not prohibited, 66-2209.1
- Qualifications of applicants for license to practice, 66-2204
- Records of board of examiners, 66-2203
- Report of board of examiners to governor, 66-2203
- Temporary permit to practice, 66-2204

### VITAL STATISTICS

- Adoption report filed by clerk of court, 69-4433
  - substitute birth certificate, issuance, 69-4420
    - recording of substitute certificate, 69-4421
    - restoration of original certificate on annulment of adoption, 69-4421
- Annulment of marriage, certificate prepared and forwarded by clerk of court, 69-4433
  - information required in certificates, 69-4411
  - report prepared by clerk, contents, 69-4434
- Birth certificates, filing required, 69-4413
  - adoption of child, issuance of substitute certificate, 69-4420
    - recording of substitute certificate, 69-4421
    - restoration of original on annulment of adoption, 69-4421
  - amendment of certificate permitted, 69-4416
  - notation on altered certificate, 69-4417
  - probative value of altered certificate, 69-4419

## INDEX

References are to Title and Section numbers

### VITAL STATISTICS (Continued)

- Birth certificates, filing required (Continued)
  - delayed certificate, filing permitted, 69-4416
  - notation on delayed certificate, 69-4417
  - probative value of delayed certificate, 69-4419
  - evidentiary value of certificates, 69-4412
  - forwarding and filing of original certificates, 69-4411
  - foundlings, report constituting certificate, 69-4415
  - illegitimacy disclosed only on court order, 69-4422
  - information required in certificates, 69-4411
  - judicial procedure for establishment of date and place of birth, 69-4418
  - legitimation of child, issuance of new certificate, 69-4423
  - syphilis test to be noted on certificate, 69-4614
  - unattended births, supplementary report by registrar, 69-4414
- Burial permit required for disposition of dead body, 69-4428
  - delay in determining cause of death, issuance of permit, 69-4427
  - importation of body into state, indorsement of permit, 69-4429
- Certified copy of certificates furnished on request, 69-4406
  - fee for certified copy, 69-4407
  - disposition of fees, 69-4408
  - local registrars not to issue certified copies, 69-4411
- Death certificate, preparation and filing, 69-4425
  - amendment of certificate permitted, 69-4416
  - burial permit, certificate or notice of delay required for, 69-4428
  - delay in determining cause of death, notice of reason required, 69-4427
  - evidentiary value of certificates, 69-4412
  - filing and forwarding of original certificates, 69-4411
  - information included in certificates, 69-4411
  - information to be furnished state registrar on demand, 69-4435
  - time of filing, 69-4424
  - unattended death, information used to complete certificate, 69-4426
- Definition of terms, 69-4401
- Disclosure of information from records restricted, 69-4404
  - governmental agencies, disclosure to, 69-4405
  - illegitimacy, court order required for disclosure, 69-4422
  - statistical use of information permitted, 69-4405
- Divorce certificate, preparation and forwarding by clerk of court, 69-4433
  - evidentiary value of certificates, 69-4412
  - information furnished to state registrar on demand, 69-4435
  - information to be included in certificate, 69-4411
  - report by clerk, contents, 69-4434
- Institutions to report information pertaining to inmates or patients, 69-4430
- Local registrars, appointment and supervision, 69-4409
  - deputies, appointment, 69-4410
  - fees paid to local registrars, 69-4431
- Marriage certificates filed, report to state board, 69-4432
  - evidentiary value of certificates, 69-4412
  - information included in certificates, 69-4411
  - information to be furnished state registrar on demand, 69-4435
- State department powers and duties, 69-4403
- State-wide system established by department, 69-4402
- Violations of act or regulations
  - local registrars to report violations, 69-4410
  - major violations, penalty, 69-4436
  - minor violations, penalty, 69-4437

### VOCATIONAL SCHOOL FOR GIRLS

See STATE INSTITUTIONS, Juvenile facilities, 80-2202 et seq.

## W

### WAGES

Assignment of claims against state, 83-901 to 83-904



## INDEX

### References are to Title and Section numbers

#### **WAGES (Continued)**

Assignments excluded from Uniform Commercial Code, 87A-9-104

Payment of

failure to pay when due

assignment and prosecution of claim by commission, 41-1314.2

investigations and inspections by commissioners, 41-1314.1

separation from employment before payday, when payable, 41-1303

Restaurant, Bar and Tavern Wage Protection Act

affidavit of ownership of equipment required of lessees, 41-2005

time of filing affidavit, 41-2006

bond required of lessee engaging in business, 41-2002

amount of bond required, 41-2005

cancellation of bond revokes certificate, 41-2006

condition of bond, 41-2006

discharge of sureties from further liability, 41-2010

increase in bond required by commissioner, 41-2010

new bond required by commissioner, 41-2010

state as obligee of bond, 41-2006

time of filing bond, 41-2006

certification of lessee on filing of bond, 41-2009

crediting and use of application fees, 41-2011

revocation of certificate by cancellation of bond, 41-2006

definition of terms, 41-2004

injunction against engaging in business until bond filed, 41-2008

lessor's liability for wages unpaid by lessee, 41-2007

purpose of act, 41-2003

short title, 41-2001

#### **WAIVER**

Affirmative defense, M. R. Civ. P., Rule 8(c)

#### **WAR**

Continuity in government, post-enemy-attack

citation of act, 82-3801

city or town executives, succession to offices, 82-3805

city or town governing bodies, succession to membership, 82-3804

constitutional provision, basis for act, V, 46; 82-3801

county commissioners, succession to board membership, 82-3803

duration of operation of act, 82-3809

governorship, succession to, 82-3802

quorum for state or local governing bodies, 82-3806

seat of local government, moving, 82-3808

seat of state government, moving, 82-3807

Resource management, post-enemy-attack

citation of act, 77-1501

definition of terms, 77-1503

emergency resource planning committee, members, 77-1504

governor

emergency resource planning committee, 77-1504

powers and duties, 77-1505

proclamation of emergency, 77-1506

legislative findings, 77-1502

policy of state, 89-1502

proclamation of emergency by governor, 77-1506

judicial inquiry as to proclamation and facts, 77-1507

violation of rules and regulations, penalty, 77-1508

#### **WAREHOUSE RECEIPTS**

Actions based on bailment, terms in receipt prescribing time and manner of instituting, 87A-7-204

Altered receipt, enforceability, 87A-7-208

Attachment of goods covered by documents, procedure required, 87A-7-602

Authenticity of third-party documents presumed, 87A-1-202

## INDEX

References are to Title and Section numbers

### WAREHOUSE RECEIPTS (Continued)

- Bills of lading law, provisions included in but omitted from warehouse receipts law, 87A-7-105
- Bond against withdrawal required by law, effect of receipt issued by owner of goods, 87A-7-201
- Care required of warehousemen to prevent loss or injury to goods, 87A-7-204
- Citation of Uniform Commercial Code chapter, 87A-7-101
- Claims based on bailment, terms in receipt prescribing time and manner of presenting, 87A-7-204
- Commercial Paper chapter inapplicable to receipts, 87A-3-103
- Conflicting claims to goods, warehouseman compelling interpleader, 87A-7-603
- Contents required or permitted in receipts, 87A-7-202
- Course of dealing between parties, application, 87A-1-205
- Damages for loss or injury to goods, limitation by contract, 87A-7-204
- Defenses defeated by negotiation of receipt, 87A-7-502
- Definition of terms, 87A-7-102
  - general definitions in Uniform Commercial Code, 87A-1-201
- Delivery of goods by warehouseman
  - destroyed receipt, 87A-7-601
  - failure to require receipt, criminal penalty, 88-154
  - good faith delivery exonerating warehouseman, 87A-7-404
  - lien lost by voluntary delivery, 87A-7-209
  - lien to be satisfied before delivery, 87A-7-403
  - lost receipt, 87A-7-601
  - obligation of warehouseman to deliver, 87A-7-403
  - persons who may require delivery, 87A-7-403
  - stolen receipt, 87A-7-601
  - surrender of document required before delivery, 87A-7-403
  - termination of storage by warehouseman, 87A-7-206
- Destroyed receipts, obtaining delivery of goods, 87A-7-601
- Deterioration of goods, notice by warehouseman to remove, 87A-7-206
- Duplicate receipt, rights and liabilities of parties under, 87A-7-402
  - criminal penalty for issuance, 88-152
- Endorsement of receipt
  - default by warehouseman or previous endorser, endorser not liable for, 87A-7-505
  - negotiation, when endorsement required for, 87A-7-501
  - nonnegotiable receipt, effect of endorsement, 87A-7-501
  - transferee's right to require necessary endorsement, 87A-7-506
- Federal law controlling over Commercial Code chapter, 87A-7-103
- Formal requirements of receipt, 87A-7-202
- Fungible goods covered by receipt
  - buyer from warehouseman takes free of claim under receipt, 87A-7-205
  - commingling permitted, 87A-7-207
  - overissue of receipts, persons entitled to goods, 87A-7-207
    - liability of issuer for damages, 87A-7-402
- Good faith required, 87A-1-203
- Hazardous goods, sale or disposition by warehouseman, 87A-7-206
- Interpleader of conflicting claims to goods, 87A-7-603
- Irregularities in issue of receipt, obligations of issuer unaffected, 87A-7-401
- Judicial process against goods covered by receipt, procedure required, 87A-7-602
- Letter of credit requirements, law governing adequacy, 87A-7-509
- License required for issuance of receipts, effect of receipt issued by owners of goods, 87A-7-201
- Lien of warehouseman
  - charges covered by lien, 87A-7-209
  - delivery of goods causing loss of lien, 87A-7-209
  - delivery of goods, satisfaction of lien required for, 87A-7-403
  - enforcement of lien, procedure, 87A-7-210
  - persons against whom lien enforceable, 87A-7-209
  - refusal to deliver goods causing loss of lien, 87A-7-209
  - sale of goods to enforce lien, 87A-7-210
  - termination of storage at warehouseman's option, sale of goods on, 87A-7-206
- Lost receipts, obtaining delivery on, 87A-7-601
- Misdescription of goods in receipt, liability of issuer, 87A-7-203

## INDEX

References are to Title and Section numbers

### WAREHOUSE RECEIPTS (Continued)

Negotiability of receipt, requirements for, 87A-7-104

Negotiation of receipt

defenses defeated by negotiations, 87A-7-502

delivery required for negotiation, 87A-7-501

endorsement necessary to title, right of holder to require, 87A-7-506

endorsement, when required for negotiation, 87A-7-501

formal requirements for negotiation, 87A-7-501

rights acquired by holder to whom negotiation made, 87A-7-502

title required by holder to whom negotiation made, 87A-7-502

warranties of negotiator, 87A-7-507

intermediary delivering documents, 87A-7-508

Nonreceipt of goods described, liability of warehousemen, 87A-7-203

Omission of required terms from receipt, liability of warehousemen, 87A-7-202

Perishable goods, removal on notification by warehouseman, 87A-7-206

Persons who may issue receipts, 87A-7-201

Prior interest prevailing over interest represented by receipt, 87A-7-503

Regulatory laws controlling over Commercial Code chapter, 87A-7-103, 87A-10-103

Removal of goods from storage on warehouseman's notice, 87A-7-206

Reservation of rights by party while performing or accepting performance, 87A-1-207

Sale contract requirements, law governing adequacy, 87A-7-509

Sale of goods to enforce warehouseman's lien, 87A-7-210

Security interest in receipt, manner of perfection, 87A-9-304

possession taken by secured party, 87A-9-305

Security interest reserved by warehouseman, enforceability, 87A-7-209

Separation of goods required, 87A-7-207

Short title of Uniform Commercial Code chapter, 87A-7-101

Stolen receipts, obtaining delivery on, 87A-7-601

Termination of storage at warehouseman's option, 87A-7-206

Time allowed for required actions, 87A-1-204

Transfer of receipt

endorsement necessary to title, right of transferee to require, 87A-7-506

notification to warehouseman of transfer, adverse interest perfected before, 87A-7-504

rights acquired by transferee, 87A-7-504

title acquired by transferee, 87A-7-504

warranties of transferor, 87A-7-507

intermediary delivering receipt, 87A-7-508

Unaccepted delivery order, negotiation of receipt defeating title based on, 87A-7-503

Unauthorized issuance, obligations of issuer unaffected, 87A-7-401

Unknown goods, description in receipt, 87A-7-203

Usage of trade, application, 87A-1-205

Warranties by transferor of receipt, 87A-7-507

intermediary delivering receipt, 87A-7-508

Wrongfully procured receipts, when defeated by prior interest, 87A-7-503

### WARM SPRINGS STATE HOSPITAL

See also STATE INSTITUTIONS

Alcoholism services center, function and procedures, 80-2404

Convalescent leave of patients, 38-502

reports by person under whom patient placed, 38-505

termination of leave, 38-504

Cost of support, payment by resident or responsible person, 38-119, 80-1601 to 80-1604

Definition of terms, 80-2401.1

Discharge of patients on report of medical staff, 38-109

maintenance of indigents after discharge, 38-110

Division of mental hygiene, hospital in, 80-2401—See INSANE AND MENTALLY

ILL, Division of mental hygiene

Industrial activities permitted, 80-1501 to 80-1503

Location of hospital, 80-2401

Management and control of hospital, 80-1401 to 80-1409

Nonresident insane persons, receipt pending return to state of residence, 38-120

Purpose of hospital, 80-2401

Superintendent, qualifications, 80-2402



## INDEX

References are to Title and Section numbers

### WARM SPRINGS STATE HOSPITAL (Continued)

- Transfer of patients from other institutions
  - Boulder river school and hospital, 80-2308
  - center for the aged, 80-2502
  - children's center, 80-2106
  - Galen state hospital, 80-1703
  - juvenile facilities of department of institutions, 80-2209
  - prison inmate, commitment proceedings, 80-1908

### WARRANTS

- City and town warrants, investment of municipal funds in, 11-1310

### WARRANTY

- Economic poison, warranty accompanying manufacture or sale, 27-203

### WATER COMPANIES

- Financing statements of utility, contents and place of filing, 87A-9-302.2
- definition of terms, 87A-9-302.1
- Uniform Commercial Code, application, 87A-9-302.3

### WATER CONSERVANCY DISTRICTS

- Annexation of realty, 89-3439
  - preannexation bonds not lien without prior agreement, 89-3440
- Assessments, 89-3416, 89-3419
- Benefits, 89-3401
- Bonds, issuance of, 89-3426
  - amount to be issued, 89-3427
  - election, 89-3428, 89-3429
  - interim receipts, 89-3432
  - maximum term and interest rate, 89-3426
  - redemption, 89-3435
  - refunding authorized, 89-3435
  - registration of bonds, 89-3433
  - resolution, 89-3428, 89-3430
  - retirement fund, 89-3436
  - sale, 89-3430
    - proceeds, 89-3434
  - tax exempt status, 89-3431
- Condemnation authorized, 89-3420
- Definitions, 89-3403
- Directors, powers of, 89-3414
  - budgetary duties, 89-3417, 89-3418
- Dissolution of district, 89-3442 to 89-3447
- Elections after organization, procedures, 89-3424
  - challenges, 89-3425
  - qualification of electors, 89-3423
- Exclusion of territory from district, 89-3441
- Electric energy, 89-3448
- Merger of districts, 89-3438
- Organization of districts
  - corporate surety bond, 89-3412
  - directors, 89-3412
  - election on, 89-3409
  - filing of documents, 89-3410
  - meetings, 89-3413
  - officers, 89-3413
  - reimbursement for election expenses, 89-3411
- Organization petition, court hearing on, 89-3409
- Other agencies unaffected, 89-3449
- Participation in federal programs, 89-3415
- Preliminary survey, request for, 89-3404
- Procedure for organization, 89-3408
- Purpose of act, 89-3402
- Request for district, water board's action upon receipt of, 89-3405 to 89-3407
- Revolving funds, 89-3437

## INDEX

References are to Title and Section numbers

### **WATER CONSERVANCY DISTRICTS (Continued)**

State examiner's duties, 89-3422  
Surplus funds, investment of, 89-3419

### **WATER CONSERVATION**

See FLOOD CONTROL AND WATER CONSERVATION; SOIL AND  
WATER CONSERVATION; WATER CONSERVANCY DISTRICTS;  
WATER RESOURCES BOARD; WATERS AND WATER RIGHTS;  
WATER SUPPLY

### **WATER POLLUTION**

See WATER SUPPLY

### **WATER RESOURCES BOARD**

Actions at law, powers and duties of board, 89-118  
Appropriation of water by board, declaration of intention, 89-121  
Attorney general, duties as legal adviser to board, 89-103  
Citation of act, "Montana Water Resources Act of 1967," 89-101.1  
Compensation of appointed board members, 89-103  
Contributions and appropriations, power of board to accept, 89-120  
Co-ordination of development and use of water resources, state policy, 89-101.2  
Damaged or destroyed property, restoration or repair by board, 89-120  
Definition of terms, 89-102  
Director, qualifications and appointment, 89-103.1  
    powers and duties, 89-103.2  
    salary, 89-103.3  
Earmarked moneys available for board, sources, 89-401  
    payment of expenses from earmarked funds, 89-402  
Employees of board, salaries, 89-103, 89-103.3  
Ground water regulation, filing of declaration, duties as administrator, 89-2913  
Inventory of water resources, powers and duties of board, 89-132.1  
Irrigation districts, creation of, duties of board, 89-1201  
Liability of board restricted to moneys provided, 89-120  
Meetings of board, quorum, 89-103  
Members of board, 89-103  
Officers of board, 89-103  
Policy of state, declaration of, 89-101.2  
Records of declarations of appropriations, copies forwarded to board, 89-813  
Revenue bonds, negotiability and terms, moneys applied to retirement, 89-109  
Rules and regulations adopted by board, 89-132.1  
Salaries of director and employees, 89-103.3  
State water plan, state policy, powers and duties of board, 89-101.2, 89-132.1  
Surveys and examination of streams, duties of board, 89-851  
Transfer of powers from Carey Land Act board and state engineer, 89-103.4  
    funds and appropriations transferred, 89-103.6  
    obligations previously assumed unimpaired, 89-103.8  
    records and property transferred, 89-103.5  
    Yellowstone Compact obligations unimpaired, 89-103.7  
Weather modification, administration of act by board, 89-311

### **WATERS AND WATER RIGHTS**

Adjudication of water rights  
    action for adjudication brought by water conservation board, 89-848  
    policy of state, 89-847  
    referee, appointment to take testimony in water case, 89-849  
    surveys and examinations by water conservation board, 89-851  
Appropriation of waters, 89-801  
    established rights unaffected, 89-801.1  
    notice of appropriation, 89-801.2  
Columbia interstate compact, 89-3201 to 89-3207—See COLUMBIA INTERSTATE  
COMPACT  
Conservancy districts—See WATER CONSERVANCY DISTRICTS  
Drainage districts—See DRAINAGE DISTRICTS  
Fish and game affected by construction projects, 26-1501 to 26-1507—See FISH AND  
GAME, Construction projects affecting fish and game

## INDEX

References are to Title and Section numbers

### WATERS AND WATER RIGHTS (Continued)

Flood control and water conservation projects, municipal participation, 89-3301 to 89-3314—See FLOOD CONTROL AND WATER CONSERVATION

#### Ground water regulation

abandonment as question of fact, 89-2925

appeal to district court

appearance by parties, 89-2922

findings, conclusions, and orders of court, 89-2922

procedure on appeal, 89-2921

right to appeal, 89-2920

appeal to supreme court, 89-2923

attorney general to assist in enforcement, 89-2930

beneficial purpose required for appropriation, 89-2925

change of location of well, effect and notice to administrator, 89-2924

compilation of information by administrator, 89-2933

contamination of ground water, measures to prevent, 89-2926

controlled ground water areas

authority of administrator to designate, 89-2914

hearing on proposal to establish, 89-2915

modification of previous order, 89-2915

notice of hearing on proposal for establishment, 89-2914

order limiting withdrawals of ground water in area, 89-2915

permit required to appropriate in controlled area, 89-2918

supervisors, appointment by administrator, 89-2932

county attorneys to assist in enforcement, 89-2930

definition of terms, 89-2911

entry of premises, rights of state agents, 89-2927

fees for filing of documents, 89-2935

hearing to determine priorities

initiation by claimant or administrator, 89-2916

order, contents, filing, and effect, 89-2917

parties to be included in hearing, 89-2916

hearing to review previous order, 89-2919

information available to public, 89-2928

inspection rights of state agents, 89-2927

investigations requested by administrator, 89-2933

notice of appropriation, contents and filing, 89-2913

notice of completion, contents and filing, 89-2913

oath, administration to witness, 89-2934

oil and gas conservation commission, jurisdiction over oil wells producing water, 89-2916

penalties for violation of act, 89-2936

pre-existing uses, priority, 89-2912

priority of appropriative rights, 89-2912

reports required are additional to other requirements, 89-2929

rules and regulations, promulgation and enforcement, 89-2931

subpoena powers of administrator, 89-2934

supervisors, appointment by administrator, 89-2932

waste of ground water, measures to prevent, 89-2926

Interstate compacts, negotiation by water conservation board, 81-2009

Irrigation districts—See IRRIGATION DISTRICTS

Rules of civil procedure, application to special proceedings, M. R. Civ. P., Rule 81(a), Table A

Taxability of water rights used for irrigation, 84-206

Water commissioners, appointment and authority in general, 89-1001

Water resources board, establishment, members, 89-103—See WATER RESOURCES BOARD

Weather modification activities, 89-310 to 89-331—See WEATHER MODIFICATION

#### Yellowstone river waters

appropriation statement to be filed with water conservation board, 89-907

information given to compact commission by water conservation board, 89-914

records of water diverted, filing with water conservation board, 89-909

rules and regulations for enforcement of compact, 89-912

weir or other measuring device, duty to install, 89-908



## INDEX

References are to Title and Section numbers

### WATER SUPPLY

- Boats, discharge of waste prohibited, 69-3508.1
  - decals, 69-3504.1
  - equipment required on boats, 69-3505
  - penalty for violations, 69-3508.2
- Cities furnishing water to industries and persons outside city, 11-1001
- Classification of waters for most beneficial use, 69-4813
  - appeal from decision at rehearing, procedure, 69-4816
  - hearings on classification, notice, 69-4814
  - industrial use, criteria for classification, 69-4803
  - rehearing of order, procedure, 69-4815
- Co-operation by state board with other agencies, 69-4808
- Council for control of water pollution, composition, 69-4810
  - co-operation of other state agencies required, 69-4819
  - expenses of council, payment, 69-4811
  - meetings of council, 69-4812
  - officers of council, 69-4812
  - powers and duties of council, 69-4813
  - terms of council members, 69-4811
- Definition of terms relating to pollution, 69-4802
  - domestic supply, law for protection of, 69-4902
- Domestic water supply, protection
  - appeal from state board rules and standards, 69-4907
  - definition of terms, 69-4902
  - penalty for violations, 69-4908
  - policy of state, 69-4901
  - prohibited acts endangering water supply, 69-4905
    - penalty for violation, 69-4908
  - state board of health to administer law, 69-4903
  - powers and duties of state board, 69-4904
  - well-drillers, information to state board, 69-4906
- Industrial use, criteria for classification of waters for, 69-4803
- Orders of state board or council, compliance required, 69-4817
  - injunction to enforce order, 69-4818
- Permits required for disposal system or discharge of waste, 69-4806
  - examination and approval of plans, 69-4809
  - person increasing source of waste required to install treatment works, 69-4807
  - plans and specifications required for permit, 69-4807
  - revocation of permit for violations, 69-4807
- Policy of state with respect to water quality, 69-4801
  - domestic uses, water used for, 69-4901
- Powers of state department, 69-4808, 69-4809
- Privately owned waters, chapter not applicable to, 69-4804
- State board of health to administer law, 69-4805
  - domestic water supply, law for protection of, 69-4903
- Subdivisions subject to sanitary restrictions, 69-5003
  - definition of "subdivision," 69-5002
  - plat not accepted unless in compliance, 69-5004
  - policy of state, 69-5001
  - rules and standards for enforcement of requirements, 69-5005
- Water pollution control facilities, board of health to administer state matching funds, 69-4808.1

### WATER TREATMENT PLANTS AND DISTRIBUTION SYSTEMS

- Board of certification, composition and functions, 69-5903
- Certification of operators by director, 69-5905
  - application for certificate, 69-5908
  - examination waived for experienced operators, 69-5906
  - fees for certificate, 69-5909
    - disposition of fees, 69-5908
  - issuance and display of certificate, 69-5907
  - reinstatement of suspended or revoked certificate, 69-5909
  - renewal of certificates, 69-5909
  - requirement of certified operator for plant or system, 69-5906
  - retention of certificate after termination of employment, 69-5907

## INDEX

References are to Title and Section numbers

### **WATER TREATMENT PLANTS AND DISTRIBUTION SYSTEMS (Continued)**

- Certification of operators by director (Continued)
  - suspension or revocation of certificate, 69-5909
  - term of certificate, 69-5909
  - unlawful to operate plant or system without certified operator, 69-5911
- Classification of plants and systems, factors considered, 69-5904
- Definition of terms, 69-5902
- Policy of state, 69-5901
- Rules and regulations of board, 69-5910
- Violations of act or rules as misdemeanor, 69-5912

### **WATER WELLS**

- Contractors
  - actions for compensation, proof of valid license required, 66-2612
  - appeals from decisions of examining board, 66-2611
  - application for license, contents and filing, 66-2606
  - board of health powers unaffected by license act, 66-2614
  - bond required of licensees, 66-2609
  - citation of license act, 66-2601
  - contractors previously in business, licensing, 66-2606
  - definition of terms used in license act, 66-2602
  - drilling on own land exempt from license act, 66-2602
  - employees of contractor exempt from license act, 66-2602
  - enforcement powers of examining board, 66-2605
  - examination of applicants for license, 66-2608
  - examining board, creation, composition and organization, 66-2604
  - expiration of licenses, 66-2607
  - fees for license, 66-2606
  - inspection of wells by examining board, 66-2605
  - issuance of license, 66-2606
  - license required for construction of wells, 66-2603
  - penalties for violations of license act, 66-2613
  - public interest affected by business of drilling, 66-2603
  - purpose of license act, 66-2602
  - qualifications of applicants for license, 66-2608
  - renewal of licenses, 66-2607
  - revocation or suspension of license, 66-2610
    - failure to renew as ground for revocation or suspension, 66-2607
  - rules and regulations of examining board, 66-2605
  - separability of provisions of license act, 66-2614
  - successor in interest to licensee, completion of business by, 66-2615
  - temporary license, requirements and issuance, 66-2606
  - training programs, establishment by examining board, 66-2605
- Records and data supplied to state board of health, 69-4906

### **WEAPONS**

- Prisoner possessing weapon, penalty, 94-3527.1

### **WEATHER MODIFICATION**

- Account in agency fund, establishment, 89-325
- Acquisition of property by board, 89-312
- Administration by water resources board, expenses of members, 89-311
- Advisory committees, establishment by board, 89-312
- Contributions and appropriations, power of board to accept, 89-312
- Expenses, payment from license and permit fees, 89-325
- Liability of state and agents, not liable for acts of private persons, 89-330
- License required, 89-313
  - applications, review by board, 89-314
  - exemptions from fee requirements, 89-314
  - fee for license, 89-317
  - issuance of license, 89-315
  - qualifications of applicants, 89-315
  - renewal of license, 89-316
  - suspension or revocation, grounds for, procedure, 89-329
  - term of license, 89-316

## INDEX

References are to Title and Section numbers

### WEATHER MODIFICATION (Continued)

- "Operation" defined, 89-319
- Permits required, 89-313
  - activities limited by terms of permit, 89-320
  - fee, time of payment, 89-324
  - issuance of permits, 89-318
  - notice of intention to apply for permit, 89-320
    - contents of notice, 89-321
    - publication of notice, 89-322
  - proof of financial responsibility by applicant, 89-323
  - requirements for permit, 89-318
  - separate permit for each operation, 89-319
  - suspension or revocation, grounds for, procedure, 89-329
- Records of operations by licensees, contents, open to public, 89-326, 89-328
- Reports of operations, requirements, open to public, 89-327, 89-328
- Violation of act, misdemeanor, 89-331
- "Weather modification and control" defined, 89-310

### WEEDS

See COUNTIES, Weed control

### WEIGHTS AND MEASURES

- American and metric systems recognized, 90-154
- Citation of act, 90-194
- Commodities, sale of
  - berries and small fruits, 90-184
  - bread, 90-178
  - bulk delivery, duplicate delivery ticket required, 90-182
  - butter, oleomargarine and margarine, 90-179
  - flour, cornmeal and hominy grits, 90-181
  - fluid dairy products, 90-180
  - furnace and stove oil, delivery ticket, 90-183
  - in general, 90-170
    - exceptions, 90-170
  - meat, poultry and seafood, sale by weight, 90-177
  - method of sale, 90-170 to 90-174
    - advertising of packages, statement of quantity, 90-174
    - misleading packages, 90-173
    - packages, 90-170
      - random packages, declarations of unit price, 90-172
  - misrepresentation of price prohibited, 90-176
  - net weight, use of in sales, 90-175
- Conflicting laws repealed, 90-193
- Construction of contracts, 90-185
- Definitions, 90-153
- Definitions of special units of measure, 90-155
- Field standards, 90-157
- Fractional parts of unit of weight or measure, 90-185
- Injunction, 90-189
- National Bureau of Standards' definitions, tables and equivalents recognized, 90-154
- Offenses and penalties, 90-188
  - hindering or obstructing officer, 90-186
  - impersonation of officer, 90-187
  - prosecutions declared valid, 90-191
- Presumptive evidence, 90-190
- Repeal of conflicting laws, 90-193
- Separability clause, 90-192
- State sealer
  - arrest without warrant, 90-167
  - chief sealer, 90-158
    - powers and duties, 90-168
  - commissioner of agriculture as, 90-158
  - commodities, regulations as to, 90-170
  - complaints, investigation of, 90-163



## INDEX

References are to Title and Section numbers

### WEIGHTS AND MEASURES (Continued)

#### State sealer (Continued)

- correct weights and measures, marking as, 90-166
- deputies, appointment of, 90-158
  - powers and duties, 90-168
- enforcement orders, 90-165
- general powers and duties, 90-159
- incorrect weights and measures
  - disposition of, 90-166
  - duty of owners, 90-169
- injunction, authorized to apply for, 90-189
- inspection of packages, 90-164
- police powers, 90-167
- regulations, 90-160
- seizures for use in evidence, 90-167
- specific powers and duties, 90-160
- testing, 90-161, 90-162

State standards, 90-156

### WESTERN INTERSTATE CORRECTIONS COMPACT

Adoption, contents, 95-2308 to 95-2312

### WILLS

Devise or bequest to trustee of inter vivos trust established by testator

- effect of entire revocation of trust prior to death, 91-321
- property not deemed held under testamentary trust, 91-321
- validity, 91-321

### WINTER WORK PROGRAMS

Definition of terms, 41-1901

Legislative access to minutes of committee, 41-1907

Municipal committees, composition and appointment, 41-1902

- meetings of committee, 41-1904
- minutes of committee, filing, 41-1907
- officers of committee, 41-1904
- service without compensation, 41-1903
- terms of members, 41-1903

Promotion of program through advertising and public relations, 41-1905

State employment service to cooperate, 41-1906

### WITNESSES

Affirmation in lieu of oath, M. R. Civ. P., Rule 43(d)

Coroner's inquest, subpoena of witness, compelling attendance, writing and filing testimony, 95-805, 95-806, 95-808

Criminal cases

- expenses of witnesses, 95-1801
- indigent defendants, procedure for obtaining subpoenas, 95-1801
- preliminary examination, exclusion or separation
  - recognizance by or deposition after examination, 95-1203, 95-1204
- subpoena, requirements and form, 95-1801

Fees payable to witnesses, 25-404

- disbarment proceedings, 93-2020

Hostile witnesses, examination as on cross-examination, M. R. Civ. P., Rule 43(b)

Interpreters, M. R. Civ. P., Rule 43(f)

Masters, witnesses before, M. R. Civ. P., Rule 53(d)

Mileage allowances for use of own vehicle, 59-801

- liability for approval of excess amount, 59-802

Offer of proof, recording in case testimony excluded, M. R. Civ. P., Rule 43(c)

Subpoena, criminal cases, 95-1801

Subpoena for attendance of witnesses, M. R. Civ. P., Rule 45(a)

### WORDS

Printing, 19-103.1

## INDEX

References are to Title and Section numbers

### WORKMEN'S COMPENSATION

- Access of board to employer's books and records, 92-820
- Account in agency fund, holding in trust, 92-840
- Administrative expenses, account in earmarked revenue fund, 92-116
- Appeal to supreme court by claimant at expense of commission, 92-827
- Assessment of insurers, 92-1005
- Cessation of operation by employer, statement and return of deposit, 92-209
- Compensation
  - biweekly payments, 92-715
  - death, injuries causing, 92-704
  - lump sum payments, 92-715
  - occupational disease compensation, reduction by receipt of workmen's compensation, 92-1333
  - partial disability, 92-703
  - permanent total disability, 92-702
  - schedule of specific injuries, 92-709
  - second injury causing permanent and total disability, 92-709A
  - temporary total disability, 92-701
  - unreasonable delay or refusal to pay, increase in award, 92-824.1
- Contractors included within term "employer," 92-410
  - independent contractor defense, when not available, 92-438
- Copy of testimony, exhibits, pleadings and records, furnishing to claimant without cost in event of action to review decision of board, 92-827
- Election by corporate officers not to be bound by act, 92-208
- "Employee" defined, 92-411
- Extraterritorial application, temporary employment in another state, 92-614
- Fees of board, amounts and disposition, 92-119
- Game wardens' retirement benefits supplemental to workmen's compensation, 68-1426
- Independent contractors excluded from coverage, 92-411
  - defense of independent contractor, when not available, 92-438
- Industrial accident board
  - biennial report to governor, 92-118
  - ex officio members not to receive additional compensation, 92-108
  - members, 92-104
  - occupational disease act, 92-1301 to 92-1368—See OCCUPATIONAL DISEASE ACT
  - salary of appointed member, 92-104
  - silicosis payments, administration, 71-1002
    - transfer of records and payrolls to board, 71-1009
  - term of office of appointed member, 92-104
- "Injury" defined, 92-418
- Insurance policies subject to provisions of act, 92-1005
- Insurance premium rates, 40-5601 to 40-5618—See INSURANCE, Workmen's compensation insurance premium rates
- Insurer's reserve for unearned premiums, 40-3008
- Legal representation of board, 92-120
- Medical and hospital services to be furnished, 92-706
- Plan No. 1, assessments against employer, 92-902
- Plan No. 2
  - agricultural employer, election to come under plan, 92-1102
  - assessments against employers, 92-1005
  - employers eligible to elect plan, 92-1001
  - form and manner of election, 92-1002
  - renewal certificates, delivery to board, 92-1006
- Plan No. 3
  - account in agency fund, payments into, 92-1105
  - advanced rate for dangerous places of employment, 92-1105.1
  - agricultural employer, election to come under plan, 92-1102
  - default in payments by employer
    - action for collection of payments, 92-1114
    - cancellation of coverage by board, 92-1114
    - compromise of claim by board, 92-1114
    - injury to employee during default, 92-1115
      - remedies of employee, 92-1116
    - subrogation of state to employee's claim, 92-1116

## INDEX

References are to Title and Section numbers

### WORKMEN'S COMPENSATION (Continued)

#### Plan No. 3 (Continued)

- disbursements from account in agency fund, 92-1122
- dividends declared from surplus in account, 92-1110
- income from account in agency fund, crediting to account, 92-1123
- physician's examination fee, 92-1119
- premiums paid by employers, 92-1101
- rates for insurance, determination by board, 92-1105
- reserve funds, investment, 92-1112
- segregated moneys, accounting by treasurer, 92-1113
- waiver of assessments when balance in account sufficient, 92-1106
- Presumption as to elections to be bound by act, 92-209
- Prosthetic appliances, repair or replacement, 92-706
- Reciprocity with other states, 92-614
- Record of proceedings and hearings, 92-827
- Records of employer, inspection by board, 92-820
- Rehabilitation of injured workmen
  - account in agency fund, payments to and from, 92-1406
  - administrative expenses not paid by funds provided, 92-1406
  - completion of rehabilitation, certification to industrial accident board, 92-1402
  - expenses payable to workman receiving training, 92-1403
  - masculine includes feminine, 92-1404
  - reconsideration of award after rehabilitation, 92-1402
  - reference of workmen to vocational rehabilitation division, 92-1401
- Relief recipients working for county, coverage, 71-307, 92-411
- Second injury causing total and permanent disability, account and payments, 92-709A

## Y

### YELLOWSTONE RIVER COMPACT

- Appropriation statement filed with water conservation board for waters taken, 89-907
- Information given to compact commission by water conservation board, 89-914
- Records of water taken, filing with water conservation board, 89-909
- Rules and regulations for enforcement of compact, 89-912
- Transfer of powers to water conservation board does not impair obligations, 89-103.7
- Weir or other measuring device, duty to install, 89-908

### YOUTH FOREST CAMP

See STATE INSTITUTIONS, Juvenile facilities, 80-2202 et seq.

### YOUTH GUIDANCE CENTERS

Joint centers, establishment by two or more counties, 16-1008B

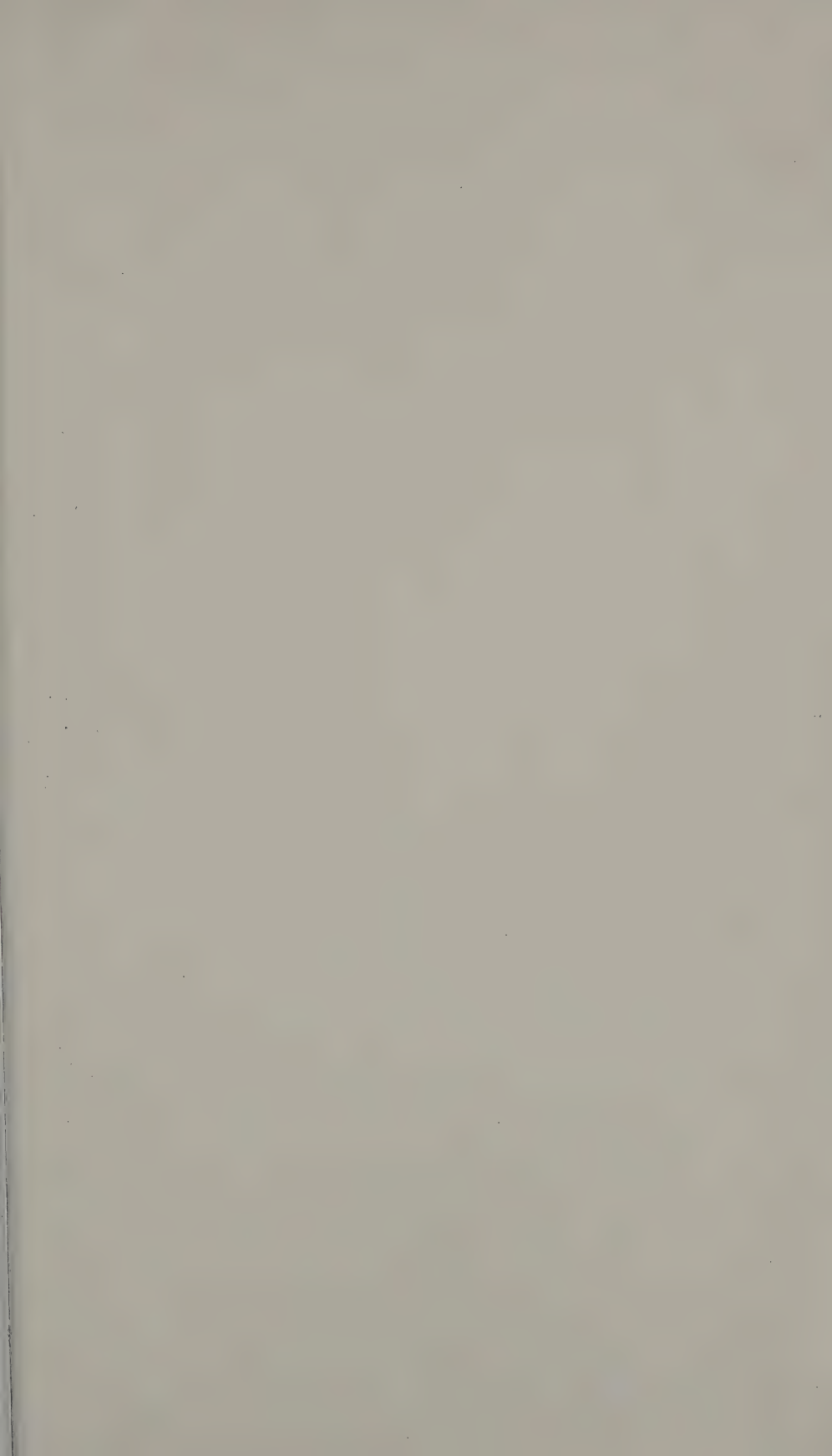
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### ZONING

See PLANNING AND ZONING

Highways, advertising and zoning regulation, 32-4701 to 32-4714—See HIGHWAYS, BRIDGES AND FERRIES, Zoning regulation along highways















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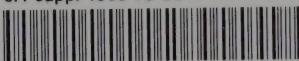
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